IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
WASHINGTON MUTUAL, INC., et al.,[1]	)	Case No. 08-12229 (MFW)
Debtors.	)	(Jointly Administered)
	)	**Hearing Date: July 13, 2011 at 9:30 a.m. (ET)** **Obj. Deadline: July 1, 2011** **Related to Docket Nos. 6696, 6964, 7038**

OBJECTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO CONFIRMATION OF THE MODIFIED SIXTH AMENDED PLAN OF REORGANIZATION

The Official Committee of Equity Security Holders (the "Equity Committee") respectfully submits its objection (the "Objection") to confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors 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") [Dkt. Nos. 6696, 6964, and 7038]. In support of its Objection, the Equity Committee respectfully states as follows:

PRELIMINARY STATEMENT

The Debtors seek confirmation of a Plan that was developed through a profoundly flawed process that favored a small group of powerful creditors over the interests of other constituents, particularly WMI's equity holders. Again and again during the bankruptcy, the Debtors bent over backward to assist major hedge fund investors while brushing aside any interests that even threatened to raise a competing claim on the Debtors' estate. These hedge funds were allowed to dominate negotiations with JPMorgan Chase Bank, N.A. ("JPMC") to resolve the pending

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

litigation that was the estate's largest asset and the competing claims concerning ownership of the Debtors' assets. They were allowed to engineer a plan that would effectively assign them ownership of billions of dollars in tax attributes completely under the radar of the Court or the other parties to the bankruptcy.

Most egregiously, the Debtors fed four of these hedge funds, known as the "Settlement Note Holders", confidential inside information about the Debtors and about settlement negotiations and then turned a blind eye to trading that the Settlement Note Holders were conducting based on this information. In particular, the Settlement Note Holders were given access to JPMC's offers, information that could be used to calculate the likely projected return on all of WMI's securities. This information was not available to the public and the Debtors knew it, but they expressly signed off on the Settlement Note Holders' trading activity based on this information nevertheless. This was not a difficult problem to remedy: all that would have been required was for the Settlement Note Holders to maintain internal ethical walls between their bankruptcy activities and their trading. The failure of the Debtors to insist upon this amounts to a tacit authorization of insider trading. It has also polluted the entire process.

The impact of the Debtors' mismanagement is evident in the Plan. Most egregious, the settlement that is the heart of the Plan was resolved at a dollar figure that makes substantially all of the creditors whole, but gives absolutely nothing to equity. Nearly every term sheet represented the same pattern: the Debtors, on behalf of their favored hedge fund constituents, submitted term sheets that asked for amounts that made creditors whole, but never yielded a penny to equity. This pattern continued even after the tax laws brought $2.6 billion of new money into the estate: still, no one increased the demand to yield money for equity. From the beginning of this case, the Debtors abandoned the interests of equity holders and allowed favored hedge funds to hijack the process for their own ends.

STATEMENT OF THE FACTS

1. The events leading to the filing of the Debtors' bankruptcy cases, and the various litigations and disputes among various parties that arose prior to the issuance of this Court's January 7, 2011 Opinion [Dkt. No. 6529] (together with the Order [Dkt. No. 6528], the "Opinion") is set forth in detail in the Court's Opinion (Op. at 2-11), and the Equity Committee will not repeat them here. Suffice to say, the seizure of WMB by the OTC and immediate sale of WMB to JPMC by the FDIC represents the largest bank failure in the history of the country. In the time period shortly before the sale to JPMC, the market price of WMI's Series R Preferred Equity fell from $340 on the open of September 22, 2008 to $1.00 on the close of September 26, 2008. The value of WMI's Common Equity fell from $2.26 on September 24, 2008 to $0.16 on the close of September 26, 2008.

2. From the outset of the bankruptcy, it has been clear that the largest assets of the estate are a number of claims against JPMC and the FDIC. These include claims for over $4 billion in deposits WMI had at its subsidiary, WMB, billions in collateral for certain REIT securities, also known as the "Trust Preferred Securities" and claims to billions of dollars in tax refunds.

3. Ownership of these assets and liability on a number of related claims was hotly disputed in public filings by both the estate and JPMC, including an adversary complaint in this Court and a separate litigation filed in the District Court for the District of Columbia. As far as the public was aware, these issues were being aggressively litigated as various discovery and

jurisdictional motions were filed and argued by the parties and WMI sought summary judgment on the deposit claim.

4. Behind the scenes, however, the parties were working toward settlement of all of these claims. A settlement was announced resolving all disputes between the estate, JPMC, and the FDIC in Court one year later, in March 2010. To many observers, the settlement appeared to come out of the blue as discovery in the underlying litigation had only barely gotten underway and not a single deposition had even been taken. Once finalized this March 2010 settlement became the Global Settlement Agreement (or "Global Settlement") that is the foundation of the Plan and the source of almost all of the funds being distributed in that Plan.

5. The Debtors sought confirmation of a prior iteration of this Plan in the fall of 2010. After a four day confirmation hearing in early December, 2010, the Court issued its Opinion. In the Opinion, the Court determined the Global Settlement to be fair and reasonable and to satisfy the standards necessary to approve a settlement. (Op. at 2).[2] The Court nevertheless denied confirmation of the Sixth Amended Plan based upon a number of material deficiencies and violations of applicable law, and deferred ruling on a number of critical issues, including: (a) the overly expansive scope of the proposed release provisions and related exculpation provisions (Op. at 74-85); (b) the appropriate rate of post-petition interest on allowed unsecured claims (Op. at 90-94); (c) whether the PIERS represent Claims or Interests (Op. at

2 The Equity Committee has filed a Notice of Appeal [Dkt. No. 6573] of the Court's determination that the Global Settlement Agreement is fair and reasonable and satisfies the standard necessary to approve a settlement under the Bankruptcy Code and applicable law (the "Appeal"). On February 22, 2011, the District Court docketed the Equity Committee's Appeal under C.A. No. 11-00158 (GMS), and immediately referred the Appeal to mandatory mediation. The Equity Committee on February 25, 2011, moved for relief from mandatory mediation and to establish a briefing schedule and set argument on the merits of the Appeal. The Debtors have filed an opposition to the motion to expedite in which the Creditors Committee has joined. Also on February 25, 2011 the Equity Committee filed a motion for leave to appeal under Fed. R. Bankr. Proc. 8003. No opposition to the Equity Committee's motion for leave to appeal has been filed, however, in their opposition to the motion to expedite, the Debtors state they intend to move to dismiss the Appeal on jurisdictional grounds.

100-01); and (d) the payment of the fees and expenses of the advisors to the Settlement Note Holders without judicial review and approval (Op. at 108).

6. Significantly, in the Opinion, the Court also expressed concern with respect to an issue raised by an individual objector to the Sixth Amended Plan: whether four hedge funds known as the "Settlement Note Holders" traded on confidential, non-public information post-petition to benefit themselves (Op. at 69).

7. The Settlement Note Holders started as two groups. The first group, Appaloosa and Centerbridge, retained the same counsel to represent their joint interests in this bankruptcy on or about September 2008. These two entities filed a single notice of appearance, a single Rule 2019 statement and have always acted in concert in these proceedings. The second group, Owl Creek and Aurelius, also began as one: they originally belonged to a different ad hoc group, the WMI Noteholders, which collectively held the other largest portion of claims against the Debtors' estate and also acted in concert to try to influence these proceedings. Aurelius explained that around October 2009 Owl Creek and Aurelius left the WMI Noteholder Group because of conflicts with senior noteholders. Shortly thereafter, Owl Creek and Aurelius joined Appaloosa and Centerbridge to form the Settlement Note Holders. From that time until very recently, these four entities have acted through the same counsel as a single group to jointly negotiate settlement proposals, litigate their common interests, and attempt to take control of these proceedings.

8. The Plan before the Court is substantially similar to the Sixth Amended Plan that was the subject of the Opinion. The Global Settlement has been modified solely to address the Court's concerns with the release provisions therein. (Supplemental Disclosure Statement [Dkt. Nos. 6697, 6966] at 3-4). And although the Settlement Note Holders are no longer signatories to

the Global Settlement, none of the material terms of the Global Settlement have changed. (Supplemental Disclosure Statement at 3-4). The Plan continues to be premised upon the Global Settlement that the Settlement Note Holders proposed and helped negotiate. (Supplemental Disclosure Statement at 4).

9. Following the issuance of the Opinion, the Equity Committee obtained authorization under Rule 2004 to conduct discovery into the Settlement Note Holders trading activities. The Equity Committee obtained documents showing the funds' acquisitions and sales of WMI securities and took one deposition of a representative from each fund.

10. Despite the relatively limited amount of discovery taken into these issues, the Equity Committee will proffer evidence at the hearing demonstrating a pattern of gross abuse of the bankruptcy process by the Settlement Note Holders with the full acquiescence, and even assistance, of the Debtors.

11. From the outset, the Debtors allowed the Settlement Note Holders to dominate the negotiations with JPMC. Indeed, the first formal offer for a global settlement was made in March 2009 not by the Debtors, but by White & Case, counsel for a number of creditors including two of the Settlement Note Holders, while the Debtors and their representatives sat by passively. Later in 2009, two of the Settlement Note Holders represented by another firm, Fried Frank, drafted their own proposal for a global settlement and entered into negotiations with JPMC on behalf of the Estate without involving or even notifying the Debtors. In November 2009, the Debtors again sought approval from the Settlement Note Holders (but not equity and not any other individual creditors) before making the proposal that became the foundation for the final Global Settlement.

12. The Settlement Note Holders goal in these negotiations was always to achieve certain levels of recovery on their bonds. It is perhaps to be expected that the hedge funds would aggressively advance their own interests, although they apparently ignored the fiduciary obligations to other claimants that they assumed when they asserted such a dominant role in the negotiations. More surprising, though, is the Debtors' willingness to allow those interests to override the interests of any other constituency, particularly equity. The hedge funds' "number" for settlement became the Estate's "number". Negotiations were concluded at the point when JPMC offered enough value to the Estate to satisfy the Settlement Note Holders that the enormous profits they would be able to claim had reached their zenith because virtually all bonds would be paid out at 100 cents on the dollar plus post-petition interest. The possibility that more value might have been available from JPMC or from another source (for example, claims against WMI's directors and officers) was ignored by the Debtors because it was not important to the favored group of creditors.

13. The power to dominate the settlement process was not the only inequitable advantage that the Settlement Note Holders garnered from the Debtors. The hedge funds were also given access to substantial amounts of material, non-public information about WMI and the progress of the bankruptcy. Shockingly, the Debtors were fully aware that the Settlement Note Holders were free to trade in the Debtors' securities while in possession of this information based on a dubious determination that none of the information was "material" under federal securities laws.

14. As the Debtors knew, with a single sixty-day exception at one of the four funds, none of the Settlement Note Holders maintained an internal ethical wall between individuals who were involved in the bankruptcy and individuals making trading decisions. In the context of this

free flow of information to traders, each of the funds insisted on maintaining their ability to buy and sell WMI securities on the market during the pendency of the bankruptcy (none of them agreed to serve on the Creditors Committee, presumably because that would have restricted their ability to trade).

15. The primary mechanism that the Settlement Note Holders claim to have relied upon to prevent trading based on material, non-public information was a verbal or written warning to the Debtors' representatives that they should be very careful not to share any such information with the representatives of the funds. Of course, concerned about its own potential liability and its complicity in such a blatantly corrupt process, the Debtors now insist that its representatives were always scrupulous in following this mandate and that they never provided a jot of information to the Settlement Note Holders that was not publicly available. But this position strains credulity past the breaking point. The interactions between the Settlement Note Holders and the Debtors were simply too frequent and too wide-ranging to have been so perfectly controlled. And there is no clear reason why the Settlement Note Holders would have invested the time in meeting after meeting if they were only being provided with data that was already available in public filings. For example, at the Settlement Note Holders' insistence, the Debtors held a number of meetings at which Quinn Emmanuel, litigation counsel for the estate, gave presentations on litigation claims and other representatives provided information about the estate. It is simply not credible that such presentations, and the question and answer sessions that followed, would have contained only information contained in publicly filed documents.

16. In addition to the verbal instruction not to share non-public information, the Settlement Note Holders entered into agreements that would restrict their trading or create an internal ethical wall for short periods. Rather than afford genuine protection against insider

trading, these agreements were used as tools to foster such misconduct. And, in yet another sign of their willingness to serve the interests of this powerful constituency, the Debtors agreed to provide a veneer of legal cover that would purportedly immunize the Settlement Note Holders' unlawful trades.

17. The ostensible purpose of these agreements was to allow the hedge funds to participate in settlement negotiations with JPMC. Under a provision inserted into the confidentiality agreement at the insistence of the Settlement Note Holders, the Debtors assumed the obligation to review the confidential information received by the Settling Note Holders and, when the agreement expired, to publicly disclose any of the information that was material under the federal securities laws. The purpose of this clause, of course, was to give the Settlement Note Holders the ability to trade freely based on everything they learned during the settlement negotiations with the justification that any *material* information had been disclosed by the Debtors, as the Debtors had promised to do in the contract.

18. This procedure for preventing insider trading was pure theater. The Debtors failed to disclose the most significant confidential information received by the Settlement Note Holders: the settlement offers themselves. Thus, as each of the Settlement Note Holders acknowledges, the funds were free to analyze potential recovery of various classes of the debtors securities based on recoveries that would flow from assets offered by JPMC. And they were free to go out to the market and acquire those bonds (from sellers who, of course, were not aware of JPMC's offers) when the recoveries suggested that the price was favorable.

