Docket #7480 Date Filed: 5/13/2011

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

SUPPLEMENTAL OBJECTION[1] OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS TO CONFIRMATION OF THE MODIFIED SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE, FILED ON FEBRUARY 7, 2011

The consortium of holders of interests subject to treatment under Class 19 of the Plan (as defined herein) (the "TPS Consortium"),[2] by and through its undersigned counsel, hereby files this objection (the "Objection") to confirmation of the Modified Sixth Amended Joint Plan of Washington Mutual Inc., ("WMI") and WMI Investment Corp. ("WMI Investment," and together with WMI, the "Debtors"), filed on February 7, 2011, as modified on March 16, 2011 and March 25, 2011 (the "Plan") [Docket Nos. 6696, 6964, and 7038].[3] In support of this Objection, the TPS Consortium respectfully represents as follows:

---

[1] The TPS Consortium expressly incorporates by reference herein each of the arguments set forth in the *Objection Of The TPS Consortium To Confirmation Of The Sixth Amended Joint Plan Of Affiliated Debtors Pursuant To Chapter 11 Of The United States Bankruptcy Code* [Docket No. 6020] (the "Initial Objection"), including its objections to the proposed "settlement" underlying the prior and current Plans. A copy of the Initial Objection is attached hereto as Exhibit A.

[2] The TPS Consortium is made up of holders of interests proposed by the Debtors to be treated under Class 19 of the Plan -- described in the Plan and Disclosure Statement (defined herein) as the "REIT Series." As is discussed in greater detail below, the REIT Series securities were purportedly exchanged, prior to the Petition Date, for certain Trust Preferred Securities issued by former affiliates of non-Debtor Washington Mutual Bank.

[3] Capitalized terms not otherwise defined herein shall bear the meanings ascribed thereto in the Plan and/or the Prior Disclosure Statement, dated October 6, 2010 and the Supplemental Disclosure Statement, dated March 16, 2011 [Docket No. 6966] (together, the "Disclosure Statement"), as applicable.

PRELIMINARY STATEMENT

1. The Plan suffers from numerous fatal flaws, which, as a matter of law, render it incapable of confirmation. These defects include, inter alia:

- The Plan would effect the underlying steps of the "conditional exchange" of the Trust Preferred Securities, purports to deliver the Trust Preferred Securities to JPMC "free and clear" of the claims now on appeal before the District Court, and provides releases purporting to affect claims against JPMC and others relating to the Trust Preferred Securities, despite the divestiture of this Court's jurisdiction to grant such relief because of the ongoing appeal of the TPS Litigation in the District Court. As this Court has been divested of jurisdiction to grant the relief requested regarding the Trust Preferred Securities, those securities must be held in escrow and related Plan-terms held in abeyance pending resolution of the TPS Litigation appeal.

- The Plan inappropriately pays post-petition interest on allowed unsecured claims at the "contract" rate rather than at the federal judgment rate set forth in 28 U.S.C. § 1961 ("FJR"). To the extent post-petition interest is payable on allowed unsecured claims, the rate of interest mandated under Bankruptcy Code Section 726(a)(5) – and incorporated into Chapter 11 through the best interests of creditors test under Bankruptcy Code Section 1129(a)(7) – is the FJR. Moreover, to the extent unsecured creditors are paid post-petition interest at the FJR, the Classes of unsecured creditors would be unimpaired and not entitled to vote on the Plan. Consequently, the cramdown provisions of Bankruptcy Code Section 1129(b) will not be implicated (through Bankruptcy Code Section 1129(a)(8)) if the Plan were modified to pay post-petition interest at the FJR. The result of the current structure of the Plan is that it impermissibly provides unsecured creditors (including, in large part, the Settlement Noteholders) with approximately $700 million in value in excess of their claims, a significant portion of which value properly belongs to the Debtors' preferred equity holders pursuant to the Bankruptcy Code's distribution scheme.

- The Plan continues to provide illegal non-consensual releases to third parties (including JPMorgan Chase Bank, N.A. ("JPMC")) and enjoins actions against assets and properties provided to such third parties "free and clear" through the Plan (including the Trust Preferred Securities and the value of Washington Mutual Preferred Funding LLC) notwithstanding the Court's Opinion (defined herein) that such non-consensual releases are impermissible.

- The Plan unfairly discriminates against the dissenting members of Class 19 by providing for an unequal distribution amongst the members of Class 19 based on their votes for a prior Plan and by denying dissenting members an opportunity to re-vote, and discriminates unfairly against disadvantaged members of Class 19 as compared to Class 20, consisting of similarly-situated interest holders by permitting only Class 20 to revote

and allowing Class 20 members their pari passu interests in the residual value of WMI's estate (value denied to disadvantaged members of Class 19). The Plan would also effect a prohibited taking of the dissenting Class 19 members' interests in their allocable share of estate value.

2. As Plan proponents, it is the Debtors' burden to prove and persuade this Court, by a preponderance of the evidence, that the Plan satisfies every applicable confirmation requirement under Bankruptcy Code Sections 1129(a) and (b). As discussed herein and in the Initial Objection, the Debtors cannot carry these burdens and confirmation must be denied.

BACKGROUND

A. The Court's January 2011 Decisions.

3. On January 7, 2011, the Court rendered its decision in the adversary proceeding captioned Black Horse Capital, LP, et al. v. JPMorgan Chase Bank, N.A., et al. (Adv. Pro. No. 10-51387) (the "TPS Litigation"). In its ruling in connection with the TPS Litigation, the Court held, inter alia, that a purported "conditional exchange" of non-Debtor trust preferred securities (the "Trust Preferred Securities") for unissued preferred stock of Debtor WMI had occurred hours before the commencement of these cases, notwithstanding the failure of the parties to take any of the steps required under the applicable documents to complete the transaction.[4] That decision has been appealed, and the matter is now before Chief Judge Sleet of the District Court for the District of Delaware (Civ. Action No. 11-124-GWS). Briefing in that matter is expected to be completed prior to this Court's consideration of the Plan.

4. Also on January 7, 2011, the Court entered an opinion [Docket No. 6528] (the "Opinion") and related Order [Docket No. 6529] denying confirmation of the *Sixth Amended*

---

[4] These steps include, inter alia, the failure to issue the WMI preferred stock for which the Trust Preferred Securities were to have been exchanged, the failure to deliver that newly-issued WMI preferred stock to a depositary for creation of "depositary shares" to be delivered to holders of Trust Preferred Securities, the failure to record the purported transfer of the Trust Preferred Securities on the applicable issuers' books and records (as required under UCC Article 8), and the failure to deliver the underlying certificates for the Trust Preferred Securities (also as required under Article 8) (together, the "Completion Steps").

Joint Plan of Affiliated Debtors Pursuant To Chapter 11 of the Bankruptcy Code, dated October 6, 2010, as modified on October 29, 2010 and November 24, 2010 (the "Sixth Amended Plan"). In the Opinion, the Court laid out in detail numerous reasons the Sixth Amended Plan was incapable of confirmation and left certain issues open for consideration should the Debtors again attempt to obtain confirmation of a plan of liquidation. The Debtors filed the current version of the Plan approximately one month later.

B. The Debtors' New Proposed Plan.

5. The current Plan remains premised on a purported "settlement" of various pieces of litigation to which the Debtors are parties, including various actions to which JPMC is also a party. Among the issues "settled" under the Plan is the dispute as to whether the "conditional exchange" had occurred and whether the Trust Preferred Securities were transferred to JPMC prior to the Petition Date. In that regard, the current Plan (like its predecessor, the Sixth Amended Plan) contemplates the Bankruptcy Court entering an affirmative injunction, ordering parties (including non-Debtors) to effectuate all of the steps in the applicable exchange, deposit and trust agreements that WMI failed to carry out pre-petition (i.e., the Completion Steps).[5] Next, the Plan contemplates assumption of agreements necessary to consummation of the "conditional exchange" transaction, including agreements to issue the WMI preferred stock that was never issued pre-petition. As noted in the Initial Objection, this proposed assumption is absolutely prohibited under Bankruptcy Code Section 365(c)(2) and, consequently, Bankruptcy Code Section 1129(a)(1).[6] The Plan also contemplates entry of an Order transferring the Trust

---

5 See Proposed Settlement, § 2.3(f) ("causing the applicable trustees, registrars, paying agents, depositary, and transfer agents to amend their records (including the securities registers of each Issuing Trust) to reflect a transfer of the Trust Preferred Securities to WMI" and "causing the trustees and boards of directors of the Issuing Trusts to take all necessary, proper and advisable action to reflect JPMorgan as the sole legal, equitable, and beneficial owner of the Trust Preferred Securities").

6 See Initial Objection, at pp. 41-46.

Preferred Securities "free and clear" of Liens (defined to mean "any charge against or interest in property to secure payment of a debt or performance of an obligation").[7]

6. The basic economic terms of the settlement were negotiated by, inter alia, JPMC and a group of four hedge funds (the "Settlement Noteholders")[8] who have accumulated large positions at various levels of WMI's capital structure slated to receive very favorable treatment under the Plan, including payment of post-petition interest on funded debt at the various contract rates as opposed to interest at the FJR.[9] This difference (contract rate versus FJR) results in overpayment to creditors of the estate in the amount of approximately $700 million, a significant portion of which value otherwise would be allocable to holders of WMI preferred equity under the Bankruptcy Code's distribution scheme.

7. While the Settlement Noteholders were signatories to the settlement underlying the Sixth Amended Plan, they are not signatories to the current version of the settlement agreement. As the Court noted in the Opinion, the Settlement Noteholders have been alleged to have traded illegally in WMI's securities based on non-public information obtained in their negotiations with the Debtors. The Official Committee of Equity Security Holders (the "Equity Committee") is currently investigating this issue, but discovery is not complete as of the filing

---

[7] See Plan, §§ 43.1 and 1.124.

[8] The Settlement Noteholders include Appaloosa Management L.P., Centerbridge Partners, L.P., Owl Creek Asset Management, L.P., Aurelius Capital Management, LP, and certain affiliates thereof.

[9] The Settlement Noteholders previously have represented through counsel that, as of May 14, 2010, in the aggregate they were the beneficial owners of or had investment authority with respect to (i) $453,813,700 in face amount of WMI's senior indebtedness, (ii) $1,291,124,000 in fact amount of WMI's senior subordinated indebtedness, (iii) $792,268,700 in face amount of WMI's junior subordinated indebtedness, and (iv) approximately 955,665 shares of preferred stock issued by WMI. See *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], at p. 2. These holdings may have changed as there are pending allegations that the Settlement Noteholders engaged in insider trading activities facilitated by the Settlement to purchase claims that receive preferable treatment under the Plan and to sell claims and interests that receive less favorable treatment.

this Objection.