19. The settlement negotiations with JPMC began in earnest in March 2009 and continued along the same path for the year it took for the parties to reach resolution. There were several interruptions in the process, and the negotiations were not carried on continuously, but

each new round began where the last left off and in each round JPMC offered progressively higher total recovery to the Estate.

20. Several points in the negotiations were particularly significant. On or around March 18, 2009, JPMC provided its first written settlement offer. That offer reflected agreement on many issues that, to the public, still appeared to be hotly contested for many months to come. These included two multi-billion dollar disputes, WMI's claim to over $4 billion in deposits held by JPMC, which JPMC agreed to turn over, and JPMC's claim to billions in collateral associated with the Trust Preferred Securities, which WMI agreed belonged to JPMC. Although anyone privy to these offers would likely realize that JPMC did not believe it had significant legal defenses to WMI's claim to the deposits, as far as the public was concerned that was very much an open issue. Indeed the Examiner's Report, published nearly a year and a half after these settlement offers were exchanged, devotes considerable attention to the strength of JPMC's legal claim to the $4 billion in deposits.

21. When the confidentiality agreement governing this information expired, the Debtors and the Settlement Note Holders claim they analyzed the settlement offers and determined them not to be material. As a result, they were never disclosed to the public. However, the trading records for at least two of the Settlement Note Holders suggest otherwise. Beginning May 11th, the first trading day following the expiration of the agreement and the trading restriction, both Aurelius and Centerbridge acquired a substantial number of WMI's subordinated notes.

22. In August 2009, two of the Settlement Note Holders, Appaloosa and Centerbridge, exchanged settlement offers with JPMC without the involvement of either of the other funds or the Debtors. In this instance, there was no confidentiality agreement or formal

trading restriction. Appaloosa voluntarily restricted itself from trading. Centerbridge did not restrict itself and, in fact, acquired a substantial number of WMI's bonds. The settlement proposal from JPMC in that round was the first to offer a significant portion of the billions in tax refunds to the Debtors. When the Debtors learned of this offer, they considered the concession sufficiently substantial to justify renewed negotiations of their own, based on the JPMC offer to Centerbridge and Appaloosa.

23. Yet another round of settlement proposals in November 2009 provided the Settlement Note Holders with yet another cache of confidential information. As in March, the Settlement Note Holders entered a confidentiality agreement on the condition that the Debtors agree to disclose anything material when the agreement expired. During this round, JPMC offered WMI 100% of certain tax refunds available under a new extension of the carry-back period for losses. The Estate had estimated the value of this additional refund at approximately \$2.6 billion. When the confidentiality agreement expired on December 30, 2009, the Debtors disclosed their estimate of the amount of this refund, but did not disclose that JPMC had offered the full amount to the estate in settlement negotiations. Only the Settlement Note Holders and the parties themselves had that information.

24. Trading was permitted after the expiration of this agreement beginning on December 31, 2009. Again, both Aurelius and Centerbridge acquired debt securities in a pattern that is indisputably suspicious. On December 31st and over the ensuing few weeks, both funds acquired large numbers of the very junior PIERS bonds, the class that was most likely to be substantially impacted by recovery of the additional tax refund by the Estate.

25. Based upon the foregoing conduct, and for the reasons discussed below, the Court should deny confirmation of the Plan.

ARGUMENT

I. The Plan Cannot Be Confirmed Because It Is Not Being Offered In Good Faith.

26. Section 1129(a)(3) of the Bankruptcy Code requires that, in order to be confirmed, a plan of reorganization must be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). "The purpose of the requirement is to prevent the debtor-in-possession from abrogating the creditor protections of Chapter 11." *In re Frascella Enters., Inc.*, 360 B.R. 435, 446 (Bankr. E.D. Pa. 2007) (citing *In re Abbotts Dairies, Inc.*, 788 F.2d 143, 150 n.5 (3d Cir. 1986)). In order to satisfy section 1129(a)(3)'s good faith requirement, the Third Circuit has explained that a plan must "fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000); *see also Abbotts Dairies*, 788 F.2d at 150 n.5 (adopting the standard set forth in *In re Madison Hotel Assocs.*, 749 F.2d 410, 424-25 (7th Cir. 1984)).

27. Lower courts in this Circuit have further explained that in order for the debtor to meet its burden with respect to good faith, the debtor must satisfy three requirements: "(1) [the plan] fosters a result consistent with the [Bankruptcy] Code's objectives . . . (2) the plan has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected . . . and (3) there was fundamental fairness in dealing with the creditors." *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 609 (Bankr. D. Del. 2001); *see also Frascella*, 360 B.R. at 446 (stating the same three factors). A determination of good faith requires an examination of the totality of the circumstances. *See, e.g., In re ACandS, Inc.*, 311 B.R. 36, 43 (Bankr. D. Del. 2004) (finding a lack of good faith where pre-petition creditors committee dominated the debtor's affairs resulting in "obvious self-dealing"); *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001); *see also In re Unichem Corp.*, 72 B.R. 95

(Bankr. N.D. Ill. 1987) (finding lack of good faith where proponent breached fiduciary duties to debtor and stating "Congress did not intend the objectives and purposes of the Bankruptcy Code to include rewarding an individual for breaching his fiduciary duty").

A. The Supposed "Reorganization" Is A Sham To Preserve Debtors' Control.

28. Washington Mutual was the largest savings and loan association in the United States with $300 billion in assets and over two thousand branches located in over fifteen states. Yet "Reorganized WMI" the "reorganized" company that is the claimed rationale for the Debtors' reorganization would conduct no active business whatsoever and would merely collect premium payments on a reinsurance portfolio that the Debtors' expert values at less than $150 million.[3] Calling this passive insurance run-off a "reorganized Washington Mutual" is absurd. Behind the façade, this Plan's true purpose is the distribution of $7 billion in WMI assets according to the Code's priority scheme. This Plan is a liquidation, pure and simple.

29. In effect, the Debtors have achieved a bankruptcy liquidation without having to comply with the procedures for protecting creditors that are afforded by liquidations under Chapter 7 and Chapter 11. The Debtors structured the Plan in this fashion to maintain control over the estate and allow them to obtain releases for favored interests, such as WMI's own Directors and Officers, JPMC and the Settlement Note Holders. Under a Chapter 11 liquidation, of course, confirmation would not discharge the debtor or permit releases of third parties. 11 U.S.C. § 1141(d). This Court's rejection of the proposed releases for the Settlement Note Holders and Officers and Directors confirms that the Debtors have attempted to use the sham reorganization to achieve ends not countenanced by the law. Even under the current formulation,

[3] The Equity Committee contends that the Plan's presentation of the reorganized debtor as a purely passive insurance company is in itself misleading because it ignores the likelihood that investors who gain control over the company will invest additional capital and acquire new businesses in order to exploit the large tax NOL it will own.

the reorganization remains a sham designed to allow the Debtors to funnel the value of the NOLs to the Settlement Note Holders while discharging the Debtors, and releasing their favored third-party constituents, of claims of creditors that would otherwise survive under a liquidation. This is a transparent abuse of the bankruptcy process and must not be countenanced by the Court.

B. Debtors Ignored Claims Against WMI's Directors And Officers.

30. WMI's Board of Directors, which retained ultimate control over decisions in the bankruptcy, is made up of individuals who also served on the company's board before the petition was filed. WMI holds (or held if the statute of limitations has now expired) substantial claims and potential claims against these individuals and against former officers and pre-petition board members who have since resigned. These claims are covered by insurance policies with limits of $250 million per year. Nevertheless, the Debtors have not filed any claims against any of WMI's former Directors or Officers and have not made any serious efforts to collect any proceeds from any of the potentially applicable insurance policies.[4] All $250 million in D&O insurance coverage for the year that ran from May 2007 through April 2008 has been claimed by various third-party litigants and is apparently on the verge of being distributed once and for all by the insurance companies, without the Debtors' Estate having made any attempt to collect its share of these proceeds. Just today, without prior notice to the Equity Committee, the press is announcing that a class action was settled for $208.5 million, presumably out of these insurance proceeds. Even more egregiously, the Debtors may have let some of its claims expire by failing

[4] Less than a month before this Objection was filed, and two and one half years after the bankruptcy began, the Debtors invited the Equity Committee to attend settlement discussions at which division of the D&O proceeds between various third-party claimants would be discussed. Although the Equity Committee was initially invited to participate in this mediation, the Debtors subsequently rescinded the invitation and notified the Equity Committee that the Debtors would be handling the negotiation of this settlement (if any) going forward.

to enter into tolling agreements with certain directors and officers, including members of the board's committee responsible for overseeing financial reporting.

31. Estate claims against the debtors' former directors and officers are frequently a source of substantial recovery for bankruptcy estates of failed companies. All $250 million in D&O insurance coverage for the year that ran from May 2008 to April 2009 still remains available, as far as the Equity Committee knows. The Washington Corporations Code provides for claims by the Estate against any director who approved a distribution at a time when the company was insolvent. Wash. Rev. Code § 23B.08.310. Such a claim would be fully covered by the D&O insurance and could represent a recovery by the estate of $100 million or more. In addition, the estate holds claims for breaches by the directors and officers of other statutory and common law duties. None of these claims have been liquidated, initiated or even, it seems, substantively researched by the Debtors.The Debtors' failure to pursue these claims is a gross breach of their duty to maximize the value of the estate for the benefit of all stakeholders. The Equity Committee's attempt to take discovery on this subject was blocked by the Debtors. At a 30(b)(6) deposition which was noticed on the topic of the Debtors' claims against its Directors and Officers, counsel for the Debtors instructed the witness not to answer every question related to these claims. Ultimately, whether the Debtors' inaction was due to carelessness or due to a conscious effort by the Debtors to protect its current and former directors from exposure to potential claims, the failure to pursue these claims constitutes a failure to take reasonable steps to maximize the value of the estate and caused direct harm to constituents, including preferred stock holders, who are very close to recovery in this case.

C. Debtors Favored Certain Powerful Creditors And Disregarded Obligations To Equity And Other Constituents.

32. From day one of this case, the Debtors have been focused entirely on achieving a recovery for large and powerful hedge funds that are significant creditors of the estate, and have ignored or even been hostile to other claimants and creditors. The Debtors' hostility to its own equity constituents was clear in its opposition to the formation of an Equity Committee. In that opposition, the Debtors insisted that WMI was "hopelessly insolvent"—tantamount to a confession that they had done nothing to fulfill their fiduciary obligations to protect shareholders. Further evidence of this disregard for equity emerged when the terms of the Global Settlement were announced -- merely two months later -- and those terms miraculously managed to settle massive and complex claims and counter-claims for an amount that brings precisely enough value into the estate to pay off almost every creditor in full while leaving equity nothing. This result was perhaps no surprise given that draft plan documents and term sheets circulated between the Debtors and the Settlement Note Holders at the very beginning of the case showed equity being canceled for no value while every other creditor class received a distribution. Even after billions of dollars in new tax refunds came into the estate, the Debtors did nothing to try to achieve a recovery for equity – but rather promised this Court and the world that the company was hopelessly insolvent.

33. On the other side of the equation, the Debtors' favoritism to the Settlement Note Holders has been demonstrated repeatedly. First, the Debtors fostered these hedge funds' ability to generate tens or even hundreds of millions in ill-gotten gains through unlawful trading. These illegal trades were made possible by the Debtors' willingness to provide the Settlement Note Holders with material, inside information concerning the Debtors (particularly, as discussed above, settlement proposals between JPMC and the Debtors), and then refusing to publicize the

material information exchanged during those periods. Second, the Debtors engineered a plan, or agreed to a plan engineered by the Settlement Note Holders, that would provide the hedge funds with ownership and control over the reorganized debtor and its multi-billion dollar NOL, while hiding from the Court and the other parties to the bankruptcy the Settlement Note Holder's plans for exploiting the value of that NOL.

34. This gross imbalance in the Debtors' treatment of its different constituents, and in particular its favoritism of certain major creditors at the expense of equity, infects the entire Plan and renders it unconfirmable.

D. Process Of Negotiating The GSA Was Dominated By The Four Settlement Note Holders.

35. The evidence at trial will show that the Global Settlement and key provisions of the Plan were largely drafted for the benefit of the Settlement Note Holders. From the first comprehensive settlement proposal given to JPMC, which was by one of the creditor groups, to the JPMC negotiations in summer 2009 that were conducted exclusively by Appaloosa and Centerbridge, to the JPMC negotiations in November-December 2009 that excluded the Creditors Committee, to the final negotiations of the first Plan, the evidence at trial will show that the Settlement Note Holders' dominated most of the negotiations that led to the Global Settlement Agreement and Plan. The Settlement Note Holders also drafted the plan documents governing Reorganized WMI, which is the central entity around which this reorganization putatively revolves. The Settlement Note Holders dominance was more pronounced still because of their control of two of the four members of the Creditors Committee, which are indenture trustees for securities that are majority-owned by the Settlement Note Holders. This robbed the Creditors Committee of its watchdog function. *Advisory Comm. of Major Funding Corp. v. Sommers (In re Advisory Comm. of Major Funding Corp.,)* 109 F.3d 219, 224 (5th Cir. 1997)

("Creditor Committees have the responsibility to protect the interest of the creditors; in essence, 'the function of a creditors' committee is to act as a watchdog on behalf of the larger body of creditors which it represents." (citations omitted)).

36. The Plan and Global Settlement, brokered by the Settlement Note Holders, also benefits the Settlement Note Holders to the exclusion of other stakeholders for the reasons discussed above, such as that the Plan gives the Settlement Note Holderss control of Reorganized WMI, which they intend to use to shelter income for their own benefit and the negotiators never once attempted to negotiate a recovery to equity, despite the solvency of the estate.

37. Accordingly, the Plan is not proposed in good faith and the Plan, and the Global Settlement on which it is based, cannot be approved.[5]

II. Settlement Note Holders' Claims Should Be Disallowed Due To Their Misuse Of Confidential Information Obtained In The Bankruptcy.

38. The Plan is objectionable to the extent it provides for allowance of Aurelius's and Centerbridge' claims because they used their strategic position in these cases to trade on material non-public information provided to them in confidence by the Debtors. Soon after filing this Objection, the Equity Committee will file an adversary action to equitably disallow the Settlement Note Holders' claims. To the extent the Settlement Note Holders' claims are disallowed, the Plan must further provide that distribution of the disallowed amounts will be made to the Debtors' other creditors and interest holders, including equity holders in accordance with the Bankruptcy Code.

39. Equity does not permit insiders from using their strategic position and access to a debtor's confidential information for private gain. *Pepper v. Litton*, 308 U.S. 295, 311 (1939).

[5] To the extent that the Court previously found that the Plan or the Global Settlement was proposed in good faith or fair and reasonable, such findings were not based upon the newly discovered evidence of misconduct discussed herein and, accordingly, the Court may properly reconsider any such findings. *See* Fed. R. Bankr. P. 9024(b).

In *Pepper*, the Supreme Court upheld the power of the bankruptcy court to equitably disallow claims to remedy inequitable conduct. In describing the breadth of contexts in which equitable disallowance applies, the Court stated:

> He who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements.

Id.

40. Where an insider uses inside information to purchase a debtor's claims at a discount without prior disclosure, the Third Circuit has held "[a]t a minimum, the remedy [] should deprive [][the insider-fiduciary] of its profit on the purchase of the notes" and further remedy may be appropriate to compensate the debtor's estate for additional administrative costs and delay caused by the insider's inequitable conduct. *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims,* 160 F.3d 982, 991 (3d Cir. 1998); *Comm. of Unsecured Creditors v. Citicorp Venture Capital, Ltd. (In re Papercraft, Corp.)*, 253 B.R. 385 (Bankr. W.D. Pa. 2000) (further reducing insider's claim on remand to account for additional administrative expenses, professional fees, lost interest and other costs), *aff'd with reduced lost interest income component,* No. 00-2181 (D.W.D. Pa. Feb. 20, 2000), *aff'd* 323 F.3d. 228 (3d Cir. 2003).

41. In *Citicorp*, the Third Circuit found that subordination of the insider's claims to other creditors was sufficient to provide a complete remedy. *Citicorp*, 160 F.3d at 991 (3d Cir. 1998). However, in doing so, it specifically declined to endorse a lower court's conclusion that the bankruptcy court lacked authority to fashion a disallowance remedy on those same facts if the subordination remedy were not sufficient to right the wrong. *Id.* n.7. Because the WMI

estate is nearly solvent, and equity holders were directly harmed by their conduct, the disallowance remedy is needed in this case to right the wrong. Moreover, courts in other jurisdictions continue to recognize equitable disallowance as a viable remedy. *Adelphia Commc'ns Corp. v. Bank of Am., N.A. (In re Adelphia Commc'ns Corp.)* 365 B.R. 24, 71-73 (Bankr. S.D.N.Y. 2007), *aff'd in relevant part*, 390 B.R. 64, 74-76 (S.D.N.Y. 2008) (equitable disallowance of claims by bankruptcy court remains viable cause of action and equitable subordination is not exclusive remedy).

A. Aurelius And Centerbridge Traded On Inside Information.

42. The evidence at confirmation will show that Aurelius and Centerbridge traded on material non-public information to an extent that warrants disallowance of their claims. The fact that they also purchased these securities to take control of the reorganization process to pursue their own ends to the detriment of others (including the insider trading itself) underscores the inequity of their conduct. Pursuant to two confidentiality agreements, Aurelius and Centerbridge learned the confidential terms of a series of term sheets that negotiated the largest claims of the estate with the estate's principal adversary, JPMC. These term sheets, from the beginning, reflected concrete value that could flow to bondholders. The term sheets progressed on a steady upward trajectory that gave the estate more and more money. Several points of agreement were reached early on, and more agreements were reached as time progressed. Two key points were agreed from the first term sheet: JPMC would receive the Trust Preferred Securities and WMI would receive more than $4 billion in contested deposits. Both positions were contrary to strongly worded public filings made by the parties at the time.

43. The evidence will also show that Aurelius and Centerbridge had access to significant aspects of the Debtors' litigation strategies, analyses, and other material confidential

information that was not made available to the public. While the Settlement Note Holders insisted on placing a provision in the confidentiality agreements that required the Debtors to publish all material information at the end of the confidentiality period, the Debtors never published any of the above non-public material information.

44. Strikingly, after the Debtors failed to publish the material non-public information shared at the end of each of these restricted periods, Aurelius and Centerbridge went on an immediate shopping spree, buying up tens of millions of dollars of securities within a few days. Centerbridge, moreover, continued trading during its private substantive negotiations with JPMC, at a time when Appaloosa restricted itself from trading in light of those same negotiations. Even Appaloosa got in on the game, making one of its only two purchases after March 2009 within two business days of becoming unrestricted. This trading pattern confirms the materiality of the information they received during those periods. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 240 n.18 (1988) ("We recognize that trading (and profit making) by insiders can serve as *an* indication of materiality."); *United States v. Victor Teicher & Co.*, 1990 WL 29697, at *2 (S.D.N.Y. Mar. 9, 1990) (citing the "very fact of [defendant's] trading" as "evidence of the materiality of the information").

45. The materiality of the term sheets, which announced JPMC's increasing, substantial offers, cannot be gainsaid. Not surprisingly, courts have found that facts about the settlement of a litigation can be material within the meaning of Rule 10b-5. *See, e.g., No. 84 Employer Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 935 (9th Cir. 2003) ("Plaintiffs have sufficiently pleaded the materiality of America West's misrepresentations regarding . . . the FAA settlement agreement."). Bankruptcy courts have recognized that committee members will be exposed through settlement negotiations to material

non-public information that they have a fiduciary duty to keep in confidence. *In re Refco Inc.*, 336 B.R. 187, 196 (Bankr. S.D.N.Y. 2006) ("[C]ommittee members should and will receive commercially sensitive or proprietary information from the debtor and other parties (including each other, because plan negotiations are as often conducted between unsecured creditor groups as between the unsecured creditors and the debtor), often in the context of settlement discussions. It has frequently been held that committee members' fiduciary duties of loyalty and care to the unsecured creditor body require such information to be held in confidence."). In the merger context, where a merger is "the most important event" in a "corporation's life," inside information about negotiations becomes "material at an earlier stage than would be the case as regards lesser transactions." *Id.* at 238. Just as merger can be "the most important event" in a "corporation's life," the settlement negotiations here dealt with what were far and away the most significant assets of the Debtors' estate. The serious, significant steps the parties took to negotiate the settlement, and the progressive, increasing offers that JPMC made, confirm the materiality of those discussions.[6]

46. Nor can Aurelius or Centerbridge find solace in the argument that they did not trade "on the basis of" this clearly material information. Rule 10b5-1 states that a person trades "on the basis of" material nonpublic information if the person "was *aware* of the material nonpublic information" when she purchased or sold stock. 17 C.F.R. § 240.10b5-1(b) (emphasis added). Courts applying this rule have held that a defendant presumptively trades "on the basis of" material non-public information whenever she trades in "knowing possession" of that

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[6] Contrary to many arguments made in opposition to the Equity Committee's recent motion to compel, reasonable investors can find information about negotiations material even though significant obstacles might prevent parties from reaching a deal. For example, even though the specific information a defendant received about merger negotiations was "false and vague," it was nonetheless sufficiently material to overcome a motion for summary judgment because the "essence" of what was communicated, i.e. that "negotiations were underway," was "both true and highly material." *SEC v. Thrasher*, 152 F. Supp. 2d 291, 299 (S.D.N.Y. 2001).

information. *United States v. Teicher*, 987 F.2d 112, 120 (2d Cir. 1993); *see also United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008) ("We . . . adhere to the knowing possession standard articulated in *Teicher*."); *United States v. Heron*, 2009 WL 868017, at *6 (3d Cir. 2009) (holding in criminal case "that a reasonable jury could [find] that [the defendant] traded on the basis of material, non-public information that he clearly possessed").

47. These facts alone will establish that Aurelius and Centerbridge engaged in inequitable conduct sufficient to warrant equitable disallowance. The Settlement Note Holders have improperly argued that trading on material non-public information is not enough: conflating the bankruptcy and securities laws, they improperly insist on proof that the trading on material non-public information was done in violation of a duty. The bankruptcy case law recognizes no such requirement. But, as discussed below, there is no doubt that the Settlement Note Holders traded in violation of a number of fiduciary duties. While their conduct is sufficiently egregious to warrant disallowance even absent a duty, the fact that they traded in violation of a duty and as insiders lowers the burden of proof and underscores the gravity of their conduct. *See, e.g.*, *In re Epic Capital Corp.*, 290 B.R. 514, 523-24 (Bankr. D. Del. 2003) (in context of equitable subordination claim interpreting *Citicorp*, noting that "[t]he burden of proof is less demanding when the respondent is an insider. If the respondent is not an insider or fiduciary, then the movant must prove with particularity "egregious conduct such as fraud, spoilation or overreaching.").

B. Settlement Note Holders Are Fiduciaries To Creditors, Estate, And Equity[7].

(1) Settlement Note Holders Are Temporary Insiders.

48. The Settlement Note Holders became temporary insiders by taking control of settlement negotiations in certain periods, by being apprised by the Debtors of non-public material information for the purposes of facilitating a settlement, and by signing confidentiality agreements that required them to "use Confidential Information only for the purpose of participating in the Cases." In *Dirks v. S.E.C.*, 463 U.S. 646, 655 (1983), the Supreme Court held that outsiders who "have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes" become temporary insiders who obtain a fiduciary obligation to the entity's shareholders and creditors. Importantly, unlike the misappropriation theory, "the temporary-insider . . . twist[] on the classical theory retain[s] its core principle that the duty to disclose or abstain is derived from the corporate insider's duty to his shareholders." *SEC v. Cuban*, 620 F.3d 551, 554 (5th Cir. 2010). Thus, the temporary insider directly takes on the fiduciary duties of the debtor's insiders, which include a direct fiduciary duty to creditors and shareholders. *See Pepper*, 308 U.S. at 307 (noting that debtor's insider has a fiduciary obligation to "the entire community of interests in the corporation — creditors as well as stockholders").

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7 In the decision denying confirmation, this Court rejected the Settlement Note Holders' attempt to seek releases for themselves on the ground that "[t]he Settlement Note Holders were not acting in this case in any fiduciary capacity; their actions were taken solely on their own behalf, not others." *In re Washington Mut., Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011). Of course, this finding, made in an entirely different context without the factual record that has been developed through recent discovery, in no way affects the question of whether the facts established during recent discovery show whether the Settlement Note Holders took on fiduciary duties to various constituents that prevented them from trading on inside information and, to the extent necessary and appropriate, establish a basis upon which the Court may reconsider its prior finding. *See* Fed. Bankr. R. 9024(b).

49. The evidence will show that the Debtors entered into a special confidential relationship of trust with the Settlement Note Holders by providing them with confidential information, both during restricted and non-restricted periods. This is clear during the restricted periods. Even during the non-restricted periods, the evidence will show that the Settlement Note Holders, and their counsel, received information that was not shared with other creditors or the public, in furtherance of the special confidential relationship between them that pervaded the case. As part of that confidential relationship, the Debtors expected the Settlement Note Holders to keep this information confidential, even after the Settlement Note Holders became unrestricted.

50. The evidence will also show that the Settlement Note Holders were given access to confidential information solely for a corporate purpose – to further settlement negotiations and to facilitate the progress of the cases. Again, this is clear during restricted periods, as the Settlement Note Holders signed confidentiality agreements that bound them to "use Confidential Information only for the purpose of participating in these Cases." Nor is there any merit to the Settlement Note Holders' argument that the confidentiality agreements expired before the trades occurred: at the time they *received* the information, the Settlement Note Holders were "*given access*" to the confidential information solely for a corporate purpose. That is all that *Dirks* requires. This made them temporary insiders with respect to the confidential information so accessed, no matter when the trading restriction elapsed. Trading on this information violated their fiduciary duties owed directly to creditors and shareholders, no matter when the trading occurred and no matter whether the Debtors (but not the creditors or shareholders) somehow sanctioned that trading. Further, the evidence will show that the information received by the Settlement Note Holders during non-restricted periods was also shared for a corporate purpose –

namely to aid in the reorganization efforts and to facilitate settlement.[8] *See* Mark J. Krudys, *Insider Trading by Members of Creditors' Committees – Actionable!*, 44 DePaul L. Rev. 99, 141-42 (1994) ("[M]embers of creditor steering committees, like official creditors' committees, appear to come within the temporary insider definition articulated in Dirks"); Donald C. Langevoort, 18 Insider Trading Regulation, Enforcement and Prevention § 3:8 (Database updated April 2011) ("More recently, the view has been expressed that members of a creditors committee overseeing a reorganization of the issuer would be treated as [temporary] insiders" (collecting citations)).

(2) The Settlement Note Holders Had Fiduciary Duties To The Classes They Held.