C. The Plan's Unequal Treatment Amongst Members Of Class 19.

8. Like the Sixth Amended Plan, the current Plan contemplates delivery of the Trust Preferred Securities to JPMC. Under the Sixth Amended Plan, in addition to any distribution from the Debtors' estates, Class 19 claimants also stood to receive from JPMC cash in an amount equal to $1,250.00 times the number of shares of REIT Series (or an amount of JPMC stock of equal value) (in either case, the "Additional Class 19 Consideration") held by such claimants in exchange for, inter alia, granting a release of JPMC.[10] Section 1.161 of the version of the Sixth Amended Plan sent out for solicitation [Docket No. 5659] further provided that if Class 19 voted to accept the Sixth Amended Plan, each member of Class 19 (regardless of its actual vote) would be "deemed" to have granted a release of JPMC and would receive its allocable share of the Additional Class 19 Consideration. Further, Section 43.6 of the version of the Sixth Amended Plan sent out for solicitation contained a similar provision, regarding releases generally, that stated that entities opting out of the demanded releases would nonetheless be bound and forced to accept the distribution they would otherwise be entitled to receive pursuant to the Plan. Subsequently, after the voting deadline for the Sixth Amended Plan, the Debtors modified Section 43.6 of the Sixth Amended Plan to provide that elections to opt out of the third-party releases would be honored and entities so electing would lose the right to a distribution.[11] In addressing this late change to the Sixth Amended Plan, the Court stated in the Opinion that:

> The Court agrees with the UST that the Plan provision with respect to third-party releases has changed materially. This is equally applicable to those who originally opted out of the releases (feeling that even though the Court might find the opt out invalid, they

---

[10] See Sixth Amended Plan, p. 50.

[11] See Opinion, p. 83.

> would still get a distribution) as those who did not bother checking the box to opt out (feeling that the Court would simply enforce the releases anyway).[12]

Section 1.161 of the Sixth Amended Plan, providing for the compelled release of claims and acceptance of plan consideration if Class 19 voted to accept the Sixth Amended Plan, was not modified. Further, as was made clear through the Debtors' witnesses at the confirmation hearing, the Sixth Amended Plan was rife with provisions that could have required releases of claims regardless of an entity's vote or election.

9. To address the Court's concerns about material changes to the release provisions after the close of voting on the Sixth Amended Plan, every impaired class – except Class 19 – was given the opportunity to vote and make an election with respect to releases under the new Plan. But, under the new Plan, members of Class 19 who voted in favor of the Sixth Amended Plan (which, again, was denied confirmation) and who elected to grant the releases demanded thereunder will receive under the new Plan: a) the share of estate value to which they are entitled as a result of their ownership of WMI preferred stock (whatever that value may be); and b) a direct payment from JPMC of the Additional Class 19 Consideration that had been allocated for Class 19 under the Sixth Amended Plan. Based on prior Rule 2019 filings in this case, it appears that the group of Class 19 holders who will receive this favorable treatment is comprised, in significant part, of the Settlement Noteholders. Class 19 members who voted against the Sixth Amended Plan and/or declined to grant the releases demanded thereunder, on the other hand, will receive nothing under the current Plan – not even the estate value to which they would be entitled outside of the Plan and/or in a chapter 7 liquidation.

10. The Equity Committee objected to this unequal treatment amongst members of Class 19 in connection with the Court's consideration of the Supplemental Disclosure Statement

---

[12] Id.

and Plan solicitation procedures (and counsel for the TPS Consortium joined in that objection and presented argument). In response to those objections, counsel for JPMC threatened that, if the Court were to force the Debtors to resolicit Class 19, JPMC would simply refuse to pay any portion of the Additional Class 19 Consideration in exchange for the releases it is slated to receive under the current Plan.[13] The Court declined to compel resolicitation of Class 19, but specifically preserved consideration of the effect of the resulting unequal treatment on the confirmability of the Plan.[14]

ARGUMENT

11. As Plan proponents, it is the Debtors' burden to prove and persuade this Court, by a preponderance of the evidence, that the Plan satisfies every applicable confirmation requirement under Bankruptcy Code Sections 1129(a) and (b).[15] As discussed herein and in the Initial Objection, the Debtors cannot carry these burdens and confirmation must be denied.[16]

I The Plan Cannot Be Confirmed Because It Contemplates Relief This Court Has Been Divested Of Jurisdiction To Grant Given The Pendency Of The Appeal Related To The TPS Litigation.

12. It is axiomatic that the act of filing a notice of appeal of a final Order divests a

---

13 Transcript of March 21, 2011 Hearing, at p. 56.

14 Id. at 171.

15 See, e.g., In re Armstrong World Indus., Inc., 348 B.R. 111, 120 n.15 (D. Del. 2006) (plan proponent must establish by preponderance of the evidence the satisfaction of requirements of Bankruptcy Code Sections 1129(a) and 1129(b)); 7 Collier on Bankruptcy ¶ 1129.02[4] (16th ed.) ("At the [confirmation] hearing, the proponent bears the burdens of both introduction of evidence and persuasion that each subsection of section 1129(a) has been satisfied. If nonconsensual confirmation is sought, the proponent of such a plan will have to satisfy the court that the requirements of section 1129(b) are also met. In either situation, the plan proponent bears the burden of proof by a preponderance of the evidence.").

16 See In re Sacred Heart Hosp. of Norristown, 182 B.R. 413, 423 (Bankr. E.D. Pa. 1995) (a confirmation hearing warrants a meticulous analysis of whether the Plan meets each of the technical requirements of the Code).

trial court of its jurisdiction over the matters on appeal.[17] The divestiture rule applies to bankruptcy appeals and exists to "prevent[] the confusion and inefficiency which would of necessity result were two courts to be considering the *same issue or issues* simultaneously."[18]

13. The Third Circuit Court of Appeals has recognized the broad nature of the divestiture rule: "Divest means what it says – the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere."[19] Because "a bankruptcy case typically raises a myriad of issues, many totally unrelated and unconnected with the issues involved in any given appeal," however, Bankruptcy Courts "retain jurisdiction over matters presented subsequent to an appeal where the appeal concerns unrelated aspects of the case."[20] Nonetheless, when a determination would "involve a key issue identical to one of the issues involved in the order being appealed," application of the divestiture rule is appropriate.[21]

---

[17] See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the [appellate court] and divests the [trial court] of its control over those aspects of the case involved in the appeal."); Venen v. Sweet, 758 F.2d 117, 120 (3d Cir. 1985) ("[T]he timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a[n appellate court] and divesting a [trial court] of its control over those aspects of the case involved in the appeal.").

[18] Trimble v. Cambridge Mgmt. Grp. (In re Trimble), No. 07-2115, 2008 Bankr. LEXIS 835, at *6 (Bankr. D.N.J. March 18, 2008) (emphasis added); see also In re Whispering Pines Estates, 369 B.R. 752, 757 (B.A.P. 1st Cir. 2007) ("The purpose of the general rule is to avoid the confusion of placing the *same matter* before two courts at the same time and preserve the integrity of the appeal process.") (emphasis added).

[19] Venen, 758 F.2d at 120-21; see also Trimble, 2008 Bankr. LEXIS 835 at *6 (citing Venen in the bankruptcy context).

[20] Whispering Pines, 369 B.R. at 758 ("As courts have noted, however, a bankruptcy case typically raises a myriad of issues, many totally unrelated and unconnected with the issues involved in any given appeal. The application of a broad rule that a Bankruptcy Court may not consider any request filed while an appeal is pending has the potential to severely hamper a Bankruptcy Court's ability to administer its cases in a timely manner.") (citation omitted).

[21] Winimo Realty, 270 B.R. at 108; see also In re Urban Dev. Ltd., Inc., 42 B.R. 741, 743-44 (Bankr. M.D. Fla. 1984) ("In order to assure that the integrity of the appeal process is preserved, it is imperative that once the appeal is lodged, the lower court *should not take any action which in any way would interfere with the appeal process* and with jurisdiction of the appeal court. … When one considers the relief sought by the Debtor in light of the foregoing, it is obvious that this Court should not interfere with the appeal process and entertain any request the Debtor which *either directly or indirectly touches upon the issues involved in*

14. The divestiture rule does not prohibit the Bankruptcy Court from implementing or enforcing the order appealed "because in implementing an appealed order, the court does not disrupt the appellate process *so long as its decision remains intact for the appellate court to review.*"[22] However, "courts have recognized a distinction between actions that 'enforce' or 'implement' an order, which are permissible, and *acts that 'expand' or 'alter' that order, which are prohibited.* Any actions that interfere with the appeal process or decide an issue identical to the one appealed are beyond mere 'enforcement' and are therefore impermissible."[23] "This distinction is particularly important in the context of a [sic] Chapter 11 bankruptcy cases, where the court will issue 'innumerable orders involving a myriad of issues, one or more of which may be on appeal at any given moment.' . . . Permitting the Bankruptcy Court to enforce orders that are on appeal while prohibiting the court from altering such orders allows the least disruption of the court's administration of a bankruptcy plan."[24]

---

the pending appeal. … [I]f this court would grant the injunctive relief sought by the Debtor, this would in effect *not only frustrate but for all practical purposes moot out the appeal and would, in fact, serve as a substitute for the appeal process.*") (emphasis added).

22 In re VII Holdings Co., 362 B.R. 663, 666 n. 3 (Bankr. D. Del. 2007) (emphasis added); In re Winimo Realty Corp., 270 B.R. 99, 105 (S.D.N.Y. 2001) ("[I]n implementing an appealed order, the court does not disrupt the appellate process so long as its decision remains intact for the appellate court to review.") (citation omitted).

23 Winimo Realty, 270 B.R. at 105-06; see also In re Emergency Beacon Corp., 58 B.R. 399, 402 (Bankr. S.D.N.Y. 1986) (finding that a Bankruptcy Court, once divested of jurisdiction by the filing of a notice of appeal, "should [not] be able to vacate or modify an order under appeal, not even a Bankruptcy Court attempting to eliminate the need for a particular appeal") (citations omitted); Bialac v. Harsh Inv. Corp. (In re Bialac), 694 F.2d 625, 627 (9th Cir. 1982) (holding Bankruptcy Court lacked jurisdiction to enjoin foreclosure of note because "[a] pending appeal divest[s] the lower court of jurisdiction to proceed further in the matter. . . . Even though a Bankruptcy Court has wide latitude to reconsider and vacate its own prior decisions, not even a Bankruptcy Court may vacate or modify an order while on appeal") (citations omitted); Buesgens v. Bergman (In re Bergman), 397 B.R. 348, 351 (Bankr. E.D.Va. 2008) (quoting Ingersoll-Rand Fin. Corp. v. Kendrick Equip. Corp. (In re Kendrick Equip. Corp.), 60 B.R. 356, 358 (Bankr. W.D. Va. 1986)) ("[T]he taking of an appeal transfers jurisdiction from the Bankruptcy Court to the Appellate Court with regard to any matter involved in the appeal and divests the Bankruptcy Court of jurisdiction to proceed further with such matters. . . . [I]t is imperative that the lower court take no action which might in any way interfere with the jurisdiction of the appeal court.").

24 Winimo Realty, 270 B.R. at 106 (citation and quotations omitted).

15. For instance, in Whispering Pines, the debtor appealed the confirmation order which provided for a scheduled sale of property and that the secured creditor would be entitled to relief from the automatic stay if the property was not sold by the scheduled date.[25] During the appeal, the Bankruptcy Court granted the secured lender relief from the automatic stay to foreclose the property.[26] The appellate court held that the Bankruptcy Court was divested of jurisdiction to enter such an order which was an impermissible modification of the confirmation order on appeal.[27] The appellate court noted that "once an appeal is pending, it is imperative that a lower court not exercise jurisdiction over those issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process."[28]

16. The admonition of the Whispering Pines Court, that Bankruptcy Courts cannot act on those matters directly on appeal or "issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process," has been followed by a number of other jurisdictions.[29] In In re Demarco, the Bankruptcy Court delayed confirmation of the debtor's plan pending resolution of an appeal in an adversary proceeding instituted by a creditor whose claim would have been disallowed under the plan.[30] The debtor moved the Bankruptcy Court for an order determining that he did not

---

[25] 369 B.R. at 759.

[26] Id.

[27] Id. at 759-60.

[28] Id. at 759 (citations omitted).

[29] Whispering Pines, 369 B.R. at 758 (citations omitted).

[30] In re Demarco, 258 B.R. 30 (Bankr. M.D.Fla. 2000).

qualify as a "responsible person" within the meaning of the United States Tax Code.[31] The Court ruled for the debtor and found that he had no tax liability as a "responsible person."[32] Shortly thereafter, the government appealed the Bankruptcy Court's decision to the District Court on the question of the debtor's liability under the Tax Code.[33] Subsequent to the government's filing of the appeal, the debtor amended the plan to disallow the government's claim and to require that, effective upon confirmation, the government release its lien and any future cause of action against the debtor.[34] In its objection to confirmation of the debtor's plan, the government contended that the act of filing an appeal with the district court divested the Bankruptcy Court of jurisdiction to consider confirmation of the plan, because an order confirming the plan would have an "impact directly or indirectly on the appeal."[35] Over an objection by the debtor, the Bankruptcy Court adopted the government's rationale and stayed confirmation, finding that "confirmation of the Debtor's plan would preclude any effective judicial relief for the [government] in the event it prevails on its appeal."[36]

17. The Plan seeks an Order from this Court providing for: a) an affirmative injunction requiring completion of the steps necessary to effect the "conditional exchange" of the Trust Preferred Securities (steps, conveniently, WMI and JPMC argued to this Court were unnecessary and/or irrelevant during summary judgment proceedings on the TPS Litigation); and

---

31 Id. at 31.

32 Id.

33 Id. at 32.

34 Id.

35 Id. (citations omitted).

36 Id. at 34.

b) assumption of the agreements necessary to complete the "conditional exchange" transaction.[37] The Court ruled in the TPS Litigation that these acts were "ministerial" and unnecessary in determining that the exchange of the TPS Securities occurred. The actions contemplated in the Plan are identical to issues that are central in the pending appeal of the TPS Litigation now within the purview of the District Court, and as such are clearly prohibited from the Court's consideration, let alone the confirmation of these portions of the Plan dealing with the transfer of the Trust Preferred Securities to JPMC. Similarly, the pendency of the TPS Litigation appeal divests this Court of jurisdiction to consider any aspect of the Plan's proposed releases or the Settlement Agreement: a) that would affect any of the TPS Consortium's claims against JPMC (or any of its affiliates) related to the Trust Preferred Securities; or b) that would purport to deliver the Trust Preferred Securities to JPMC "free and clear" of the very claims now on appeal before the District Court.

18. Faced with these Debtors' request that this Court interfere with matters currently on appeal before Chief Judge Sleet in the District Court, this Court should following the teachings of Demarco and Whispering Pine avoid any action that "would preclude any effective judicial relief for the [Consortium] in the event it prevails on its appeal."[38] The filing of the appeal to the District Court constituted "an event of jurisdictional significance" that divested the Bankruptcy Court of its jurisdiction to proceed further with matters related to the releases. It is of no consequence that "the Court is not convinced that continued litigation against JPMC and/or the FDIC would" provide equity interest holders with any recovery.[39] Respectfully, it is not this

---

[37] The assumption of such agreements, which provide for the issuance of WMI securities, would also clearly violate Bankruptcy Code Section 365(c)(2), which itself would preclude confirmation of the Plan under Bankruptcy Code Sections 1129(a)(1) (also discussed infra).

[38] Id.

[39] Opinion, pp. 66-67.

Court's decision to make. Rather, the nature of the issues on appeal to the District Court prohibits this Court from interfering with the appellate process. [40]

19. A very reasonable and commonly-employed alternative to a complete stay of this Court's proceedings, and one the Court should employ here, would be to deposit the disputed property (the Trust Preferred Securities) into an escrow account and hold in abeyance any Plan provision that would interfere with the pending appeal of the TPS Litigation pending resolution by the District Court.[41] In that way, the Court may avoid taking any action offensive to the District Court's jurisdiction over the TPS Litigation and preserve the sanctity of the bankruptcy and appellate processes.[42]

---

[40] See In re Emergency Beacon Corp., 58 B.R. 399 at 402 (Bankr. S.D.N.Y. 1986) (finding that a Bankruptcy Court, once divested of jurisdiction by the filing of a notice of appeal, "should [not] be able to vacate or modify an order under appeal, not even a Bankruptcy Court attempting to eliminate the need for a particular appeal") (citations omitted).

[41] See, e.g., Premier Entm't Biloxi LLC v. Pacific Mgmt. Co., LLC (In re Premier Entm't Biloxi LLC), No. 08-60349, 2009 WL 1616681 (5th Cir. 2009) (finding that the Bankruptcy Court properly deposited disputed funds into an escrow agreement, with a determination of which party was entitled to those funds to be made through an ordered process and at a later date, for purposes of continuing confirmation process).

[42] Knapp v. Seligson (In re Ira Haupt & Co.), 361 F.2d 164, 168 (2d Cir. 1966) (as Judge Friendly succinctly put it many years ago, the "conduct of bankruptcy proceedings not only should be right but must seem right."

II The Plan Cannot Be Confirmed Because It Inappropriately Allows Post-Petition Interest Claims At The "Contract" Rate.

A. To The Extent Post-Petition Interest Is Payable, The Appropriate Rate Of Interest Is The Federal Judgment Rate.

20. To the extent post-petition interest is payable on allowed unsecured claims in bankruptcy, the rate of interest mandated under Bankruptcy Code Section 726(a)(5) – and incorporated into Chapter 11 through the best interests of creditors' test under Bankruptcy Code Section 1129(a)(7) – is the FJR set forth in 28 U.S.C. § 1961. Notwithstanding, the Plan provides for Postpetition Interest Claims on allowed unsecured claims "calculated at the *contract rate* set forth in any agreement related to such Allowed Claim or, if no such rate or contract exists, at the federal judgment rate."[43]

21. But, to the extent unsecured creditors were to be paid post-petition interest at the FJR as mandated under Bankruptcy Code Sections 1129(a)(7) and 726(a)(5), those classes of unsecured creditors would be unimpaired and not entitled to vote on the Plan. Consequently, the cramdown provisions of Bankruptcy Code Section 1129(b) would never be implicated because Bankruptcy Code Section 1129(a)(8) would be satisfied. But, even if the cramdown principles of Bankruptcy Code Section 1129(b) did have application to the treatment of unsecured creditors here – in other words, the holders of unsecured claims were somehow deemed to be "impaired" (notwithstanding payment in full, plus post-petition interest at "the legal rate") and rejected the Plan – the Debtors would be unable to demonstrate that payment of the higher contract rates of interest would be fair and equitable. The result is that the Plan, as currently constituted, impermissibly diverts to unsecured creditors (including, in large part, the Settlement

[43] See Plan, p. 17, § 1.151 (emphasis added).

Noteholders) approximately $700 million in value in excess of their claims and any entitlement to post-petition interest. A significant portion of that misallocated value properly belongs to WMI's preferred equity holders under to the Bankruptcy Code's distribution scheme.[44]

A. The "Legal Rate" Of Interest Under Bankruptcy Code Section 726 Of The Bankruptcy Code Is The Federal Judgment Rate.

22. Bankruptcy Code Section 726(a)(5) provides on allowed unsecured claims a fifth-priority payment "of interest *at the legal rate* from the date of the filing of the petition."[45] Courts have consistently interpreted the reference in Bankruptcy Code Section 726(a)(5) to interest "at the legal rate" to mandate application of the FJR.[46]

23. As set forth in the Initial Objection and expanded upon herein, principles of statutory interpretation compel the conclusion that the phrase "interest at the legal rate" in Bankruptcy Code Section 726(a)(5) means interest at the FJR.[47] When interpreting a section of the Bankruptcy Code, it is the Court's "duty, if possible, to give effect to every clause and word of a statute"[48] and "a court should construe a statute to avoid rendering any element of it superfluous."[49] Further, courts must focus on the "plain meaning" of a statute and can look to

---

[44] In its Opinion, the Court reserved the issue of the appropriate rate of post-petition interest on allowed unsecured claims. See Opinion, p. 94.

[45] 11 U.S.C. § 726(a)(5) (emphasis added).

[46] See, e.g., Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Assoc. (In re Premier Entm't Biloxi LLC), No. 06-50975, 2010 Bankr. LEXIS 2994, at *167-74 (Bankr. S.D. Miss. Sept. 3, 2010) (finding that the FJR provides the appropriate measure of interest in a solvent debtor case); Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231, 1234 (9th Cir. 2002); In re Country Manor of Kenton, Inc., 254 B.R. 179 (Bankr. N.D. Ohio 2000); In re Dow Corning Corp., 237 B.R. 380, 412 (Bankr. E.D. Mich. 1999) ("Dow I"); In re Melenyzer, 143 B.R. 829, 832-33 (Bankr. W.D. Tex. 1992).

[47] See Cardelucci, 285 F.3d at 1234-36; In re Country Manor of Kenton, 254 B.R. at 182; Dow I, 237 B.R. at 400-11.

[48] In re Anderson, 348 B.R. 652, 657 (Bankr. D. Del. 2006) (Walrath, J.) (citations omitted) (rejecting creditor's argument that the phrase "allowed claim" in Section 521(a)(6) should be read to mean merely "claim," since the "Court cannot ignore [Congress's] choice of words").

[49] First Bank Nat'l Assoc. v. F.D.I.C., 79 F.3d 362, 367 (3d Cir. 1996).

the dictionary definition of a term to understand the statute's meaning.[50] When the plain meaning of the statute is not clear on its face, the Court may then consider the legislative history to assist its interpretation.[51] Where the legislative history is consulted to illuminate the meaning of a statute, the "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill."[52]

24. As noted by the court in Country Manor, the analysis of Bankruptcy Code Section 726(a)(5) and its impact on chapter 11 cases must begin with an examination of the language of the statute itself.[53] As the Dow I court noted, the phrase "interest at the legal rate" had a commonly understood meaning when Congress enacted the Bankruptcy Code in 1978 which "was, and is, commonly understood to mean a rate of interest fixed by statute, and not by contract."[54] The Dow I court found that Bankruptcy Act cases "achieve[d] uniformity" in using the term "the legal rate" to mean a rate of interest fixed by statute[55] and that "[f]or over 100 years

---

[50] See In re Charter Behavioral Health Sys., LLC, 292 B.R. 36, 44-45 (Bankr. D. Del. 2003).

[51] In re Continental Airlines, Inc., 257 B.R. 658 (Bankr. D. Del. 2000) (Walrath, J.) (resolving to rely on (i) the plain meaning of the term "employee," (ii) the "scant legislative history" of the relevant Bankruptcy Code section, and (iii) other courts' interpretations to determine the meaning of "employees" under Bankruptcy Code Section 502(b)(7)); In re Washington Mut., Inc., 419 B.R. 271, 277 (Bankr. D. Del. 2009) ("Generally, legislative history should not be relied upon where the language of the statute or rule is clear.") (citations omitted).