51. Previously in this action, the WMI Noteholders' Group attempted to circumvent Rule 2019 by arguing that they had no fiduciary capacity. This Court rejected that argument for reasons fully applicable here:

> "The WMI Noteholders Group's argument is premised on the erroneous assumption that the Group owes no fiduciary duties to other similarly situated creditors, either in or outside the Group. The case law, however, suggests that members of a class of creditors may, in fact, owe fiduciary duties to other members of the class. See *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) (finding that stockholders, "by appealing from a judgment which affected a whole class of stockholders owed an obligation to them, the full extent of which we need not now delineate. Certainly, at the very least they owed them an obligation to act in good faith."); *Official Committee of Equity Security Holders of Mirant Corp. v. The Wilson Law Firm, P.C. (In re Mirant Corp.)*, 334 B.R. 787, 793 (Bankr. N.D. Tex. 2005) ("It is a well established principle of

8 If the material nonpublic information was not given to the Settlement Note Holders solely for a corporate purpose – for example, if the Debtors gave the Settlement Note Holders confidential information for the purpose of allowing them to trade on it – then that underscores that the Plan has been proposed in bad faith. *See, e.g., In re Refco Inc.*, 336 B.R. 187, 196 (Bankr. S.D.N.Y. 2006) ("When the debtor has public stock or debt, moreover, the securities laws may preclude the debtor from disclosing material non-public information on a selective basis to committee members absent a binding confidentiality agreement.

> bankruptcy law that when a party purports to act for the benefit of a class, the party assumes a fiduciary role as to the class.")."

In re Washington Mut., Inc., 419 B.R. 271 (Bankr. D. Del. 2009). This Court had no occasion to determine "the precise extent of fiduciary duties owed" because it sufficed to conclude that "collective action by creditors in a class implies some obligation to other members of the class." *Id.*

52. That conclusion suffices here too. There is no need to determine the precise extent of the fiduciary duties owed by the Settlement Note Holders. It is enough to note that by acquiring blocking positions in all the subordinated classes, and negotiating and acting collectively, the Settlement Note Holders took on obligations to other members of those classes. That duty is sufficient to prevent the Settlement Note Holders from trading on inside information gleaned through their collective efforts.

(3) Settlement Note Holders Took On Role And Duties Of Creditors Committee.

53. There is no doubt that Creditors Committees owe fiduciary duties that prevent them from trading on inside information. *See, e.g., Rickel & Assocs., Inc. v. Smith (In re Rickel & Assocs., Inc.),* 272 B.R. 74, 100 (Bankr. S.D.N.Y. 2002) (discussing a committee member's use of inside information and noting that the member may not use his position to advance his personal interest at the expense of the creditor class).

54. Under the unique facts of this case, the Settlement Note Holders should be held to the same standards as Creditor Committee members. In particular, the evidence will show that the Settlement Note Holders took a central role in the negotiation process, often to the exclusion of the Creditors' Committee, and held more sway in negotiations than any constituency, including the Creditors Committee. As they made clear to the Debtors and JPMC, given their

dominating control of the subordinated classes, no deal could pass without their votes. Further, individually and through counsel, the Settlement Note Holders were privy to nearly the entire array of information entrusted to the Creditors Committee. Finally, the Settlement Note Holders held great power over the Creditors' Committee itself, through their influence over two of the indenture trustees who sit on the Creditors Committee.

55. The Equity Committee is not requesting an upheaval of the manner in which bankruptcies are conducted. The simple point is that if ad hoc creditors wish to band together, acquire blocking positions in various classes of security, and use their power to collect material information about the case and take control of the proceedings, they should be made to erect an ethical wall that separates those making investment decisions from those who interface with the debtor and receive material nonpublic information.

C. The Settlement Note Holders Were Non-Statutory Insiders.

56. Although there is no need to decide whether the Settlement Note Holders are non-statutory insiders, the fact that they are makes their inequitable conduct that much more troubling. Non-statutory insiders are those that do not fall within the enumerated categories of section 101(31), but still have a sufficiently close relationship with the debtor to suggest that transactions were not conducted at arms-length. *Official Comm. of Unsecured Creditors v. Highland Capital Mgmt., LP (In re Broadstripe, LLC)*, 444 B.R. 51, 79 (Bankr. D. Del. 2010). Courts have recognized that access to a debtor's inside information may constitute a sufficiently close relationship that confers non-statutory insider status on a creditor. *In re Krehl*, 86 F.3d 737, 743 (7th Cir. 1996) ("[a]ccess to inside information can be sufficient to confer insider status even where there is no legal right or ability to exercise control over a corporate entity"). That is especially true, where, as here, the parties were originally parties to the Global Settlement that

forms the backbone of the Plan. *See In re Allegheny Int'l, Inc.*, 118 B.R. 282, 299 (Bankr. W.D. Pa. 1990) (party held to be insider and fiduciary where it sought and received inside information as a proponent of a plan); *Luedke v. Delta Air Lines, Inc.*, 159 B.R. 385 (S.D.N.Y. 1993) (complaint stated claim based on fiduciary duty by alleging that creditors committee assumed a duty to all parties in reorganization case by becoming joint sponsor and proponent of joint plan).

57. Insiders' conduct is subject to heightened scrutiny, and if material evidence of unfair conduct is presented, the burden shifts to the insider to rebut the inference by showing the fairness of his or her transactions with the debtor. *See e.g., Schubert v. Lucent Techs.s (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 412 (3d Cir. 2009) (analyzing inequitable conduct in the context of equitable subordination); . *Broadstripe*, 444 B.R. at 79.

58. Similar to the *Krehl* and *Allegheny* cases, the Settlement Note Holders are non-statutory insiders by virtue of their strategic position in the Debtors' Plan and Global Settlement negotiations, and their access to the Debtors' confidential financial information. Accordingly, it is appropriate that the Settlement Note Holders be deemed insiders for purposes of their trading in the Debtors' claims, and the relevant transactions should be subject to heightened scrutiny by the Court.

D. This Is A Paradigm Case Of Inequitable Conduct Warranting Disallowance.

59. In *Citicorp*, the circuit court described the findings of the bankruptcy court as the "paradigm case of inequitable conduct by a fiduciary." *Citicorp*, 160. F.3d at 987-88. These included the facts that CVC purchased claims for the "dual purpose of making a profit and influenc[ing] the reorganization in its own self-interest" and that CVC purchased the claims with "the benefit of non-public information acquired as a fiduciary." *Id.* at 989. Courts have long

condemned this dual purpose of controlling a reorganization at the expense of other stakeholders and profiting on insider information. As the Supreme Court has observed:

> Access to inside information or strategic position in a corporate reorganization renders the temptation to profit by trading in the Debtor's stock particularly pernicious. The particular dangers may take two forms: On the one hand, an insider is in a position to conceal from other stockholders vital information concerning the Debtor's financial condition or prospects, which may affect the value of its securities, until after he has reaped a private profit from the use of that information. On the other hand, one who exercises control over a reorganization holds a post which might tempt him to affect or influence corporate policies--even the shaping of the very plan of reorganization--for the benefit of his own security holdings but to the detriment of the Debtor's interests and those of its creditors and other interested groups.

Wolf v. Weinstein, 372 U.S. 633, 642 (1963).

60. The evidence will show that Aurelius and Centerbridge purchased the claims with insider information. In addition, the evidence will show that they used their large holdings to influence the reorganization in their own self-interest and to the detriment of equity holders and others.

61. Additionally, Aurelius and Centerbridge usurped a corporate opportunity because the opportunity to purchase the notes was a corporate opportunity of which they could not avail itself, consistent with its fiduciary duty, without giving the corporation and its creditors notice and an opportunity to participate. *Citicorp*, 160 F.3d at 987-88 (parties' fiduciary duty "required that it share everything that it knew with [debtors'] board and the Committee before commencing its purchases"); *Brown v. Presbyterian Ministers,* 484 F.2d 998, 1005 (3d Cir.1973) (holding that director who purchased a note at discount breached a fiduciary duty because "[t]he opportunity should have been disclosed to the receiver as representative of the creditors").

E. Equity Holders Have Been Directly Harmed By The Inequitable Conduct.

62. The evidence at trial will show that the equity holders were harmed in several direct ways by Aurelius' and Centerbridge's conduct, including that the delay caused by their conduct cost the estate tens of millions of dollars in interest and administrative fees and that they deprived the Debtors of a corporate opportunity that, if used, could have saved the estate tens of millions of dollars in payments. In addition, Aurelius and Centerbridge helped cause the Debtors to adopt a plan of reorganization that gives nothing to equity, in spite of the large returns possible.

63. To remedy their conduct, their profits from buying and selling securities in this case should be disallowed and disgorged. In addition, they should be required to pay the estate for the interest and administrative fees caused by the delay their conduct brought on. *See, e.g., Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims,* 323 F3d 228, 236 (3d Cir. 2003) (affirming award of profits and the costs of delays caused by the inequitable conduct, including interest, professional fees and expenses).

III. Post-Petition Interest Should Be Paid At The Federal Judgment Rate.

64. Confirmation should be denied because the Plan provides for the payment of post-petition interest calculated at the applicable contract rate or, where no contract exists, calculated at the federal judgment rate *plus* additional interest on the already accrued post-petition interest (*i.e.*, interest on interest) in violation of sections 726(a)(5) and 1129(a)(7) of the Bankruptcy Code. (*See* Plan § 1.151) (stating "interest shall continue to accrue only on the then outstanding

and unpaid obligation or liability, *including any Post-petition Interest Claim thereon*, that is the subject of an Allowed Claim." (emphasis added)).[9]

A. Under Section 726(a)(5) Of The Bankruptcy Code, The Legal Rate Of Interest Is The Federal Judgment Rate.

65. Generally, unsecured creditors are prohibited from recovering any post-petition interest. *See* 11 U.S.C. § 502(b)(2); *United Savings Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 372-73 (1988); *In re Chateaugay Corp.*, 156 B.R. 391, 403 (S.D.N.Y. 1993) ("502(b)(2) bars post-petition interest on a pre-petition unsecured claim"). The only exceptions in the Bankruptcy Code to the general prohibition on post-petition interest are contained in section 506(b) and section 726(a)(5).[10] Section 726(a)(5) permits payment of post-petition interest on unsecured claims "at the legal rate" in a chapter 7 liquidation where a debtor's estate is solvent. While section 726(a)(5) does not directly apply in a chapter 11 case, it is made applicable through section 1129(a)(7), which requires each holder of a claim or interest to receive the amount such holder would receive if the debtor's estate was liquidated under chapter 7 of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(7).

66. Neither the Bankruptcy Code nor the legislative history provides a definition of the phrase "the legal rate" as used in section 726(a)(5). *In re Washington Mut., Inc.*, 442 B.R.

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[9] To the extent that the Plan provides for the payment of post-petition interest on post-petition interest (or compound post-petition interest), for the reasons set forth herein, equity requires that such interest on interest be disallowed. *See, e.g., Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 165-66 (1946); *In the Matter of the New York, New Haven and Hartford R. Co.*, 4 B.R. 758, 799 (D. Conn. 1980) (denying interest on interest "under the principles set forth in *Vanston*"); *In re Anderson*, 69 B.R. 105, 109 (9th Cir. B.A.P. 1986) (affirming the bankruptcy court's decision denying interest on interest as a result of, *inter alia*, conflicting equitable interests in the case); *In the Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 791 F.2d 524, 532 (7th Cir. 1986) (denying compounding interest, because *inter alia*, interest on interest would result in a windfall to the debenture holders).

[10] Section 506(b) of the Bankruptcy Code addresses when a secured creditor is entitled to recover post-petition interest. Here, at issue is whether unsecured creditors are entitled to recover post-petition interest and, if so, at what interest rate. Thus, section 506(a) simply does not apply.

314 (Bankr. D. Del. 2011). The majority of courts that have addressed the issue – including this Court – have decided that the use of "at the legal rate" in section 726(a)(5) means at the federal judgment rate provided by 28 U.S.C. § 1961. *See In re Coram Healthcare Corp.*, 315 B.R. at 345-47 ; *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 257 (Bankr. S.D.N.Y. 2007) ("[i]t is by far the better view, in my opinion, that 'legal rate' is the federal judgment rate and not the same as that authorized under section 506(b), which is a contract rate."); *In re Best*, 365 B.R. 725, 727 (Bankr. W.D. Ky. 2007) ("[t]he more recent cases hold that the federal judgment rate is the proper rate of interest under 11 U.S.C. § 726(a)(5)"); *In re Garriock*, 373 B.R. 814, 816 (E.D. Va. 2007) ("Having reviewed each line of cases, the Court is persuaded that 'the legal rate' refers to the federal judgment rate, and does not encompass, as BB&T contends, any lawful pre-petition contract rate."); *In re Chiapetta*, 159 B.R. 152, 161 (Bankr. E.D. Pa. 1993) ("[W]e further conclude that, since a claim is like a judgment entered at the time of bankruptcy filing, the applicable rate should be the federal judgment rate....").[11] These courts rest their decisions on sound statutory construction and fundamental policies that underlie the Bankruptcy Code.