[52] In re Paret, 347 B.R. 12, 16 (Bankr. D. Del. 2006) (Walrath, J.) (quoting Garcia v. United States, 469 U.S. 70, 76 (1984)).

[53] See 254 B.R. at 181.

[54] 237 B.R. at 400-05.

[55] Id. at 401 (See, e.g., Dayton v. Stanard, 241 U.S. 588, 590 (1916); Dower v. Bomar, 313 F.2d 596, 597 (5th Cir. 1963); Delatour v. Prudence Realization Corp., 167 F.2d 621, 622 (2d Cir. 1948); In re Realty Assocs. Sec. Corp. 163 F.2d 387, 389 (2d Cir. 1947); Imperial '400' National Inc., 374 F. Supp. 949, 954 (D.N.J. 1974) (contrasting contract rate with "the governing legal rate"); In re Maryvale Community Hosp., Inc., 307 F. Supp. 304 (D. Ariz. 1969); In re Norcor Mfg., 36 F. Supp. 978 (E.D. Wis. 1941); Rollins v. Repper, 69 F. Supp. 976, (E.D. Mich. 1947); In re Jones, 2 B.R. 46 (Bankr. N.D. Ala. 1979)).

courts have consistently used the term to mean a rate of interest fixed by statute."[56] The Cardelucci court also recognized that "the commonly understood meaning of 'at the legal rate' at the time the Bankruptcy Code was enacted was a rate fixed by statute."[57]

25. As the Dow I court reasoned, Congress "intended for the term to carry this commonly understood meaning."[58] First, Congress chose the language "interest at the legal rate" when it could simply have said "interest" when it enacted, "for the first time, a statute requiring

---

[56] Id. at 402. See also City of New York v. Saper, 336 U.S. 328, 336 (1949) (referring to rate fixed by statute as "interest at the legal rate"); Louisville & N. R. Co. v. Holloway, 246 U.S. 525, 528 (1918) (referring to a rate fixed by Kentucky statute as that state's legal rate of interest); Dayton v. Stanard, 241 U.S. 588, 590 (1916) (observing that "the ordinary legal rate" is the statutorily-fixed rate of interest that will apply when there is no contract); American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U.S. 261 (1914) (referring to "legal interest" as the applicable state statutory rate in situation where contract did not specify an interest rate); Mohamed v. UNUM Life Ins. Co., 129 F.3d 478, 481 (8th Cir. 1997); In re M/V Nicole Trahan, 10 F.3d 1190, 1192 (5th Cir. 1994) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 269 (2nd Cir. 1989) (same); U.S. v. Griffin, 782 F.2d 1393, 1395 (7th Cir. 1986) (same); Colegrove, 771 F.2d at 123 (distinguishing between "interest [at] the legal rate," which is fixed by statute, and "the rate provided for in the original loan agreement"); Memphis Sheraton Corp. v. Kirkley, 640 F.2d 14, 19 (6th Cir. 1981) (observing that "interest at the legal rate" is a rate fixed by statute); Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 568 (10th Cir. 1978) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); National Packing Co. v. Century Provision Co., 354 F.2d 7, 9 (7th Cir. 1965) (equating "legal rate" with a Kansas statutory rate); Dower v. Bomar, 313 F.2d 596, 597 (5th Cir. 1963) (noting Florida statute establishing the maximum "legal rate of interest" for loans to a corporation); E.I. Du Pont De Nemours & Co. v. Lyles & Lang Constr. Co., 227 F.2d 517 (4th Cir. 1955) (referring to "interest at the legal rate [as a] rate fixed by statute"); Delatour v. Prudence Realization Corp., 167 F.2d 621 (2d Cir. 1948) (calling the statutorily-created rate of interest imposed on debts overdue in New York as "the legal rate of interest"); In re Realty Associates Securities Corp., 163 F.2d 387, 389 (2d Cir. 1947) (equating "interest at the legal rate" with the statutory judgment rate); Bins v. Artison, 764 F. Supp. 129, 132 (E.D. Wis. 1991) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); Reid v. Prudential Ins. Co. of America, 755 F. Supp. 372, 377 (M.D. Fla. 1990) (same); Burston v. Commonwealth of Virginia, 595 F. Supp. 644, 652 (E.D. Va. 1984) (same); In re Maryvale Cmty. Hosp., Inc., 307 F. Supp. 304, 309 (D. Ariz. 1969) (referring to rate of interest in an Arizona statute as 'The Arizona legal rate of interest"); In re Norcor Mfg. Co., 36 F. Supp. 978, 980 (E.D. Wis. 1941) (equating "the legal rate" with a Wisconsin statutory rate); Rollins v. Repper, 69 F. Supp. 976, 979 (E.D. Mich. 1947) (referring to interest rate established by Michigan statute as "the legal rate of interest"); Fitch v. Remer, 1860 U.S. App. LEXIS 453 (D. Mich. July 1860) (observing that in Michigan the legal rate of interest was a rate fixed by statute); City of Danville v. Chesapeake & O. Ry., 34 F. Supp. 620, 637 (W.D. Va. 1940) ("The legal rate of interest, generally speaking, is a rate fixed by statute ...."); Family Fed. Sav. & Loan v. Davis (In re Davis), 172 B.R. 437, 457 (Bankr. D.C. 1994) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); In re Goldblatt Bros., 61 B.R. 459, 465 (Bankr. N.D. Ill. 1986) (same); In re Jones, 2 B.R. 46, 49 (Bankr. N.D. Ala. 1979) (awarding interest on judgment at "the legal rate" as established by Alabama statute)).

[57] 285 F.3d at 1234-35.

[58] Dow I, 237 B.R. at 403.

the payment of post-petition interest to unsecured creditors in solvent estates."[59] Moreover, the language originally proposed for Bankruptcy Code Section 726(a)(5) was "interest on allowed claims," as set forth in the 1973 *Report of the Commission on the Bankruptcy Laws of the United States*, which explained "the rate of interest is to be determined by other applicable law."[60] The fact that Congress rejected the phrase "interest on allowed claims" in favor of "interest at the legal rate" is significant: "'other applicable law' is a broad, general term …[c]onversely, 'interest at the legal rate" carries a much more definite meaning, a rate of interest fixed by statute."[61] The Dow I court relied on several cornerstone rules of statutory construction to reach its conclusion: (1) "a rejected proposition 'strongly militates' against a judgment that Congress intended a result that it expressly declined to enact," (2) "a court must assume that Congress carefully selects and intentionally adopts the language that it chooses to employ in a statute," and (3) "where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[62]

26. Moreover, use of the definite article "the" as a modifier for "legal rate" demonstrates that Congress "meant for a single source to be used to calculate post-petition

---

59 Id.

60 Id. (H.R. Doc. No. 93-137, 93d Cong., 1st Sess., § 4-405(a)(8) reprinted in Volume B Collier on Bankruptcy App. Pt. 4(c) (Alan N. Resnick & Henry J. Sommer eds., 15th ed. Rev., at 4-679; Note 6 reprinted at id. at 4-681).

61 Id.

62 Id. (citations omitted); see also Cardelucci, 285 F.3d at 1234 (assuming that Congress carefully selects and adopts the language used in a statute and recognizing that "instead of a general statement allowing for awards of interest, Congress modified what type and amount of interest could be awarded with a specific phrasing 'at the legal rate.'").

interest, as opposed to using whatever rate of interest happened to be in a contract."[63] This rationale is widely accepted and continues to be applied by courts around the country.[64] Moreover, outside of the instant context, federal courts have consistently interpreted statutes that use the definite article "the" to mean a specific or particular person, object, or idea.[65] The definite article "the" necessarily restricts the scope of the clause it modifies and, in this instance, specifies the FJR as *the* legal rate for calculating post-petition interest on claims in bankruptcy cases.

27. The use of the phrase "at the legal rate" would also make little sense had Congress intended the term simply to mean any legally permissible rate of interest fixed by contract.[66] It would be entirely unnecessary for Congress to have to instruct Bankruptcy Courts not to allow post-petition interest at illegal or usurious rates, "but had Congress felt such instruction necessary, it presumably would have used 'legal' in a similar manner throughout the

---

[63] Dow I, 237 B.R. at 404; Cardelucci, 285 F.3d at 1234; Melenyzer, 143 B.R. at 831 n.2; In re Country Manor of Kenton, Inc., 254 B.R. 179, 182 (Bankr. N.D. Ohio 2000).

[64] See, e.g., In re Smith, 431 B.R. 607, 610 (Bankr. E.D.N.C. 2010) (explaining and adopting the Cardelucci distinction between Congress's purposeful use of "the" instead of "a" or "an"); see also Garriock v. McDowell (In re Garriock), 373 B.R. 814, 816 (E.D.Va. 2007) (same).

[65] See e.g., Freytag v. C.I.R., 501 U.S. 868, 902 (1991) (noting that "[t]he definite article 'the' obviously narrows" the scope of any clause that follows); Flandreau Santee Sioux Tribe v. United States, 197 F.3d 949 (8th Cir. 1999) (interpreting "the statute's use of the definite article 'the' instead of the indefinite article 'a'" to refer to a specific person or object) (citations omitted); St. Clair Intellectual Prop. Consultants, Inc. v. Matsushita Elecs. Indus. Co., Ltd., 691 F.Supp.2d 538, 553 (D. Del. 2009) (noting that "an indefinite article 'a' or 'an'. . .carries the meaning of 'one or more'") (citations omitted); O'Sullivan v. Loy (In re Loy), 432 B.R. 551, 559 n.9 (E.D.Va. 2010) ("'An estate' is not a reference to a specific foreign proceeding. The indefinite article signals that the phrase refers to a hypothetical estate. If Congress had meant to reference a specific, existing estate, it would likely have used the definite article."); see also Black's Law Dictionary 1324 (5th ed. 1979) ("Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the'. The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object."); Chicago Manual of Style 116 (15th ed. 2003) ("An article is a limiting adjective . . .The definite article points to a definite object . . . And indefinite article points to nonspecific objects . . .").

[66] Dow I, 237 B.R. at 404.

Bankruptcy Code. But Congress did not do this."[67]

28. Moreover, any post-petition interest required to be paid pursuant to Bankruptcy Code Section 726(a)(5) accrues because of the delay caused by the administration of the federal bankruptcy law. Accordingly, post-petition interest, which is akin to post-judgment interest, is procedural and governed by federal law and the allowance of a claim is akin to a "money judgment," therefore, Bankruptcy Courts are required to calculate post-petition interest in accordance with 28 U.S.C. § 1961(a).[68] Moreover, "federal courts have long referred to the rate of interest calculated pursuant to §1961(a) as 'the legal rate' or 'the federal legal rate.'"[69]

29. Leading commentators on bankruptcy law also recognize that proper statutory analysis leads to the conclusion that Bankruptcy Code Section 726(a)(5) must refer to the FJR:

> The reference in the statute to the 'legal rate' suggests that Congress envisioned a single rate, probably the federal statutory rate for interest on judgments set by 28 U.S.C. § 1961. . . . Had Congress intended contract rates to apply, it presumably would have used language other than 'the legal rate,' a term that typically refers to a statutory rate.[70]

30. Significantly, had Congress intended to provide interest under Bankruptcy Code Section 726(a)(5) at state judgment rates or contractual rates of interest, it certainly knew how to specify such an arrangement. For instance, Bankruptcy Code Section 506(b) provides that an allowed secured claim (secured by property with value greater than the amount of the claim) is permitted "interest on such claim, and any reasonable fees, costs, or charges provided for *under the agreement* or State statute under which such claim arose." 11 U.S.C. § 506(b) (emphasis added). As expressed by the Country Manor court, the distinction between Bankruptcy Code

---

[67] Id. at 404-05.

[68] Id. at 406; Country Manor, 254 B.R. at 183.

[69] Dow I, 237 B.R. at 407.

[70] 6 Collier on Bankruptcy ¶ 726.02[5] (16th ed. rev. 2010).

Section 726(a)(5) ("interest at the legal rate") and Bankruptcy Code Section 506(b) (which explicitly uses the term "agreement") "beg[s] the question, if both §§ 506(b) and 726(a)(5) were intended to refer to the agreed upon interest rate, why is the term 'agreement' specified in one section and not the other."[71] Other examples of Congress distinguishing between rights provided under the Bankruptcy Code versus those provided by contract or non-Bankruptcy law abound. For example, Bankruptcy Code Section 365(d)(5) incorporates both concepts in the same statutory provision (providing for satisfaction of contractual obligations pursuant to Bankruptcy Code Section 503(b)(1) for the first sixty days following commencement of the case and pursuant to the terms of the underlying agreement thereafter). Clearly, where Congress wanted rights to be determined pursuant to contract, it knew how to effect that treatment. That it chose not to do so with respect to calculation of post-petition interest on unsecured claims leaves the FJR as the only logical alternative, as discussed above.

31. In addition to statutory construction, several other factors support application of the FJR to the payment of post-petition interest under Bankruptcy Code Section 726(a)(5). Application of the FJR to post-petition interest claims promotes uniformity within federal law.[72] Applying the FJR, a single, easily determined interest rate to all unsecured claims for post-petition interest ensures equitable treatment of creditors and is the most practical, judicially-efficient method of allocating distributions.[73]

---

71 254 B.R. at 182.

72 See Cardelucci, 285 F.3d at 1235; Dow I, 237 B.R. at 400 n.14; see also Beguelin v Volcano Vision Inc. (In re Beguelin), 220 B.R. 94, 100-01 (B.A.P. 9th Cir. 1998) (citing Godsey, 134 B.R. 865, 867 (Bankr. M.D. Tenn. 1991)).

73 Cardelucci, 285 F.3d at 1235-36 ("By using a uniform interest rate, no single creditor will be eligible for a disproportionate share of any remaining assets to the detriment of other unsecured creditors. … Calculating the appropriate rate and amount of interest to be paid to a myriad of investors has the potential to overwhelm what could otherwise be a relatively simply process pursuant to 11 U.S.C. § 726(a)(5).") (citations omitted); Country Manor, 254 B.R. at 182.

32. Thus, principles of statutory construction and other considerations make it plain that Bankruptcy Code Section 726(a)(5) mandates FJR as the appropriate rate of interest. The "guiding principle" with respect to statutory construction is that "the expression of one thing [in a statute] is the exclusion of others."[74] Therefore, if "interest at the legal rate" in Bankruptcy Code Section 726(a)(5) means the FJR, courts do not have discretion to provide another rate under the provision.[75]

B. Bankruptcy Code Section 1129(a)(7)'s "Best Interest" Test Makes The FJR Applicable To Post-Petition Interest Claims Under A Chapter 11 Plan.

33. Bankruptcy Code Section 726(a)(5) (and its requirement to pay post-petition interest "at the legal rate") is not directly applicable to cases under chapter 11. See Bankruptcy Code Section 103(b). Rather, Bankruptcy Code Section 726(a)(5)'s application in chapter 11 is a product of the "best interests" test imposed under Bankruptcy Code Section 1129(a)(7). This section requires that, under a chapter 11 plan, with respect to **each** class under the plan, dissenting members must receive as much as they would if the case had been administered under chapter 7.[76] In applying the "best interests" test, this Court must give consideration to not only what creditors would receive in a chapter 7 case (post-petition interest "at the legal rate") but also what junior impaired classes (e.g., WMI preferred equity holders) would receive in a chapter 7 liquidation – all residual value after payment of claims and post-petition interest "at the legal rate." Here, payment of anything beyond the FJR would result in an impermissible diversion of

---

[74] Acme Metals Inc. v. Raytheon Eng'rs & Constructors (In re Acme Metals, Inc.), 257 B.R. 714, 719 (Bankr. D. Del. 2000) (Walrath, J.) (quoting Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 206 (1928)).

[75] Cardelucci, 285 F.3d at 1236 ("Nonetheless, 'interest at the legal rate' is a statutory term with a definitive meaning that cannot shift depending on the interests invoked by the specific factual circumstances before the court.") (citation omitted); Dow I, 237 B.R. at 409 ("[A]lthough, it is frequently described as a 'court of equity, a Bankruptcy Court is not empowered to ignore the actual provisions of the Bankruptcy Code in order to reach a result that it finds more palatable.").

[76] See Bankruptcy Code Section 1129(a)(7)(A)(ii).

value to unsecured creditors in excess of their entitlement under Bankruptcy Code Section 1129(a)(7) – value that is required to flow to dissenting WMI preferred equity holders (per Bankruptcy Code Section 1129(a)(7)'s application to Classes 19 and 20 – also impaired Classes under the Plan).

34. Of the cases cited in the Opinion to suggest payment of interest at the contract rate under a chapter 11 plan might be appropriate, only one – In re Schoeneberg – held that Bankruptcy Code Section 726(a)(5) allowed for the payment of post-petition interest on unsecured claims at the contract rate.[77] The Schoeneberg court, however, reached its decision considering: a) case law concerning post-petition interest on secured claims under Bankruptcy Code Section 506(b), which as discussed above are explicitly allowed interest "provided for *under the agreement* or State statute under which such claim arose;" and b) case law under the Bankruptcy Act prior to enactment of the Bankruptcy Code Section 726(a)(5).[78] Of further note, the "contractual rate" to which the creditor in Schoeneberg was deemed to be entitled was a rate established by a Federal statute for agricultural lenders.[79]

35. Two of the other cases cited in the Opinion, In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company[80] and Southland Corp. v. Toronto-Dominion (In re Southland Corp.)[81] addressed post-petition interest under the Bankruptcy Act and under Bankruptcy Code Section 506(b) for an oversecured claim, respectively – not Bankruptcy Code Section 726(a)(5).

---

[77] 156 B.R. 963, 972 (Bankr. W.D. Tex. 1993).

[78] Id. at 970-72 (analyzing case law determining the rate of post-petition interest in "an analogous § 506(b) situation" and cases finding that secured creditors are to be awarded interest at the contract rate).

[79] Id. (setting the post-petition interest rate at the rate determined by 12 U.S.C. § 2205).

[80] 791 F.2d 524 (7th Cir. 1986) (the railroad filed its petition for reorganization in 1977 under section 77 of the Bankruptcy Act, which while since appealed remained applicable to its proceedings).

[81] 160 F.3d 1054 (5th Cir. 1998).

Relying on pre-Code cases here would constitute error because, under the Bankruptcy Act, the award of interest on unsecured claims was discretionary and was based on equitable principles.[82] Under the Bankruptcy Code, however, the award of post-petition interest is now statutorily-provided under Bankruptcy Code Section 726(a)(5) at the "legal rate."

36. In addition, the Court cited to two Dow Corning cases in the Opinion for the propositions that: a) some courts have concluded there is a presumption the contract rate of interest should be applied in solvent debtor cases;[83] and b) the FJR is only a minimum for post-petition interest to unsecured creditors and courts have within their discretion to allow interest at some other rate.[84] But, both cases provide such propositions in the context of the "fair and equitable" test, which is only applicable to classes that do not accept the plan – not to Bankruptcy Code Section 726(a)(5) and Bankruptcy Code Section 1129(a)(7)'s "best interests" test. In fact, the Dow II court explicitly held that post-petition interest is provided at the FJR under the best interests of creditors' test pursuant to Bankruptcy Code Section 726(a)(5).[85] Similarly, this Court in In re Coram Healthcare Corp. addressed post-petition interest under the "fair and equitable" test and appeared to have accepted that post-petition interest under the "best interests" test and Bankruptcy Code Section 726(a)(5) was to be paid only at the FJR.[86]

C. Bankruptcy Code Section 1129(b)'s "Fair And Equitable" Test Does Not Justify Payment Of Post-Petition Interest At Anything Other Than The FJR.

37. Pursuant to Bankruptcy Code Section 1124(1), a claim is unimpaired if treatment

---

[82] See e.g., Vanston Bond Holders Protective Committee v. Green, 329 U.S. 156, 163, (1946).

[83] In re Dow Corning Corp., 456 F.3d 668, 677-80 (6th Cir. 2006) ("Dow Corning").

[84] In re Dow Corning Corp., 244 B.R. 678, 694-96 (Bankr. E.D. Mich. 1999) ("Dow II").

[85] Id. at 686.

[86] 315 B.R. 321, 346-47 (Bankr. D. Del. 2004).

under a plan "leaves unaltered the legal, equitable and contractual rights to which such claim or interest entitles the holder of such claim or interest." Courts, including this Court, have held that to the extent *the Bankruptcy Code* defines or alters the rights of creditors, a claim is not "impaired" by a plan merely because it provides treatment in accordance with those Bankruptcy Code provisions.[87] This Court, in Coram Healthcare, applied this very concept to the payment of post-petition interest on unsecured claims, and held that application of the FJR did not render such claims "impaired" pursuant to Bankruptcy Code Section 1124(a). As the Court noted in Coram:

> It is not the Equity Committee's Plan which limits the rights of [unsecured creditors receiving the FJR]. Instead, if their rights are altered at all, it is because of the Code and decisional law under the Code.[88]

38. In this case, like the Coram case, if the Plan were to be modified to provide for payment of post-petition interest at the FJR (as mandated by Bankruptcy Code Sections 1129(a)(7) and 726(a)(5)), the Plan would not alter contractual, legal or equitable rights of unsecured creditors. Rather, the Plan would simply reflect application of Bankruptcy Code provisions in respect of treatment of unsecured claims.

39. Where it is the Bankruptcy Code that defines the rights of unsecured creditors, and not the Plan, such creditors would not be impaired by application of the FJR. As such, to the extent unsecured creditors were to be paid post-petition interest at the FJR, as mandated under

---

87 See In re Mirant Corp., No. 03-46590-DML-11, 2005 Bankr. LEXIS 909, at *15 (Bankr. N.D. Tex. May 24, 2005) (noting that "the court also must distinguish between an effect of the Plan and an effect brought about by operation of the Code"); In re PPI Enterprises (U.S), Inc., 324 F.3d 197, 205 (3d Cir. 2003) ("PPI Enterprises") (finding claim held by debtor's former landlord unimpaired where plan allowed landlord's damages up to cap established by Bankruptcy Code Section 502(b)(6)); In re American Solar King Corp., 90 B.R. 808, 819-820 (Bankr. W.D. Tex 1988) ("Solar King") (finding creditor unimpaired under a plan where it was treated as a subordinated creditor pursuant to Bankruptcy Code Section 510(b)).