67. While the Equity Committee recognizes that this Court has previously determined that section 726(a)(5) affords some discretion to consider the equities of the case to determine the proper rate of interest to be awarded to creditors in solvent debtor cases (*see* Op. at 94 (citing *In re Coram Healthcare Corp.*, 315 B.R. at 347)), the Equity Committee respectfully submits

[11] *See also Ogle*, 261 B.R. 22 (Bankr. D. Id. 2001); *In re Gulfport Pilots Assoc., Inc.*, 434 B.R. 380 (Bankr. S.D. Miss. 2010); *In re Beguelin*, 220 B.R. 94, 100 (9th Cir. BAP 1998); *In re Evans*, 2010 WL 2976165, at *2 (Bankr. M.D.N.C. July 28, 2010); *In re Gulfport Pilots Ass'n, Inc.*, 434 B.R. 380, 392-93 (Bankr. S.D. Miss. Apr. 12, 2010); *In re Smith*, 431 B.R. 607, 610 (Bankr. E.D.N.C. 2010); *In re Hoskins*, 405 B.R. 576, 587 (Bankr. N.D. W. Va. 2009); *In re Country Manor of Kenton, Inc.*, 254 B.R. 179, 182 (Bankr. N.D. Ohio 2005); *In re Drew*, 272 B.R. 8, 11-12 (Bankr. D. Wy. 2001); *In re Godsey*, 134 B.R. 865, 866-67 (Bankr. M.D. Tenn. 1991); 6 *Collier on Bankruptcy* ¶ 726.02[5] at 726-12 to 726-13 (16th ed.) ("The reference in the statute to the 'legal rate' suggests that Congress envisions a single rate, probably the federal statutory rate for interest on judgments set by 28 U.S.C. § 1961." (internal citations omitted)).

that section 726(a)(5) limits the payment of post-petition interest to the federal judgment rate. The language Congress chose to use in section 726(a)(5) is clear and does not afford any discretion and none should be engrafted onto the statute. *In re Cardelucci*, 285 F.3d 1231, 1236 (9th Cir. 2002) ("'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."); *In re Garriock*, 373 B.R. 814, 817 (Bankr. E.D. Va. 2007) ("Even if the Court believed that Congress struck the wrong balance in this case, and did not adequately consider the potential creation of windfalls for solvent debtors, the Court is not at liberty to substitute its policy judgment for that of Congress."). The Equity Committee submits that Congress was clear in its intention that post-petition interest should be calculated at federal judgment rate.

B. In The Event The Court Determines It Has Discretion With Respect To The Interest Rate, The Egregious Facts Present In This Case Compel Interest To Be Calculated At The Federal Judgment Rate.

68. In the event the Court concludes it does have discretion with respect to the applicable rate of post-petition interest, the facts here compel the conclusion that interest should be calculated at the federal judgment rate. In *Coram*, this Court found that it is appropriate to consider the equities when determining the appropriate rate of interest to apply. 315 B.R. at 346-47. In that case, Cerberus, a substantial holder of Notes had placed one of its employees on the debtor's board of directors and thereby was able to, and did, advance its own interests to the detriment of the debtor. *Id.* However, Cerberus was not the only party to benefit from its improper conduct. The Court found that in advancing its own interests, Cerberus also advanced the interests of other similarly situated noteholders who had consistently acted as a group during the bankruptcy case in opposition to the debtor's equity holders. *Id.* at 347. Under those

circumstances, the Court found that it would be inequitable to permit the noteholders to recover post-petition interest calculated at the contract rate. *Id.*

69. In this case, in the event the Court is inclined to consider the equities, the Equity Committee submits (and will demonstrate at trial) that the egregious conduct of the Debtors and the Settlement Note Holders more than justify application of the federal judgment rate.

(1) The Debtors Abandoned Their Fiduciary Duties To Equity Holders By Allowing The Settlement Note Holders To Hijack Negotiations Of The Global Settlement To Maximize Their Own Profits.

70. As will be shown at the confirmation hearing, the Settlement Note Holders bought substantial amounts of debt on the cheap beginning around the time of the Petition Date and continued trading in the Debtors' securities at various levels of priority well into the Debtors' bankruptcy cases. The Settlement Note Holders used their positions as substantial stakeholders to insert themselves into the negotiations of the Global Settlement thereby obtaining significant amounts of material non-public information concerning the status of those confidential negotiations. The Settlement Note Holders then used that information to inform themselves as to what additional securities of the Debtors they should purchase to make the most profit as well as leverage that information in a fashion to garner just enough from JPMC through the Global Settlement to pay themselves (and similarly situated creditors) in full plus post-petition interest leaving the Debtors' equity holders with essentially nothing.[12] In short, the Settlement Note

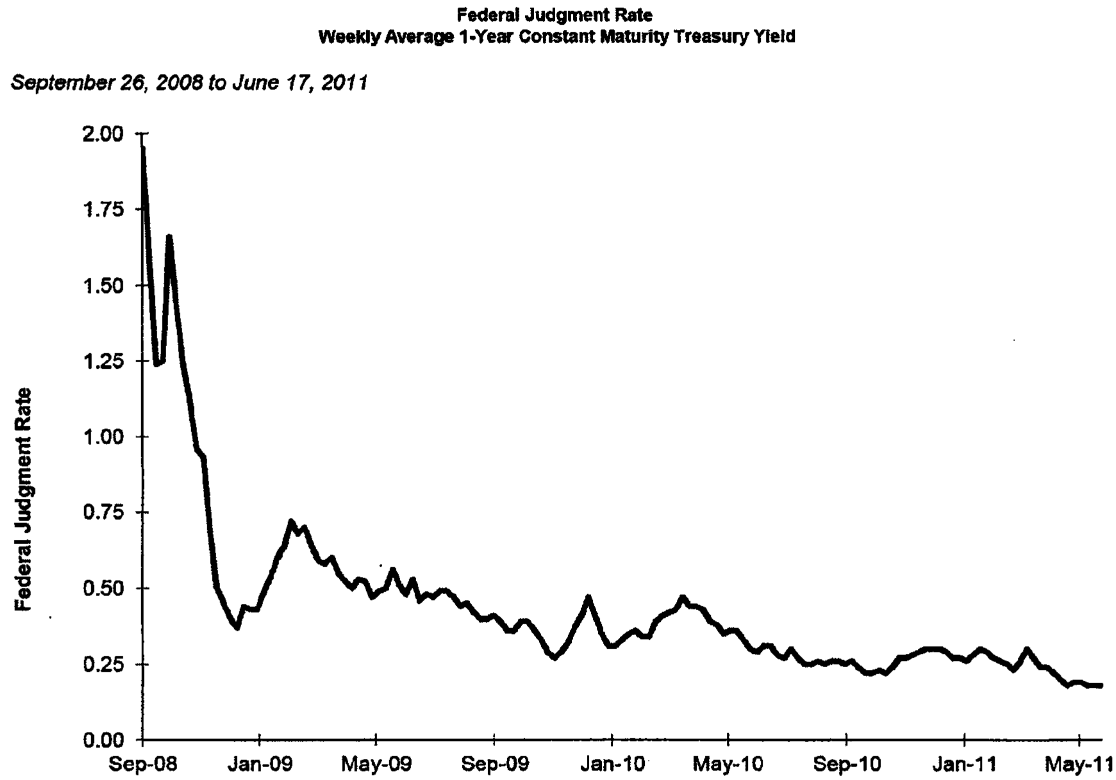
[12] Aurelius confirmed as much in its opposition to the Equity Committee's Rule 2004 Motion [Dkt. No. 6567] aimed at obtaining further discovery from the Settlement Note Holders on these points. *See* Aurelius Capital Management, LP's Response [Dkt. No. 6652] at 4 ("*Second*, and indeed reinforcing the result of any consideration of the equities, postpetition interest at the contract rate was a critical and material bargained-for element of the Global Settlement Agreement."), and February 8, 2011 Hrg. Trans. at 53 (attached hereto as Exhibit A) ("The contract rate of interest is a material term to the deal that we cut and that this Court approved.")

Holders used material non-public information to hijack the Debtors' bankruptcy case to maximize their own profits.

71. Further, all the inequitable facts cited above in support of a finding that the Plan was proposed in bad faith and that the claims of Aurelius and Centerbridge should be disallowed support a finding that the federal judgment rate should apply.

C. The Federal Judgment Rate As Of The Effective Date Of The Plan Should Be Applied.

72. The federal judgment rate to be applied in this case should be determined as of the Effective Date of the Plan. It is well established that the payment of post-petition interest is intended to compensate creditors for the delay in receiving payment caused by the bankruptcy. *See, e.g.*, *In re Melenyzer*, 143 B.R. 829, 833 (Bankr. W.D. Tex. 1992) (post-petition interest is intended to compensate creditors for time value of money); *In re Ogle*, 261 B.R. 22 (Bankr. D. Idaho 2001) ("The federal judgment rate accurately reflects this time value of money.") In this case, that purpose is best served by using the rate in effect on the Effective Date of the Plan. Here, the federal judgment rate in effect on the Petition Date (1.95%) declined precipitously immediately following the Petition Date. The following chart demonstrates that extreme drop in the federal judgment rate:



73. The rate in effect for the majority of these cases was approximately 0.5% or lower. If the Court were to apply federal judgment rate as of the Petition Date, creditors' recoveries would grossly exceed the amount necessary to compensate them for the delay caused by these cases, violating the fundamental purpose of awarding post-petition interest in the first instance. Moreover, such an award would overlook the market reality as it has existed for nearly the entirety of this case. On the contrary, application of the federal judgment rate in existence on the Effective Date of the Plan will most accurately compensate creditors for the "time value" of their unpaid claims and reflect the federal judgment rate as it has actually existed throughout the substantial majority of this chapter 11 case.

IV. Reorganized WMI Is Undervalued.

74. The evidence will show that the debtors have undervalued Reorganized WMI, both as a run-off company and as it will actually be used in the hands of the Settlement Note Holders who will take control of the company. The Settlement Note Holders have made it plain from the beginning of this case that they intend to use reorganized WMI to take advantage of its tax attributes. As wealthy funds, they have the wherewithal to invest their own capital to purchase assets to generate income that can be shielded from taxes for the next twenty years. Owl Creek ran spreadsheets as recently as this year showing how much money could flow to the shareholders of reorganized WMI if cash infusions of billions of dollars were made.

75. The Equity Committee will submit two expert reports in support of this conclusion. The first Equity Committee report, submitted by Peter J. Solomon, explains how the company is undervalued even using Blackstone's assumptions. It also shows how much value the Settlement Note Holders can reap from the NOLs if they are successful in exploiting them through cash infusions. The second report, submitted by the Equity Committee's tax expert BDO USA, gives the lie to the primary assumption that underlies the Debtors' valuation report: to wit, that Section 269 of the Tax Code poses a *per se* bar on any investments by reorganized WMI that exceed the current value of the company.

76. This undervaluation of Reorganized WMI harms equity, and all impaired creditors, by withholding the value that should flow to them. It also improperly benefits the Settlement Note Holders by giving them more than they deserve. Not only does this undervaluation cause an inequitable distribution of assets, it is another sign of the bad faith with which this Plan was proposed.

V. The Plan Improperly Conditions Distributions on Claimants' Agreement to the Third-Party Releases.

77. Under the Plan, the Debtors have conditioned creditors' and interest holders' distributions – distributions to which they are already entitled to receive under the Bankruptcy Code without giving up anything – upon their agreement to the Plan's third-party releases. And what do creditors and interest holders receive in exchange for their agreement to the third-party releases? Nothing. Yet, if they refuse to acquiesce to the Debtors' demands, they will not receive their distributions on account of their allowed claims and interests. This clearly improper and coercive tactic designed to extort support for the Plan violates section 1129(a)(7) and cannot be permitted to stand.

78. Where, as here, plan proponents seek to require parties to grant releases in order to receive a distribution under a chapter 11 plan, the "best interest of creditors test" under section 1129(a)(7) of the Bankruptcy Code limits the extent to which the rights of non-releasing creditors or interest holders may be diminished. Section 1129 requires, in relevant part:

> With respect to each impaired class of claims or interests –
>
> (A) each holder of a claim or interest of such class —
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date;

11 U.S.C. § 1129(a)(7)(A). In *In re Conseco, Inc.*, the debtors proposed that creditors be required to grant a release of non-debtors in order to receive a distribution under a chapter 11 plan. *Holmes v. United States (In re Holmes)* 301 B.R. 525, 528 (Bankr. N.D. Ill. 2003). The

court rejected the release provision to the extent it would violate the "best interest of creditors" test stating:

> [u]nder §1129 (a)(7)(ii), a plan cannot be confirmed unless each non-accepting creditor gets at least as much as it would get in a Chapter 7 liquidation. Under previous plan provisions, creditors who did not vote to accept the plan but were clearly entitled to a distribution in a Chapter 7 liquidation had to release non-debtors to receive a distribution. *These provisions violated the best interests of creditors test because they forced creditors to accept the release or give up the distribution to which they were entitled under §1129 (a)(7)(ii).*

Id. (emphasis added). In *Conseco*, the Court found third-party release provisions acceptable only after the debtors revised the plan to add an opt-out provision that did not result in a forfeiture of plan distributions. *Id.*

79. Here, rather than a "carrot and a stick," the Debtors are wielding a billy club in order to force creditors and interest holders to give up their rights against third parties. The Modified Plan provides:

> each Entity that has elected not to grant the releases set forth in this Section 43.6, including, without limitation, any Entity that fails to execute and deliver a release following notice in accordance with the provisions of Section 32.6 hereof, shall not be entitled to, and shall not receive, any payment, distribution or other satisfaction of its claims pursuant to the Plan.

(Plan § 43.6) (the "<u>Third Party Release</u>"). Thus, unless a Claim or Interest Holder agrees to grant the Third Party Release, it will not receive the distribution from the estate to which it is otherwise entitled under the Bankruptcy Code by virtue of its allowed claims and interests. The coercive aspect of this provision is apparent. Here, there is no added inducement to consent to the Third Party Release, but rather, only the threat to take away claimants' distributions to which they are legally entitled. The Debtors cannot threaten to take away lawful distributions unless creditors and interest holders are given consideration in exchange.