88 Id.

Bankruptcy Code Sections 1129(a)(7) and 726(a)(5), those classes of unsecured creditors would be unimpaired and not entitled to vote on the Plan. Pursuant to Bankruptcy Code Section 1126(f), "*a class that is not impaired under a plan*, and each holder of a claim or interest of such class, are *conclusively presumed to have accepted the plan*, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required."[89]

40. Bankruptcy Code Section 1129(a)(8) requires only that each class of claims or interests accept the Plan *or* not be impaired under the Plan.[90] The cramdown provisions of Bankruptcy Code Section 1129(b), including the "fair and equitable" requirements, are only implicated when the alternative requirements of Bankruptcy Code Section 1129(a)(8) are not met.[91] Consequently, if the Plan provided for payment of unsecured claims in full, plus interest at the FJR, such Classes would be unimpaired and the cramdown provisions of Bankruptcy Code Section 1129(b) would never come into play.

41. But, assuming arguendo, Bankruptcy Code Section 1129(b)'s "fair and equitable" standard were implicated by payment of unsecured claims in full, plus interest at the FJR, it would still not provide a basis for payment of post-petition interest at anything above the FJR. In Coram Healthcare, this Court held that in a cramdown, "the specific facts of each case will determine what rate of [post-petition] interest is fair and equitable."[92] The Court further noted that "actions of [creditors] are relevant" in making that determination.[93] And, in Coram

[89] 11 U.S.C. § 1126(f) (emphasis added).

[90] 11 U.S.C. § 1129(a)(8).

[91] 11 U.S.C. §1129(b).

[92] 315 B.R. at 347.

[93] Id. at 346 (finding the FJR of interest fair and equitable because conduct of certain creditors ultimately resulted in delay in cases); see also In re Dow Corning Corp., 244 B.R. 678, 695 (Bankr. E.D. Mich. 1999) ("[t]he touchstone of each decision on allowance of interest in bankruptcy . . . and reorganization has been

Healthcare, this Court correctly declined to award interest beyond the FJR because, among other things, the noteholders in that case generally had "acted as a group in th[e] case in advancing their interests and opposing the Equity Committee."[94]

42. First, it must be noted that here, unlike in Coram Heathcare or Dow, in which the courts considered the general equitable principles of Chapter 11 in addition to the plain language of Bankruptcy Code Sections 1129(a)(7) and 726(a)(5) (so-called "solvent debtor" interest), the "Plan" in this case is essentially a settlement and liquidation. For all practical purposes, there is no reorganized debtor that will continue to operate as a going concern and that would have received the "benefit" of the Chapter 11 process without affording creditors of their contractual rights.[95] Rather, the "reorganization" here is a sham based on the emergence of a shell reinsurance company already in "run-off" mode. Accordingly, the "fairness" concerns implicit in a Court's analysis of a reorganizing plan under Chapter 11 have little (if any) application here, where there is no concern that an entity's restructuring is occurring at the expense of creditors with contractual rights to payment of interest at particular rates. The only "concern" here is the potential right to so-called solvent-debtor interest under Bankruptcy Code Section 1129(a)(7) and 726(a)(5) – interest that, as set forth herein, plainly would accrue (if at all) at the FJR.

43. Moreover, even if the fairness concerns implicit in Coram Healthcare were applicable here, the circumstances of these cases demonstrate that, if post-petition interest is to be afforded to unsecured creditors, payment of interest at the FJR is more than fair and equitable. Stated differently, the payment of post-petition interest to creditors beyond the FJR would not be

---

a balance of equities between creditor and creditor or between creditors and the debtor") (citations omitted).

94 315 B.R. at 347.

95 See, e.g., In re Dow, 244 B.R. at 695, *rev'd on other grounds* 456 F.3d. 668 (6th Cir. 2006) (drawing distinction between FJR interest to be paid as a "floor" by a solvent debtor pursuant to § 1129(a)(7), and the "fairness" concerns implicit in § 1129(b)).

fair and equitable to the members of Class 19, because it would result in an effective windfall to, in large part, the very creditors who gifted away significant estate value to JPMC once they had negotiated for full payment of their own interests and who now stand accused of violating securities laws by trading on non-public information obtained during those negotiations. Moreover, the Debtors have not demonstrated that unsecured creditors have suffered any unique or particular harm or delay that would justify post-petition interest at a rate other than the FJR. And, in fact, as in Coram Healthcare, the unsecured creditors in these cases, led by the Settlement Noteholders, have largely acted as a group in advancing their own interests at the expense of other estate constituents and opposing interests advanced by both the TPS Consortium and the Equity Committee.

44. Finally, the Plan voting results are not available as of the filing of this Objection. But, to the extent Classes reject the Plan, the Debtors will have the burden of demonstrating the Plan is fair and equitable with respect to **each** rejecting Class (including Class 19, which, by the Debtors' own design, has been deemed to reject this current Plan based on votes submitted with respect Sixth Amended Plan).[96] In light of the circumstances giving rise to the Plan (the economic terms of which were negotiated by holders of unsecured claims to provide for their recovery in full (plus interest), with all other value shunted away to JPMC rather than distributed to WMI preferred equity), and in balancing the equities between unsecured creditors and the members of Class 19, the Debtors simply cannot meet their burden to demonstrate that payment of post-petition interest at the contract rate would be: a) necessary to satisfy Bankruptcy Code Section 1129(b) with respect to rejecting unsecured Classes (if any); or b) permissible with

---

[96] See, e.g., United States v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654-55 (B.A.P. 9th Cir. 1994); 266 Washington Associates v. Citibank, N.A. (In re Washington Associates), 147 B.R. 827, 830 (E.D.N.Y. 1992) (burden of proof on confirmation "rests squarely on the plan's proponent").

respect to application of Bankruptcy Code Section 1129(b) to WMI preferred equity holders who would be directly harmed by the overpayment of value to senior classes.[97] As such, the Plan cannot be confirmed.

III The Plan Cannot Be Confirmed Because It Continues To Provide Non-Consensual Releases to Third Parties.

45. A primary reason the Sixth Amended Plan was denied confirmation by this Court was its inclusion of aggressive and illegal third-party releases. As this Court has correctly noted on multiple occasions, third-party releases are permissible only when the releasing party consents and receives compensation.[98] While that was made clear to the Debtors again in the Opinion,[99] the current Plan continues to include releases (some overt, and some disguised) that violate this Court's specific rulings on this topic.

46. For example:

- Section 43.6 provides that "each entity that has elected not to grant the releases set forth in this Section 43.6 … shall not be entitled to, and shall not receive, any payment, distribution or other satisfaction of its claim pursuant to the Plan." Moreover, Section 43.6 grants third-party releases from *each Entity* that elects to grant releases. Importantly, this provision fails to explicitly preserve the rights of non-electing holders to pursue claims against non-debtor third parties *notwithstanding any other provision of the Plan*. Also, while this provision sets out the punishment the Debtors would exact on non-consenting stakeholders, it does nothing to limit the applicability of the Plan's illegal releases to the third-party claims of those punished holders.

---

[97] See 11 U.S.C. § 1129(a)(7); see also Genesis Health, 266 B.R. at 612 ("A corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims."); In re MCorp Fin. Inc., 137 B.R. 219, 235 (Bankr. S.D. Tex. 1992) ("[A] dissenting class should be assured that no senior class receives more than 100 percent of the amount of its claims."); see also 7 Collier on Bankruptcy ¶ 1129.04[4][a][i] (15th ed. rev. 2004) ("'[F]air and equitable' can be seen to have two key components: the absolute priority rule; and the rule that no creditor be paid more than it is owed.").

[98] See Opinion, at pp. 74-77; Coram, 315 B.R. at 335 (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," rather, any such release must be based on consent of the releasing party (by contract or the mechanism of voting in favor of the plan); In re Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999) (plan could not be confirmed where it required non-consensual release of third-party claims).

[99] See Opinion, at pp. 74-87.

- Section 43.1 contemplates entry of an Order transferring certain assets and properties, including the Trust Preferred Securities, "free and clear" of Liens (defined to mean "any charge against or interest in property to secure payment of a debt or performance of an obligation") and in accordance with Bankruptcy Code Sections 363 and 1141. This provision is overbroad and impermissible to the extent the "free and clear" language would deprive non-electing holders of the ability to seek recovery from assets delivered to JPMC, including the Trust Preferred Securities and the value of Washington Mutual Preferred Funding LLC which are being transferred to JPMC under the Plan.

- Section 43.2 discharges and releases Debtors and Reorganized Debtors from any and all Claims and suits whether or not the holder of a Claim based upon such debt voted to accept the Plan. This provision is overbroad and impermissible to the extent it fails to carve out the pending appeal of the TPS Litigation, the subject matter of which is now before the District Court.

- Section 43.3 provides injunctive protection to all of the Released Parties (which includes JPMC and its Related Persons) and with respect to their assets. This provision is overbroad and impermissible to the extent such injunction applies to non-electing holders or purports to affect the appeal of the TPS Litigation.

- Section 43.10 deems consent to the Global Third-party Releases set forth in Section 43.6 for *each holder* of a Claim or Equity Interest that does not elect to withhold consent. This provision should explicitly limit deemed consent with respect to *each* Claim or Equity Interest for which the election is made, as discussed above, so that holders are able to elect whether to grant such release with respect to each Claim or Equity Interest held.

47. As such, the Plan cannot be confirmed.

IV The Plan Cannot Be Confirmed Because It Violates Bankruptcy Code Sections 1129(a)(1) And 1129(a)(3).

48. Bankruptcy Code Section 1129(a)(1) makes it a confirmation requirement that a plan comply with all applicable provisions of Title 11 of the United States Code. See 11 U.S.C. § 1129(a)(1). Bankruptcy Code Section 1129(a)(3) requires that, for a plan to be confirmed, it have been "proposed in good faith and not by any means prohibited by law." See 11 U.S.C. § 1129(a)(3). This "good faith" standard requires that "the plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent

with the objectives and purposes of the Bankruptcy Code."[100] Notably, a plan must not only comply with the provisions of the Code, but must comply with any other applicable non-bankruptcy law.[101] Furthermore, under Bankruptcy Code Section 1129(a)(3), the Court must find that the "plan will *fairly achieve a result consistent with the objectives and purposes* of the Bankruptcy Code."[102]

A. Assumption Of The Trust Preferred Securities Exchange Agreements Clearly Would Violate Bankruptcy Code Sections 365(c)(2) And 1129(a)(1), And Must Not Be Approved.

49. As set forth in detail in the Initial Objection,[103] the Plan's proposed assumption of the Trust Preferred Securities exchange agreements (each calling for the issuance of the WMI preferred stock that was to have been "exchanged" for the Trust Preferred Securities) violates the complete prohibition against assumption of agreements "to issue a security of the debtor" set forth in Bankruptcy Code Section 365(c)(2) (thereby causing the Plan to fail to satisfy Bankruptcy Code Section 1129(a)(1)).

B. To The Extent The Settlement Noteholders Have Acted Illegally With Information Obtained During Confidential Plan Negotiations, The Debtors Are Incapable Of Satisfying The "Good Faith" Requirement.