80. According to the Debtors' Liquidation Analysis, if these cases were converted to chapter 7, preferred equity holders would likely not receive any distribution. (Plan Ex. D). Under chapter 7, however, creditors and interest holders would retain any claims they may have against third parties. Unless WMI preferred equity holders who vote to reject the Plan will receive some additional consideration in exchange for granting the Third Party Release, the Plan violates section 1129(a)(7).

81. As if extorting support for the Third Party Release was not enough, the Debtors also seek to discharge the claims and interest of holders who opt out of the Third Party Release. Section 43.2 of the Plan provides for discharge and release of claims and termination of equity interests "regardless of whether any property will have been distributed or retained pursuant to the Plan on account of such Claims ... or other Equity Interests." Section 43.2 further provides that the discharge will be effective "whether or not ... (b) a Claim based upon such debt is allowed under section 502 of the Bankruptcy Code (or is otherwise resolved)." Based on the foregoing provisions, claim or interest holders that decline to grant the Third Party Release will not receive any distribution under the Plan and their claims and interests will still be discharged. (Plan §§ 43.2, 43.6). A debtor enjoys the benefit of a discharge in exchange for creditors and interest holders actually receiving distributions on account of allowed claims and interests. Where a debtor's estate has sufficient assets to make sufficient distributions, but the debtor withholds distributions on account of allowed claims and interests, a discharge is improper. The Plan turns the fundamental purpose of the Bankruptcy Code on its head and allows the Debtors to "have their cake and eat it too."

VI. The Plan Cannot Be Confirmed Because It Is Not Feasible As Required By Section 1129(a)(11).

82. In order to be confirmed, section 1129(a)(11) of the Bankruptcy Code requires the Plan to be "feasible." 11 U.S.C. § 1129(a)(11) (requiring that "the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.") "The plan proponent bears the burden to show by a preponderance of the evidence that the proposed Chapter 11 'plan has a 'reasonable probability of success,'...'" *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 148 (Bankr. D.N.J. 2010) (citations omitted). "The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed. The purpose of the feasibility requirement is to protect against visionary or speculative plans." *In re Aleris Int'l., Inc.*, 2010 WL 3492664, at *28 (Bankr. D. Del. May 13, 2010) (citations omitted).

83. Where the viability of a plan is contingent on a decision that will be made by another regulatory or judicial body, and such decision is uncertain of outcome, a plan is not feasible. *Holmes v. United States (In re Holmes)*, 301 B.R. 911, 913-15 (Bankr. M.D. Ga. 2003) (plan that was dependent on IRS acceptance of debtor's settlement offer was not feasible where it was uncertain if the IRS would even consider the offer); *In re Yates Dev., Inc.*, 258 B.R. 36, 44-5 (Bankr. M.D. Fla. 2000) (plan not feasible where it hinged entirely upon a favorable ruling of appellate court relieving debtor of responsibility to pay $5,000.00 per day).

84. Although tabulations from the voting on the Plan have not been published, to the extent there are more than 300 holders of record of Reorganized Common Stock, Reorganized WMI will not be eligible for a suspension of Securities Exchange Act of 1934 ("<u>34 Act</u>") reporting requirements and will be required to register stock in Reorganized WMI under the 34

Act.[13] See Prior Disclosure Statement at § VII.C. Notwithstanding applicable federal law and Securities and Exchange Commission ("SEC") rules and regulations, the Debtors have not complied with securities reporting requirements during the pendency of their bankruptcy cases. Regardless of number of record holders of Reorganized Common Stock, the SEC will likely require Reorganized WMI to file all delinquent reports and provide audited financial statements, which at this point is likely a practical impossibility. As set forth below, this presents a serious question as to Reorganized WMI's ability to function on emergence from bankruptcy and, thus, feasibility of the Plan.

85. As interpreted by the SEC, the 34 Act requires debtors to continue to file annual Form 10-K and quarterly Form 10-Q reports during their time in bankruptcy as well as upon their emergence from bankruptcy. SEC Staff Legal Bulletin No. 2 (Apr. 15, 1997) (hereinafter "SLB 2") (a copy of SLB 2 is attached hereto as Exhibit B). However, debtors may obtain an exemption from the reporting requirements under the 34 Act if they request on a timely basis and are granted a "no-action" letter from the SEC. Under SLB 2, a no action request must be timely submitted to the SEC "promptly after it has entered bankruptcy, not when it is preparing to emerge from bankruptcy." SLB 2, §II.C. In order to be timely, the no action request must be made no later than the filing deadline for first 34 Act report required to be filed after filing for bankruptcy.

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13 In order to be eligible for any exemption from having to file 34 Act reports for the post Effective-Date period, the stock of Reorganized WMI would need to have less than 300 holders of record, or less than 500 holders of record if the total assets of the issuer had not exceeded $10 million on the last day of each of the issuer's three most recent fiscal years. SLB 2, §IV.D, Exchange Act Rule 12h-3. While previous iterations of the Plan may (or may not) have created less than 300 record holders of Reorganized Common Stock, it should be noted that as a result of the Court's January 7, 2011 opinion denying confirmation of Sixth Amended Plan, the Plan has been modified to potentially include a larger number of holders. Specifically, the Plan now provides a right of Stock Election to holders of Class 12 Disputed Claims and Class 21 Dime Warrants. Supplemental Disclosure Statement, §IV.B.1; Plan §27.3.

86. In this case, the Debtors failed to make any "no action" request upon commencement of their bankruptcy in accordance with SLB 2 and in fact have never done so. Moreover, although they are now preparing to emerge from bankruptcy, Debtors have still not filed a no-action request in accordance with SLB 2. Nor do they plan to file reports with the SEC upon emerging from bankruptcy. *See* Prior Disclosure Statement at § VII.C. Indeed, in response to a motion for summary judgment filed by the Equity Committee to compel a shareholders meeting (which would have required the Debtors to prepare certified financial statements), the Debtors dismissed efforts to provide public securities reporting information as a "waste" of estate assets. *See* Declaration of William Kosturos, Chief Restructuring Advisor of Washington Mutual, Inc. in Connection with Debtors' Opposition to Motion for Summary Judgment. [Adv. Pro. 10-50731, Exhibit B to Opposition of WMI to Motion for Summary Judgment [Adv. Dkt. No. 9] at 5] ("WMI has not prepared or filed audited financial statements since those prepared as of December 31, 2007, and has not retained an auditor.") The Debtors specifically noted the amount of time that would be required to comply with federal securities laws. In the estimate of Mr. Kosturos,

> WMI would require at least 180 days to prepare and have certified financial statements for 2008 and 2009. For example, an accounting firm would first need to be selected and retained, then compile the pertinent financial information pursuant to Generally Accepted Accounting Principles and conduct the appropriate procedures pursuant to Generally Accepted Auditing Standards.

Id. Given that another year has passed since Mr. Kosturos made this statement, it is likely the cost of reconstructing the financial statements and disclosure statements for delinquent reports has grown significantly. Enough time has now elapsed that it may no longer be physically possible for the Debtors to provide the delinquent 34 Act reports. Accordingly, whether the Debtors must comply with their 34 Act reporting obligations appears totally dependent on the willingness of the SEC to grant a retroactive exemption for the delinquent reports as well as a suspension of the Debtors' post-reorganization obligations.

87. The Debtors' confidence that the SEC will relieve them of the obligation to file delinquent 34 Act reports rests solely upon a *single verbal discussion* they had with a staff person of the SEC at the outset of the cases. In its Opposition to the Equity Committee's Motion for Summary Judgment, or in the Alternative, for Relief from the Automatic Stay, WMI indicated that it contacted a staff person of the SEC by telephone call shortly after the commencement of the Chapter 11 cases, notified it of its intention not to prepare or file audited financial statements and received "the acquiescence of the SEC." [Adv. Pro. 10-50731, Exhibit B to Adv. D.I. 9 at 21]. Any so called "acquiescence of the SEC" occurred over two years ago and is not in writing and not binding on the SEC.

88. Notwithstanding the Debtors' foregoing assertions, the decision whether to exempt the debtors from preparing and filing delinquent reports rests with the SEC. From review of prior decisions of the SEC, it appears unlikely that the SEC will acquiesce to the Debtors' view. As a threshold matter, the Debtors have neglected to follow the SEC's procedure for requesting an exemption. Even if they were to file for an exemption now, it seems unlikely the SEC would approve based upon its previous denials of similar requests by debtors with far less complicated circumstances than exist for the Debtors. For example, in *In re AmeriVision Communications, Inc.*, the debtor submitted its request six months after its bankruptcy filing, and its request was in the form of a 10-page singled-spaced letter that addressed the SEC's requirements in detail.[14] The no-action letter noted there had been no trading of the debtor's securities. Additionally, AmeriVision argued that hardship, cost and lack of public interest

[14] A copy of the SEC's denial of AmeriVision's no-action request dated June 14, 2004 is attached hereto as Exhibit C.

justified modified reporting requirements. However, although it was made in a more timely fashion, and may have been supported by similar arguments as the Debtors would make in this case, the SEC *denied* AmeriVision's request for modified reporting. In light of this, it is hard to see why a request by the Debtors at this late stage in their bankruptcy cases would be met with a more favorable response.

89. Moreover, in another distinction from the AmeriVision case, there has been significant trading of the Debtors' publicly listed securities during the pendency of these cases. Where a debtor's securities are sold on a national exchange, the SEC has found that is, "by itself, sufficient evidence that there is an active market for those securities." SLB 2, §II.B. Under these circumstances "[t]he Division ***will not*** issue a favorable response to a request for modification of Exchange Act reporting for those securities." *Id.* (emphasis added).

90. This unequivocal ruling belies the Debtors' claims that the SEC would readily agree in an informal, non-public way at the outset of the cases to give a blanket exemption to the Debtors' 34 Act reporting requirements. Given the importance that it places on reporting where there is trading of a debtor's securities, it appears the SEC would have strong incentive to require full compliance in these cases. The allegations of insider trading might give the SEC further incentive to require full reporting. Indeed, in light of the serious charges, the SEC may wish to decide for itself whether the information in the delinquent 34 Act reports is relevant and useful.

91. However, as set forth above, the Debtors can no longer avoid the issue. Upon emerging from bankruptcy, absent exemptive relief from the SEC, they will be required to prepare and file all delinquent SEC reports, and all reports that become due after the Effective Date. By their own admission, the Debtors are not in a position to do so because they have not prepared audited financial statements since 2007. Accordingly, until the Debtors resolve their

status with the SEC, and show a reasonable likelihood that they and the Reorganized Debtors will be able to comply with applicable federal law, the Plan as proposed is not feasible.

VII. Distribution Of Estate Assets To Non-Estate Creditors Is Improper Under The Bankruptcy Code.

92. The purpose of the Bankruptcy Code is to provide equal distribution of assets in a debtor's estate to the *debtor's* creditors. *See, e.g.*, *In re Mayes*, 294 B.R. 145, 162 n.32 (10th Cir. BAP 2003); *In re Old CarCo LLC*, 435 B.R. 169, 189 n.17 (Bankr. S.D.N.Y. 2010). Indeed, the distribution of a debtor's assets to its creditors pursuant to the distribution scheme set forth in the plan of reorganization is the cornerstone of the bankruptcy process Importantly, it is axiomatic that property of the estate should not be distributed to non-estate creditors – creditors that are not creditors of the debtor – pursuant to a plan of reorganization. Indeed, it is difficult to imagine how distribution of estate assets to non-debtor creditors furthers the goals of bankruptcy as it results in little (if any) benefit to the debtor. Here, the Plan was not proposed in good faith insofar as it proposes to distribute $335 million of estate assets to holders of WMB Senior Notes in Class 17A who hold no legitimate claims against the Debtors' estate but, rather, hold claims against WMB (a non-debtor).

VIII. The Plan Is Not Fair And Reasonable

93. For the reasons previously set forth at the last confirmation hearing, the Plan is not fair and reasonable. While the Equity Committee has promised not to relitigate that position at this confirmation hearing, rather preserving them for appeal, a recent decision issued by the D.C. Circuit should respectfully cause this Court to reconsider its prior decision. *See* Fed. R. Bankr. P. 9024(b).

94. A central issue at the last hearing was whether the Debtors were receiving enough consideration for the business tort claims against JPMC. In concluding that the GSA was fair

and reasonable, this Court explained that FIRREA posed a high bar to those claims, citing a District Court of Columbia.

> Both JPMC and the FDIC Receiver contend that the Debtors have no chance of recovery on those claims. Principally, they argue that any claims challenging the closing of WMB or its sale to JPMC are barred by FIRREA. . . .
>
> The Court finds, however, that the Debtors' likelihood of success on the Business Tort Claims is not high. The ANICO suit has already been dismissed on the basis that it had to be brought in the FDIC receivership action. ANICO, 705 F. Supp. 2d at 21. There is a question whether the Business Tort Claims were included in the claim the Debtors originally filed in the FDIC receivership action. Further, as noted above, any claim for damages under the Business Tort Claims would require that the Debtors prove that they were solvent at the time of the seizure of WMB, a position diametrically opposed to assertions they would need to prove in the preference and fraudulent conveyance claims.

In re Washington Mutual, Inc., 442 B.R. at 343-44. Last week, the D.C. Circuit reversed ANICO on the ground that FIRREA preemption does not apply. *Am. Nat'l Ins. Co. v. FDIC*, 2011 WL 2506043 (D.C. Cir. June 24 2011). This undermines the principal argument made by JPMC and FDIC in support of the minimal recovery (if any) awarded for the business tort claims. It also undermines the first ground cited in this Court's Opinion for devaluing the business tort claims. Regarding the second ground cited in the Opinion, there are two possibilities: if the Debtors was solvent, the business tort claims remain strong; if the Debtors was insolvent, the Debtor has strong fraudulent conveyance claims worth billions of dollars. In either event, it is now clear that the Debtors has substantial claims for billions of dollars that it is giving up for next to nothing in this Plan. Amazingly, moreover, the debtors put on no evidence for the value of these claims. For these reasons, we respectfully urge the Court to reconsider its decision that the plan is fair and reasonable.