50. When assessing the good faith of a plan, courts must consider the "totality of the circumstances" surrounding the negotiation and filing of the plan.[104] As this Court has noted, "the ultimate fairness of the *process* in bankruptcy is a paramount principle to be protected by

---

100 In re Zenith Elecs. Corp., 241 B.R. 92, 107 (Bankr. D. Del. 1999) (citations and quotations omitted).

101 See Zenith Elecs. Corp., 241 B.R. at 108 (incorporating Delaware corporate law in section 1129(a)(3) analysis, the court evaluated whether the transaction between a controlling shareholder and its corporation was "entirely fair").

102 In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004) (quoting In re PWS Holding Corp., 228 F.3d 224 (3d Cir. 2000)) (emphasis added).

103 See Initial Objection, at § III.

104 Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.), 324 F.3d 197, 211 (3d Cir. 2003).

the Bankruptcy Court."[105] Given the court's duty to safeguard the process from inequities, the court is granted "considerable judicial discretion" to inquire into the "fundamental fairness" of that process.[106]

51. In Coram, this Court denied confirmation of the debtor's plan on good faith grounds where it found that the continuing conflict of interest and breach of fiduciary duty by the debtor's chief executive officer "tainted" the debtors' negotiations of its plan and, ultimately, the plan itself.[107] Without the debtors' knowledge, the debtors' chief executive was receiving nearly $1 million in annual payments pursuant to an employment contract signed with one of the debtor's largest creditors.[108] Because the chief executive officer had an actual conflict of interest with the interests of the debtor, and because the creditor paying him was able to exert undue influence on the process, by virtue of a provision in the employment contract "requir[ing] that [the chief executive officer] obey the instructions" of the creditor, the Court denied confirmation of the plan because it had not been proposed in good faith pursuant to Bankruptcy Code Section 1129(a)(3).[109]

52. Similarly, leading commentators on bankruptcy law recognize that activity forbidden by law that corrupts the plan negotiation process will cause the plan not to comply with Bankruptcy Code Section 1129(a)(3), even if the plan otherwise technically complies with title 11:

Given the wide range of possible plan proponents, it is possible that a plan could

---

105 In re Coram Healthcare, 271 B.R. 228, 232 (Bankr. D. Del. 2001) (emphasis added).

106 In re Am. Family Enters., 256 B.R. 377, 401 (D.N.J. 2000) (citations and internal quotations omitted).

107 Coram, 271 B.R. at 232.

108 Id. at 231-32.

109 Id. at 234-35.

> be part of a scheme that technically complies with title 11, but violates other law. For example, a plan proponent could have bribed another to take actions that would ease confirmation in the proponent's favor. If done knowingly and fraudulently, such activity is a bankruptcy crime. That is clearly something 'forbidden by law' and thus, if discovered, would preclude confirmation even if no provision of title 11 was violated.[110]

53. In this case, the Court must once again safeguard the "paramount principle" of "ultimate fairness of the process in bankruptcy" to find that the Plan is unconfirmable because of the circumstances surrounding its negotiation. As the Court is well aware, there are pending allegations that the benefits the Settlement Noteholders received from trading on the information and provisions of the Plan were unreasonable and, frankly, illegal. If proven to have occurred, the insider trading activities of the Settlement Noteholders facilitated by the Settlement will constitute the very type of illegality that precludes a finding of good faith and should be found to have "tainted" the entire negotiation process.[111] As such, the Plan cannot be confirmed.

C. The Plan Cannot Be Confirmed Because It Would Effect Prohibited Discrimination Against Certain Members Of Class 19.

54. A plan may not unfairly discriminate against or amongst like creditors. Bankruptcy Code Section 1123(a)(4), which requires that a plan "provide the same treatment for each claim or interest of a particular class" unless the holder of such claim or interest agrees to less favorable treatment,[112] "restates the cardinal principal of bankruptcy law, namely that creditors of the same class have a right to equality of treatment."[113] Similarly, Bankruptcy Code Section 1129(b)(1) requires that, within the context of a cram down, the plan "does not

---

[110] 7 Collier on Bankruptcy ¶ 1129.02[3][b][ii] (16th ed. rev. 2010).

[111] See In re Frascella Enters., Inc., 360 B.R. 435, 445 (Bankr. E.D. Pa. 2007) ("[S]ome illegalities might indeed undermine the *bona fides* of the plan's proposal, or be part of an illegal means of proposal.").

[112] 11 U.S.C. § 1123(a)(4).

[113] 7 Collier on Bankruptcy ¶ 1123.01[4][a] (16th ed. rev. 2010).

discriminate unfairly" between impaired classes of claims that have not accepted the plan.[114] Although the two sections contemplate separate forms of unfair discrimination—1123(a)(4) prohibiting unfair discrimination within a single class and 1129(b)(1) prohibiting unfair discrimination between different classes of claimants with similar rights—the diagnostics used to determine whether the plan provides for such discrimination are often intertwined.[115] That is because the purpose of the prohibition against unfair discrimination is to ensure fairness in the bankruptcy process. Indeed, equality of treatment of and amongst creditors is a fundamental precept of bankruptcy law.[116]

55. The Plan, on its face, effects prohibited discrimination in two ways. First, by providing unequal treatment to members within Class 19, based on their votes on the prior Sixth Amended Plan, the Plan violates Bankruptcy Code Section 1123(a)(4) and, as a result, Bankruptcy Code Section 1129(a)(1). Next, while Class 19 is the only Class not allowed to vote, Class 20 (comprised of other WMI preferred equity holders with rights *pari passu* to those held by members of Class 19) is allowed to vote and members are allowed to retain their rights to estate distributions. As noted above, members of Class 19 who voted against the prior Sixth Amended Plan were deemed to have rejected the current Plan and to have forfeited their right

---

[114] 11 U.S.C. § 1129(b)(1). Although not explicitly defined by legislative history or case law, the prohibition against unfair discrimination "ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes." In re Armstrong World Indus., Inc., 348 B.R. at 121 (quoting In re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986); see H.R. Rep. No. 595, at 416-17 (1977), reprinted in U.S. Code Cong. & Admin. News 1978, pp. 6372, 6373 (explaining the rule against unfair discrimination as one "which demands that a class not be unfairly discriminated against with respect to equal classes" and which "preserves just treatment of a dissenting class from the class's own perspective").

[115] See e.g., Armstrong v. Rushton (In re Armstrong), 294 B.R. 344, n.4 (B.A.P. 10th Cir 2003).

[116] See Begier v. IRS, 496 U.S. 53, 58 (1990); Am. United Mut. Life Ins. Co. v. City of Avon Park, Fla., 311 U.S. 138, 147 (1940) ("[A] composition would not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others, whether that consideration moved from the debtor or from another . . . . That rule of compositions is but part of the general rule of 'equality between creditors' applicable in all bankruptcy proceedings.") (internal citations omitted).

even to the estate value to which they would be entitled as a result of their position in WMI's capital structure. As a result, the Plan effects prohibited discrimination as between Class 19 (at least with respect to those holders who were automatically deprived of their entitlement to Plan value) and Class 20, in violation of Bankruptcy Code Section 1129(b).

56. The Debtors bear the burden of proof to show the Plan does not unfairly discriminate.[117] While the prohibition against unfair discrimination does not require a plan to provide for identical treatment between dissenting and accepting classes, assuming that different treatment is based upon some rational basis,[118] the plan "may not provide harsher treatment for members of a class who reject the plan; each member of a class must receive the same treatment."[119] Bankruptcy Code Section 1123(a)(4) requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest *agrees* to a less favorable treatment of such particular claim or interest."[120] Where a plan provides for the disparate treatment of members of the same class, it is unconfirmable as a matter of law.[121]

57. Respectfully, the Court's reliance on In re Dana Corp. for the proposition that Section 1123(a)(4) does not require equal treatment among members of a class, but merely the

---

117 See Educ. Credit Mgmt. Corp. v. Coleman (In re Coleman), 560 F.3d 1000, 1011 (9th Cir. 2009).

118 In re Drexel Burnham Lambert Grp., Inc., 138 B.R. 714, 715-16 (Bankr. S.D.N.Y. 1992).

119 7 Collier on Bankruptcy ¶ 1129.03[3][b][vii], n.44 (16th ed. rev. 2010) (citing 11 U.S.C. § 1123(a)(4)); Combustion Eng'g Inc., 391 F.3d at 239 ("The Bankruptcy Code furthers the policy of 'equality of distribution among creditors' by requiring that a plan of reorganization provide similar treatment to similarly situated claims.").

120 11 U.S.C. § 1123(a)(4) (emphasis added).

121 See In re AOV Indust., Inc., 792 F.2d 1140, 1152 (D.C. Cir. 1986) (finding plan unconfirmable where it required creditors to release any claims against non-debtor plan funders in order to participate in the plan); In re Union Meeting Partners, 165 B.R. 553, 567 (Bankr. E.D. Pa. 1994) aff'd 52 F.3d 317 (3d Cir. 1995) (finding plan unconfirmable and violative of Section 1123(a) where it required members of the same class to tender different consideration in exchange for the same percentage recovery).

opportunity for equal treatment, is misplaced.[122] In Dana Corp., a portion of the approximately 133,000 members of the Ad Hoc Committee of Asbestos Personal Injury Claimants (the "Ad Hoc Committee") entered into a number of settlement agreements with the Debtor wherein the settling members of the Ad Hoc Committee were to receive under the Debtor's plan approximately $267 per member in satisfaction of each member's personal injury claim against the Debtor.[123] Since all personal injury claimants were grouped together into one class, those members who chose not to settle would receive nothing through the Plan, but their claims would "pass through the bankruptcy and [be] reinstated" against the Debtor post-bankruptcy.[124] So, while the Court did correctly cite Dana Corp. for the proposition that "[w]hat is important is that each claimant within a class have the same opportunity to receive equal treatment," the "equal opportunity" afforded dissenting class members in Dana Corp. is not akin to the opportunity afforded dissenting class members in the present case.[125] In Dana Corp., the members of the class who chose not to settle with the Debtor had their claims preserved, to be reinstated after the bankruptcy, and "thus ha[d] the opportunity to settle their claims or litigate them—the same options given to the participants in the settlement agreements."[126]

58. Here, dissenting members of Class 19 have no such opportunity. Instead, the claims held by members of Class 19 who voted against the Plan and, in so doing, rejected the settlement offer from JPMC, are to be discharged and released "regardless of whether any

---

[122] See Opinion, pp. 85-86.

[123] Ad Hoc Comm. of Pers. Injury Asbestos Claimants v. Dana Corp. (In re Dana Corp.), 412 B.R. 53, 57 (S.D.N.Y. 2008).

[124] Id.

[125] Opinion, p. 86.

[126] Dana Corp., 412 B.R. at 62.

property will have been distributed or retained pursuant to the Plan on account of such Claims."[127] Thus, far from the "equal opportunity" afforded claimants in Dana Corp., the dissenting members of Class 19 are unfairly discriminated against by the Plan not only because they do not receive their equal distribution of residual estate value under the Plan, but also because they purportedly lose their rights to litigate their claims against JPMC and the FDIC post-bankruptcy.

59. Putting aside, for the moment, the multiple instances of illegal discrimination against members of Class 19 who rejected the Sixth Amended Plan, the Plan illegally deprives dissenting members of Class 19 of *any* recovery, including estate distribution rights in which those members hold a vested property interest. Assuming the Court adopts the FJR as the proper standard for post-petition interest, as it should for the aforementioned reasons, approximately $700 million in additional value would be available for distribution to stakeholders, a large portion of which would be allocable to holders of WMI preferred equity under the Bankruptcy Code's distribution scheme. Because the members of Class 19 retain a property interest in any potential estate distribution to Class 19,[128] confirmation of the Plan (depriving them of that recovery) by the Court would amount to an unconstitutional taking of the dissenting members' property interests, insofar as it would involuntarily transfer the property interests of one set of private parties—the dissenting members of Class 19—to another set of private parties (other members of Class 19 and members of Class 20). Although a Bankruptcy Court, in applying the provisions of the Bankruptcy Code, will likely affect contractual obligations and potentially

---

[127] Plan, § 43.2.

[128] A property interest held by a party-in-interest to a bankruptcy "is afforded in federal bankruptcy court the same protection [it] would have under state law if no bankruptcy had ensued." Butner v. United States, 440 U.S. 48, 55-56 (1979). This protection extends to an equity holder's right to receive an estate distribution after all Allowed Claims and post-petition interest have been paid in full. See In re Introgen Therapeutics, Inc., 429 B.R. 570 (Bankr. W.D. Tex. 2010).

sanction the diminution of some party's property rights, the Court must consider whether "the interference goes so far as to constitute 'total destruction' of the value in the property held by a creditor," and, where such action does, recognize that "it violates the Fifth Amendment and may not stand."[129] Here, where the Plan seeks to transfer the property interests of Class 19's dissenting members to the accepting members of Class 19 and members of Class 20, confirming the Plan would result in the "total destruction" of one private party's property rights through the enrichment of another private party.[130] Accordingly, the Plan authorizes an unconstitutional taking an cannot be confirmed.

60. In addition to the unequal distributions to members of Class 19 based on their votes on the prior Sixth Amended Plan and the potential for an unconstitutional taking that would be effected by the Plan's redistribution of property from one private party to another, the Plan further discriminates against Class 19 as a whole by eliminating the Class members' right to vote on the latest Plan. Unlike the members of Class 19, those in Class 20—who hold similar interests to the members in Class 19—have been afforded the opportunity to revote and reclassify themselves as accepting members of the class, which entitles them to a potential estate

---

[129] Americredit Fin. Servs., Inc. v. Nichols (In re Nichols), 440 F.3d 850, 854 (6th Cir. 2006) (finding that a modification to the debtor's plan did not constitute 'total destruction' of the creditor's right to payment was merely delayed, not extinguished) (citations omitted).

[130] The Plan offends the Fifth Amendment Takings Clause in two respects. First, there is no conceivable public purpose for the Court to endorse the "total destruction" of dissenting Class 19 members' property interests in the estate. Such a result, however, is unavoidable if the Plan is confirmed, since the Plan involuntarily transfers the property interests of those members to other creditors in the distribution scheme. Without any conceivable purpose other than the redistribution of property from one private party to another, the Plan sanctions a transfer that "is unlawful regardless of the compensation paid." Theodorou v. Measel, 53 F. App'x. 640, 642 (3d Cir. 2002). Furthermore, even if the Court could fashion some "public use" for which the transfer was to be made—such as the efficient administration of the Debtors' estate through the judicial system—the involuntary transfer still violates the Fifth Amendment since the dissenting members do not receive "just compensation" for their loss. Not only do the dissenting members of Class 19 fail to receive "just compensation," they do not even receive one cent of compensation for the loss of their property interests in the Debtors' estate. Thus, because the Plan provides for the involuntary transfer of property from one private party to another, or, in the alternative, the taking of property for "public use" without just compensation, the Court's approval of the Plan would be tantamount to a unconstitutional regulatory taking.

distribution. Because these classes hold similarly-situated interests, but are treated differently with respect to their right to vote, the Plan unfairly discriminates against Class 19.

61. "Courts have developed several methods" to determine whether a plan unfairly discriminates against or amongst like creditors.[131] Recently, a number of courts, in evaluating a plan's treatment of impaired, dissenting classes, have adopted the rebuttable presumption test derived from an influential article written by former professor, now Bankruptcy Judge, Bruce A. Markell.[132] Under the so-called Markell Test, there is a rebuttable presumption of unfair discrimination whenever there is: (a) a dissenting class; (b) another class of the same priority; and (c) a difference in the plan's treatment of the two classes that results in either (i) a materially lower percentage recovery for the dissenting class, or (ii) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.[133] Where there is a materially lower percentage recovery, "the presumption [of unfair discrimination] can be rebutted 'by showing that, outside of bankruptcy, the dissenting class would similarly receive less than the class receiving a greater recovery. . . .'"[134]

62. Thus, under the Markell Test, a rebuttable presumption arises that the Plan unfairly discriminates against Class 19 since the members of Class 19, unlike those in Class 20 who hold similar interests, were not entitled to vote on the Plan or receive their allocable share of

---

[131] Armstrong World Indus., Inc., 348 B.R. at 121.

[132] See, e.g., Id.; In re Quay Corp., Inc., 372 B.R. 378, 386 (Bankr. N.D. Ill. 2007); In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 231 (Bankr. D.N.J. 2000); see also Bruce A. Markell, A New Perspective on Unfair Discrimination in Chapter 11, 72 Am. Bankr. L. J. 227 (1998).

[133] Armstrong World Indust., Inc., 348 B.R. at 121 (citing In re Dow Corning Corp., 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999)).

[134] Id.

distributable estate value. Furthermore, the Debtors are unable to rebut this presumption of illegality. Outside of bankruptcy, members of Class 19 would be treated equally, both with respect to one another and in regards to members of Class 20. That is to say, it is only through the Plan that accepting members of Class 19 are awarded a higher percentage of recovery than their dissenting counterparts. And it is only through the Plan that members of Class 20 (who are presumed to hold rights of equal priority to estate value as members of Class 19) are able to leapfrog the members of Class 19 who voted against the Sixth Amended Plan. As such, the Debtors will be unable to overcome this rebuttable assumption of unfair discrimination that arises under the Markell Test.

63. Finally, by eliminating Class 19 members' right to vote, the modified Plan violates Bankruptcy Code Section 1127 (and by extension, Bankruptcy Code Section 1129(a)(1)) because the Plan provision removing the right to revote "fails to meet the requirements of sections 1122 and 1123 of this title."[135] The Debtors are barred from modifying a plan if such modification violates another provision of the Bankruptcy Code, specifically, and as mentioned, the provisions that require equal treatment both against and amongst creditors. Moreover, regardless of the effect a modified plan has on those Bankruptcy Code Sections, pursuant to Bankruptcy Rule 3019, any modification must be voted on by the members of an impaired class unless (i) the modification does not "adversely change" a member's treatment and (ii) the member "previously accepted the plan."[136] This Court has recognized the importance of safeguarding the right to vote, within the context of a debtor who filed a modified plan, since a party "must be given an opportunity to change its prior election . . . [because a party] must know

---

[135] 11 U.S.C. § 1127(a).

[136] F.R.B.P. 3019(a) (emphasis added).

the prospects of its treatment under the plan before it can intelligently determine its rights. . ."[137]

64. As is clear from the spirit and text of Bankruptcy Code Section 1127 and Bankruptcy Rule 3019, the Debtors were obligated, per Bankruptcy Code Section 1126(a),[138] to provide Class 19 (or at least the members thereof who voted against the Sixth Amended Plan) an opportunity to vote on the current Plan. They chose not to do so, and this Court specifically preserved the issue of whether that decision would have an effect on confirmation of the Plan. It does; and the Plan cannot be confirmed.

RESERVATION OF RIGHTS

65. The TPS Consortium reserves the right to amend, modify or supplement this Objection prior to the conclusion of the hearing on confirmation of the Plan and to review and object to any amended or revised version of the Settlement or Plan. The TPS Consortium also reserves the right to object to any documents contained in the Plan Supplement and any amendments, modifications or supplements thereto prior to the conclusion of the hearing on confirmation of the Plan. The TPS Consortium reserves the right to assert additional objections at the hearing on confirmation of the Plan. Moreover, any failure to respond herein to a specific statement or omission contained in the Settlement, Plan, or Plan Supplement shall not be deemed acceptance thereof.

---

137 In re Century Glove, Inc., 74 B.R. 958, 961 (Bankr. D. Del. 1987); see In re Frontier Airlines, Inc., 93 B.R. 1014 (Bankr. D. Colo. 1998) (holding that where the modification of a chapter 11 plan adversely affects a party, that party is entitled to reconsider and change its vote).

138 See 11 U.S.C. 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan.").

WHEREFORE, the TPS Consortium respectfully requests that the Court (a) deny confirmation of the Plan, and (b) grant such other and further relief as it deems just and proper.

Dated: Wilmington, Delaware
May 13, 2011

Respectfully submitted,

CAMPBELL & LEVINE LLC

/s/ Kathleen Campbell Davis ________________
Marla Rosoff Eskin, Esq. (DE 2989)
Bernard G. Conaway, Esq. (DE 2856)
Kathleen Campbell Davis, Esq. (DE 4229)
800 North King Street, Suite 300
Wilmington, DE 19809
(302) 426-1900
(302) 426-9947 (fax)

– and –

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Sigmund Wissner-Gross, Esq.
Seven Times Square
New York, NY 10036
(212) 209-4800
(212) 209-4801 (fax)

– and –

Jeremy B. Coffey, Esq.
Timothy J. Durken, Esq.
Jonathan D. Marshall, Esq.
One Financial Center
Boston, MA 02111
(617) 856-8200
(617) 856-8201 (fax)

Counsel for the TPS Consortium

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

CERTIFICATE OF SERVICE

I, Kathleen Campbell Davis, of Campbell & Levine, LLC, hereby certify that on May 13, 2011, I caused a copy of the foregoing to be served upon the individuals listed on the attached service list by electronic mail and via First Class Mail.

Dated: May 13, 2011

/s/*Kathleen Campbell Davis*
Kathleen Campbell Davis (No. 4229)

In re: Washington Mutual, Inc., *et al*
08-12229
Service List

Mark David Collins, Esquire
Richards, Layton & Finger, PA
One Rodney Square
920 N. King Street
Wilmington, DE 19801

Adam G. Landis, Esquire
Landis Rath & Cobb LLP
919 Market Street, Suite 1800
P.O. Box 2087
Wilmington, DE 19899

Peter Calamari, Esquire
Quinn Emanual Urquhart & Sullivan, LLP
55 Madison Avenue, 22nd Floor
New York, NY 10010

David B. Stratton, Esquire
Pepper Hamilton LLP
1313 N. Market Street, Suite 5100
P.O. Box 1709
Wilmington, DE 19899-1709

Fred S. Hodara, Esquire
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036-6745

Brian Rosen, Esquire
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Stacey R. Friedman, Esquire
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

Thomas R. Califano, Esq.
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, NY 10020

Charles Edward Smith, Esquire
Washington Mutual, Inc.
925 Fourth Avenue
Seattle, Washington 98104

Jane Leamy, Esquire
Office of the U.S. Trustee for the District of Delaware
844 King Street, Suite 2207, Lockbox 35
Wilmington, Delaware 19899-0035

Justin A. Nelson, Esquire
1201 Third Ave., Suite 3800
Seattle, WA 98101

William P. Bowden, Esquire
Ashby & Geddes, P.A.
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899

M. Blake Cleary, Esquire
Young Conaway Stargatt & Taylor, LLP
1000 West Street, 17th Floor
Wilmington, DE 19801