CONCLUSION

For the reasons set forth herein, the Equity Committee respectfully requests that the Court deny confirmation of the Plan.

Dated: July 1, 2011
Wilmington, Delaware

ASHBY & GEDDES, P.A.

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-and-

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

- - - - - - - - - - - - - - - - - -*
In the Matters of: *
WASHINGTON MUTUAL, INC., et al., * Case No. 08-12229(MFW)
Debtors. *
- - - - - - - - - - - - - - - - - -*
BROADBILL INVESTMENT CORP., *
Plaintiff, *
v. * Adv. Pro. No. 10-50911(MFW)
WASHINGTON MUTUAL, INC., *
Defendant. *
- - - - - - - - - - - - - - - - - -*
MICHAEL WILLINGHAM and ESOPUS *
CREEK VALUE LP, *
Plaintiffs, *
v. * Adv. Pro. No. 10-51297(MFW)
WASHINGTON MUTUAL, INC., *
Defendant. *
- - - - - - - - - - - - - - - - - -*

- - - - - - - - - - - - - - - - - -*
WASHINGTON MUTUAL, INC. and *
WMI INVESTMENT CORP. *
Plaintiffs, *
v. * Adv. Pro. No. 10-53420(MFW)
PETER J. AND CANDANCE R. ZAK *
LIVING TRUST OF 2001 U/D/O *
AUGUST 31, 2001, et al., *
Defendants. *
- - - - - - - - - - - - - - - - - -*

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

February 8, 2011
10:31 AM

B E F O R E:
HON. MARY F. WALRATH
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

affected other parties in the case. And that link isn't even alleged here.

Let me just check my notes for a second, Your Honor. Excuse me.

(Pause)

MR. MAYER: Your Honor, the equity committee itself has said that the stakes are very high and they're right about that. The stakes are hundreds of millions of dollars. Unfortunately, the stakes here are hundreds of millions of dollars that will either be received by PIERS holders or will be received by subordinate and senior debt holders in the form of additional interest. That's what's before the Court. That's what's so disturbing about the issue that's raised by the equity. The contract rate of interest is a material term to the deal that we cut and that this Court approved. And again, if Your Honor wants to hold a completely new hearing, I guess there are no issues that are foreclosed and all issues will be open. And all parties will be free to raise whatever issues they wish to raise including issues that various parties decided not to raise and not to litigate because we had a deal. Now if the deal no longer holds and the hearing is completely open then, of course, everybody is free to raise whatever issues they want.

That's not what we want, Your Honor. We're not interested in months of litigation. We're not interested in

EXHIBIT B

DIVISION OF CORPORATION FINANCE
SECURITIES AND EXCHANGE COMMISSION

Staff Legal Bulletin No. 2 (CF)

ACTION: Publication of CF Staff Legal Bulletin

DATE: April 15, 1997

SUMMARY: This staff legal bulletin provides the Division of Corporation Finance's views on requests to modify the Securities Exchange Act of 1934 periodic reporting of issuers that are either reorganizing or liquidating under the provisions of the United States Bankruptcy Code.

SUPPLEMENTARY INFORMATION: The statements in this legal bulletin represent the views of the Division's staff. This bulletin is not a rule, regulation, or statement of the Securities and Exchange Commission. Further, the Commission has neither approved nor disapproved its content.

CONTACT PERSON: For further information please contact Anne M. Krauskopf, Special Counsel, at (202) 942-2900.

I. Background

Issuers are required to file current and periodic reports with the Commission pursuant to Sections 13(a) /1 or 15(d) /2 of the Exchange Act /3 if they have:

* securities listed on a national securities exchange; /4

* securities registered under Section 12(g) /5 of the Exchange Act; or

* a registration statement that has become effective under the Securities Act of 1933. /6

In June 1972, the Commission published Exchange Act Release No. 9660, which addressed how the Exchange Act reporting requirements apply to "[i]ssuers which have ceased or severely curtailed their operations." In the release, the Commission emphasized the importance of Exchange Act reporting in preserving free, fair, and informed securities markets. The Commission stated, however, that "when not inconsistent with the protection of investors, [it] would modify the reporting requirements as they apply to particular issuers."

Companies in bankruptcy are not relieved of their reporting obligations. Neither the United States Bankruptcy Code /7 nor the federal securities laws provide an exemption from Exchange Act periodic reporting for issuers that have filed for bankruptcy. In the release, however, the Commission expressed the general position that, with respect to issuers subject to the jurisdiction of the Bankruptcy Court, it generally would accept reports which "differ in form or content from reports required to be filed under the Exchange Act."

The release also states that, in deciding whether to accept modified Exchange Act reports, the Commission will consider the following: (1) how difficult it is for the issuer to obtain the information necessary to complete those reports; /8 (2) the issuer's financial condition; (3) the issuer's efforts to advise its security holders and the public of its financial condition and activities; and (4) the nature and extent of the trading in the issuer's securities.

The release provides the Commission's general position on accepting modified Exchange Act reports from issuers subject to the jurisdiction of the Bankruptcy Court. An issuer relying on that general interpretive guidance should take all steps possible to inform its security holders and the market of its on-going financial condition and the status of its bankruptcy proceedings, including filing any available information with the Commission.

II. Requests for Modified Exchange Act Reporting

An issuer in bankruptcy may request a "no-action" position from the Division that applies the positions in the release to the issuer's facts. /9 In providing a no-action position, the Division determines whether modified reporting is consistent with the protection of investors. In its request, the issuer should present a clear demonstration of its inability to continue reporting, its efforts to inform its security holders and the market, and the absence of a market in its securities.

Requests often do not provide all of the information necessary for the Division's analysis. This staff legal bulletin identifies factors the Division considers when acting on these requests. This guidance will help issuers prepare requests and make the process more efficient and less costly.

III. Information Required in Requests

A. Information Regarding Disclosure of Financial Condition

The first factor the Division considers is whether the issuer made efforts to inform its security holders and the market of its financial condition. The Division also looks at the issuer's Exchange Act reporting history. The request should include the following information.

1. Whether the issuer complied with its Exchange Act reporting obligations before its Bankruptcy Code filing

Because the issuer's efforts to inform the market of its financial condition are important, an issuer submitting a request should have been current in its Exchange Act reports for the 12 months before its Bankruptcy Code filing. /10 Accordingly, the issuer should discuss its Exchange Act reporting history for that period.

2. When the issuer filed its Form 8-K announcing its bankruptcy filing; whether the

issuer made any other efforts to advise the market of its financial condition

The Division considers the timeliness of the issuer's Form 8-K announcing its bankruptcy filing when determining whether to grant the request. /11 The Division does not have a specific, objective test concerning the timing of the Form 8-K filing. However, the issuer should state the date the Form 8-K was due and filed. If the issuer filed the Form 8-K after the due date, it should explain why. The issuer also should discuss any other efforts that it made to inform its security holders and the market of its financial condition.

3. Whether the issuer is able to continue Exchange Act reporting; whether the information in modified reports is adequate to protect investors

The issuer should discuss the reasons why it is unable to continue Exchange Act reporting. The request should discuss specifically: (1) whether the issuer has ceased its operations or the extent to which the issuer has curtailed operations; (2) why filing periodic reports would present an undue hardship to the issuer; (3) why the issuer cannot comply with the disclosure requirements; and (4) why the issuer believes granting the request is consistent with the protection of investors.

Management of the issuer also should represent, if true, that: (1) the filing of periodic reports would present an undue hardship; and (2) the information contained in the reports filed with the Bankruptcy Court pursuant to the Bankruptcy Code is sufficient for the protection of investors while the issuer is subject to the jurisdiction of the Bankruptcy Court.

B. Information Regarding the Market for the Issuer's Securities

The Division also considers the nature and extent of trading in the issuer's securities. The issuer should discuss in detail the market for its securities. Trading of the issuer's securities on a national securities exchange or the Nasdaq Stock Market is, by itself, sufficient evidence that there is an active market for those securities. The Division will not issue a favorable response to a request for modification of Exchange Act reporting for those securities. /12

Issuers that do not have securities traded on a national securities exchange or the Nasdaq Stock Market should quantify the effect of the Bankruptcy Code filing on the trading in the issuer's securities. /13 This information should demonstrate that there is minimal trading in the securities. /14

The issuer should state the number of market makers for its securities. The issuer also should provide detailed information regarding the number of shares traded and the number of trades per month for each of the three months before the issuer's Bankruptcy Code filing and each month after that filing. /15

General statements in the request that trading has been "minimal" or "insignificant" are not sufficient to enable the Division to reach a conclusion on the request. An unequivocal statement that there is "no trading" in the issuer's securities is sufficient. /16

C. The Timing of the Issuer's Request for Modified Reporting

An issuer should submit its request promptly after it has entered bankruptcy, not when it is preparing to emerge from bankruptcy. /17 The Division will consider a request as submitted "promptly" if it is filed before the date the issuer's first periodic report is due following the issuer's filing for bankruptcy. /18

IV. Positions Taken by the Division in Granting Requests

A. Reports Required While Bankruptcy Proceedings are Pending

Generally, the Division will accept, instead of Form 10-K and 10-Q filings, the monthly reports an issuer must file with the Bankruptcy Court under Rule 2015. /19 The issuer must file each monthly report with the Commission on a Form 8-K within 15 calendar days after the monthly report is due to the Bankruptcy Court.

Notably, the relief given applies only to filing Forms 10-K and 10-Q. /20 The issuer still must satisfy all other provisions of the Exchange Act, including filing the current reports required by Form 8-K and satisfying the proxy, issuer tender offer and going-private provisions. /21

Issuers reorganizing under the jurisdiction of the Bankruptcy Court must file a Form 8-K to disclose any material events relating to the reorganization. Issuers liquidating under the jurisdiction of the Bankruptcy Court must file a Form 8-K to disclose whether any liquidation payments will be made to security holders, the amount of any liquidation payments, the amount of any expenses incurred, and any other material events relating to the liquidation. /22

B. Reports Required Upon Emergence From Bankruptcy

1. An issuer that is reorganized under its bankruptcy plan

When an issuer's reorganization plan becomes effective, the issuer must file an appropriate Form 8-K. That Form 8-K should include the issuer's audited balance sheet. From then on, the issuer must file Exchange Act periodic reports for all periods that begin after the plan becomes effective. /23

Any post-reorganization filings under the Securities Act or the Exchange Act must include audited financial statements prepared in accordance with generally accepted accounting principles for all periods for which audited financial statements are required even though the issuer may have been subject to bankruptcy proceedings during some portion of those periods. /24

2. An issuer that is liquidated under its bankruptcy plan

After the issuer's liquidation plan becomes effective, the issuer must continue to disclose material events relating to the liquidation on Form 8-K. At the time the liquidation is complete, the issuer must file a final Form 8-K to report that event. /25

C. Effect on Short-Form Registration, Rule 144 and Regulation S

An issuer that has filed modified reports would not be considered "current" in its Exchange Act reporting, with respect to those reports due while its bankruptcy proceedings were pending, for purposes of: (1) determining eligibility to use Securities Act Form S-2 or S-3; (2) satisfying the current public information requirement of Securities Act Rule 144(c)(1); or (3) satisfying the reporting issuer definition of Rule 902(l) of Regulation S.

D. Availability of Rule 12h-3

Exchange Act Rule 12h-3 provides a means to suspend an issuer's obligation to file periodic reports under Section 15(d) of the Exchange Act. The Division has taken the position that modified Exchange Act reporting in accordance with a grant of a request would be sufficient for purposes of meeting the reporting requirement of Rule 12h-3. /26 Accordingly, an issuer that otherwise satisfies the conditions of Rule 12h-3 may suspend reporting upon emergence from its bankruptcy proceedings if it has been granted relief in response to a request and has satisfied the conditions of that grant.

1/ 15 U.S.C. 78m(a).

2/ 15 U.S.C. 78o(d).

3/ 15 U.S.C. 78a et seq.

4/ See Section 12(b) of the Exchange Act (15 U.S.C. 78l(b)).

5/ 15 U.S.C. 78l(g).

6/ 15 U.S.C. 77a et seq.

7/ 11 U.S.C. 101 et seq.

8/ See Exchange Act Rule 12b-21.

9/ The Division has granted nine no-action requests since January 1995. E.g., Comptronix Corporation (April 4, 1997); Cray Computer Corporation (May 16, 1996); I.C.H. Corporation (May 10, 1996); F&M Distributors, Inc. (May 1, 1996).

10/ Focus Surgery, Inc. (October 3, 1996).

11/ Item 3 of Form 8-K requires the issuer to file a current report on that form within 15 calendar days of specified events related to a bankruptcy filing.

12/ If the issuer remains current in its Exchange Act reporting requirements until trading on a national securities exchange or the Nasdaq Stock Market stops, it may then request modified reporting. F&C International, Inc. (October 15, 1993).

13/ An issuer's securities are not considered to be "traded" on a national securities exchange or the Nasdaq Stock Market if: (1) those securities have been delisted; or (2) trading in those securities on those markets has formally been suspended.

14/ E.g., Sea Galley Stores, Inc. (March 24, 1995) (tabular presentation demonstrated decreased trading volume in the issuer's securities).

15/ If national securities exchange or Nasdaq Stock Market trading stopped during one of these months, the issuer should show separately within that month the information for the periods before and after trading stopped.

16/ E.g., Numerica Financial Corporation (April 1, 1996) (noting that no transfers of issuer stock occurred for a two-year period and that transfer agent was given instructions to prohibit further transfers); F&M Distributors, Inc., supra, and Focus Surgery, Inc., supra (stating there was no trading in the issuer's stock).

17/ Selectors, Inc. (September 18, 1990) and AorTech, Inc. (September 14, 1990).

18/ Focus Surgery, Inc., supra. The staff also will consider a request to be submitted "promptly" if the issuer is current in its Exchange Act reporting after filing its Bankruptcy Code petition and through the date of its request. United Merchants and Manufacturers, Inc. (November 19, 1996).

19/ Fed. R. Bankr. P. 2015.

20/ If, as a result of a "hardship," an issuer wants to file in paper format rather than electronically on EDGAR, it should contact the Division's Office of Edgar Policy at (202) 942-2940.

21/ Transactions in the issuer's securities also continue to be subject to the requirements of the Exchange Act, including the tender offer and short-swing profit provisions.

22/ BSD Bancorp, Inc. (March 30, 1994); Cray Computer Company, supra; I.C.H. Corporation, supra.

23/ Famous Restaurants, Inc. (June 4, 1993); Sea Galley Stores, Inc., supra; Diversified Industries, Inc., supra.

24/ Any requests for relief from financial statement obligations should be sent to the Division's Office of Chief Accountant.

25/ E.g., Cray Computer Company, supra; I.C.H. Corporation, supra.

26/ Union Valley Corporation (November 2, 1993).

EXHIBIT C

June 14. 2004

04033265

Act: 34
Section: 15(d)
Rule:
Public Availability: 6-14-04

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: AmeriVision Communications, Inc.
Incoming letter dated May 14, 2004

Based on the facts presented, the Division is unable to provide the requested no-action relief regarding reports required to be filed with the Commission pursuant to Sections 13(a) and 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act"). We note in this regard that the Company's Exchange Act reporting obligation does not cease as a result of being subject to the protection of the Bankruptcy Court and we remind you of your continuing obligation to keep the market informed of developments related to the status and performance of the Company. See Exchange Act Release No. 9660 (June 30, 1972) and Staff Legal Bulletin No. 2 (April 15, 1997).

This position is based on the representations made to the Division in your letter. Any different facts or conditions might require the Division to reach a different conclusion. Further, this response expresses the Division's position on enforcement action only and does not express any legal conclusion on the questions presented.

Sincerely,

Jeffrey S. Cohan
Attorney-Examiner

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

June 14, 2004

Lesley R. Ford
Doerner, Saunders, Daniel & Anderson, L.L.P.
320 South Boston Avenue
Suite 500
Tulsa, Oklahoma 74103

Re: AmeriVision Communications, Inc.

Dear Ms. Ford:

In regard to your letter of May 14, 2004, our response thereto is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in your letter.

Sincerely,

David Lynn
Chief Counsel

DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.

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May 14, 2004

VIA FAX AND FEDERAL EXPRESS
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
Attn: Jeff Cohan

Re: Revised Request for Modification of Reporting Obligations Under the Securities Exchange Act of 1943 – AmeriVision Communications, Inc.

Dear Mr. Cohan:

On behalf of our client AmeriVision Communications, Inc., an Oklahoma corporation ("AmeriVision" or the "Company"), we hereby request, based upon the facts and circumstances discussed below, that the Staff agree not to recommend enforcement action by the Securities and Exchange Commission (the "Commission") if AmeriVision follows the modified reporting procedures set forth herein. The Company is currently required to file periodic reports under Section 13 of the Securities Exchange Act of 1934 (the "Exchange Act"). This letter replaces and supercedes the letter originally sent to the Commission on March 15, 2004.

Based on Exchange Act Release No. 9660 (June 30, 1972) (the "Release"), the Commission's Staff Legal Bulletin No. 2 (April 15, 1997) (the "Staff Bulletin"), and prior no-action correspondence, during the pendency of its Chapter 11 case (as discussed below), AmeriVision proposes to file with the Commission, under cover of Current Reports on Form 8-K, copies of the monthly financial reports that are required to be filed with the United States Bankruptcy Court pursuant to Bankruptcy Rule 2015 and the United States Trustee's Financial Reporting Requirements for Chapter 11 Cases, as well as other material information concerning developments in its bankruptcy proceedings, in lieu of continuing to file quarterly and annual reports under the Exchange Act. AmeriVision will continue to comply with all other requirements of the Exchange Act, including Regulation 14A regarding the solicitation of proxies.

I. Background

AmeriVision is a provider of long distance telephone and other telecommunications services, primarily to residential users. AmeriVision promotes its services under its LifeLine® service mark through the members of various non-profit organizations that support strong family values. These non-profit organizations receive a percentage of eligible, collected revenues when AmeriVision's customers designate them. In addition to long-distance and related telecommunication services, such as calling cards, prepaid cards and toll-free service, AmeriVision offers its customers Internet access and a credit card program under the LifeLine® service mark.

AmeriVision was incorporated in 1991 as an Oklahoma corporation and maintains its principal executive offices in Oklahoma City, Oklahoma. On December 8, 2003 (the "Petition Date"), AmeriVision filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Western District of Oklahoma (the "Bankruptcy Court"), Case Number 03-23388. The Debtor will continue to manage its properties and operate its businesses as a debtor-in-possession under the jurisdiction of the Bankruptcy Court and in accordance with the applicable provisions of the Bankruptcy Code.

II. Applicable Law

In the past, the Commission or its Staff has agreed to suspended or modify the Exchange Act reporting requirements of certain issuers subject to bankruptcy proceedings. The Release and Staff Bulletin reflects the Staff's position that the Commission will accept reports differing in form and content from the quarterly and annual reports required under the Exchange Act where the issuer is subject to bankruptcy proceedings or has ceased or severely curtailed its operations so long as the modified reporting procedure is consistent with the protection of investors. Granting the relief requested herein would be consistent with the Release, the Staff Bulletin and the Commission's previous no-action correspondence, where, as here, full compliance with the reporting requirements of the Exchange Act would pose an undue hardship, such compliance was not needed to protect and inform investors and the public, and the modified reporting procedures proposed were not inconsistent with the public interest. See, e.g., Hauser, Inc. (July 17, 2003); Insilico Holding Co. (March 18, 2003); Laclede Steel Company (July 25, 2002); Opticon Medical Inc. (June 28, 2002); Brazos Sportswear, Inc. (November 22, 1999); Roberds, Inc. (October 4, 2000); LA Gear, Inc. (February 27, 1998); Martin Lawrence Limited Editions (July 3, 1997); Comptronix Corporation (April 4, 1997); and Cray Computer Corporation (May 16, 1996).

The Release also refers to Section 12(h) of the Exchange Act, which permits the Commission to exempt issuers in whole or in part from the reporting requirements of the Exchange Act "if the Commission finds, by reason of the number of public investors, among of trading interest in the securities, the nature and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors." Many of these bases for granting relief under Section 12(h) are applicable to AmeriVision: there is no trading activity in AmeriVision's securities; the equity value of AmeriVision's shareholders has decreased significantly and has, in all likelihood, been eliminated; and AmeriVision's limited staff necessarily devotes a large portion of their time to activities related to AmeriVision's reorganization.

The Release also mentions Exchange Act Rule 12b-21 as a potential basis for relief from the reporting requirements of the Exchange Act. This rule provides, in part, that "[if] any required information is unknown and not reasonably available to the registrant...because the obtaining thereof would involve unreasonable effort or expense,...the information may be omitted...[and] such information on the subject as [the registrant] possesses or can acquire without unreasonable effort or expense, together with the sources thereof" may instead be provided. In its discussion of Rule 12b-21, the Release states that "in general, an unreasonable effort or expense would result if the benefits which might be derived by the shareholders of the issuer from the filing of the information are outweighed significantly by the cost to the issuer of obtaining the information."

For the reasons set forth above, AmeriVision believes that the cost and administrative burden to AmeriVision of obtaining the information necessary to comply with the Exchange Act reporting requirements significantly outweighs the benefits derived by AmeriVision's shareholders from AmeriVision's full compliance with the Exchange Act reporting requirements.

III. Discussion

A. AmeriVision Was Timely in Filing Its Form 8-K Reporting Its Chapter 11 Filing

AmeriVision publicly announced its bankruptcy filing in a press release two days after the Petition Date. On December 11, 2003, AmeriVision filed a Form 8-K with the Commission reporting the bankruptcy filings. The deadline for filing the Form 8-K with the Commission was December 23, 2003.

B. AmeriVision's Compliance With Its Exchange Act Reporting Obligations

AmeriVision has complied with all periodic reporting obligations under Section 13(a) of the Exchange Act for the twelve month period preceding the Petition Date, including the filing, on April 15, 2003, of the Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2002, and, on July 31, 2003, August 14, 2003, and November 19, 2003, of the Company's Quarterly Report on Form 10-Q and 10-QSB for the quarters ended respectively, March 31, 2003, June 30, 2003, and September 30, 2003. Due to a variety of problems that have arisen over the course of the past year (some which prevented AmeriVision from filing without unreasonable effort or expense), including the resignation of the Company's Chief Executive Officer, ongoing negotiations relating to refinancing and a final merger agreement, and the discovery of an understatement affecting the Company's liabilities, AmeriVision has had difficulties with the timeliness of these reporting requirements. However, in all instances in which the Company could not meet the reporting deadline, the Company has filed a notification of inability to timely file with the Commission and has completed the filing as soon as possible thereafter. Pending the outcome of this request, the Company has not filed its Form 10-K for its fiscal year ending December 31, 2003. The Company has filed a notification of inability to timely file its Form 10-K for 2003 with the Commission.

C. AmeriVision Has Continuously Advised the Market of Its Financial Condition

AmeriVision has continuously advised the market of its financial condition. The following are a few excerpts of certain disclosures that AmeriVision has previously made in its periodic reports disclosing its financial condition. This is by no means an exhaustive list of AmeriVision's previous public disclosures regarding its financial condition.

The following disclosures appeared in AmeriVision's Annual Report on Form 10-K for the fiscal year ended December 31, 2002 (filed on April 15, 2003):

> "Since 1998, we have experienced a decline in annual net sales from $124.2 million to $64.1 million. From January 2002 to December 2002, subscribers with traffic have decreased by approximately 20%. We have also had several changes in management in recent years. To counteract the decline in revenue and subscribers we have implemented several significant cost cutting strategies, as well as strategies to increase our subscriber base and net revenues. However, with continual declines in net sales we may not be able to meet our cash requirements in the near future.
>
> "As discussed elsewhere, we are in default of our credit facility and our subordinated and non-subordinated notes. As a result, an aggregate of $19.4 million principal amount of indebtedness, plus accrued and unpaid interest, may be accelerated and become due and payable on or after May 30, 2003. Upon the earlier of May 30, 2003 or the acceleration of either of our credit facility or our subordinated or non-subordinated notes, we would be required to either refinance the debts or repay the amounts due. We continue to hold discussions with our lenders concerning refinancing the debts or consummating a potential reorganization with PNG. We can provide no assurance that we will be successful in refinancing our debt, consummating a reorganization, or otherwise becoming able to meet our obligations as they become due or under accelerated repayment terms. Therefore, at December 31, 2002, all of our long-term debt is classified as current. Unless these matters can be resolved, there exists substantial doubt about our ability to continue as a going concern, as expressed in our independent auditors' report."

The following disclosures appeared in AmeriVision's Form 10-Q for the quarterly period ended March 31, 2003 (filed on July 31, 2003):

"From our inception through December 31, 2002 we have incurred cumulative net operating losses totaling approximately $12.1 million. During the years ended December 31, 2001 and 2002, we generated net income of $3.4 million, and $1.3 million. The improvements of net income from operating activities were primarily achieved as a result of reductions in operating expenses. However, for the three month period ended March 31, 2003 our net income was $83,000 compared to $786,000 for the same period in 2002. We reduced our accumulated stockholders' deficiency from approximately $25.8 million at December 31, 1997 to approximately $13.8 million at March 31, 2003. In addition to the net operating losses, the accumulated deficit was partially due to our declaration and payment of quarterly capital distributions to our stockholders during the period between 1994 and 1997, totaling approximately $16.0 million, and our redemptions of common stock totaling approximately $4.7 million. Our current liabilities exceeded our current assets by approximately $18.4 million at December 31, 2002 and $17.8 million at March 31, 2003."

"The FDIC sold our loan to LINC Credit, L.L.C. on May 14, 2003. We subsequently entered into a forbearance agreement with LINC Credit effective July 14, 2003. Among other things, and subject to earlier termination of the forbearance agreement for certain breaches of the agreement, the forbearance agreement provides for the credit facility to remain in place until September 30, 2003 at which time it may be renewed for two further months under certain conditions. Upon termination of the forbearance agreement, LINC Credit will have the right, but not the obligation, to accelerate the repayment of the entire amount outstanding under the credit facility. We can give no assurance that we will successfully renegotiate the credit facility or that the credit facility will be amended to include terms favorable to us or that LINC Credit will continue to forebear from taking action against us."

The following disclosures appeared in AmeriVision's Form 10-Q for the quarterly period ended June 30, 2003 (filed on August 14, 2003):

"As a result of the Company's default under the Credit Facility, Coast required the Company to stop payment to the Subordinated Creditors, and consequently the Company is in default of $5.5 million principal amount of our subordinated and certain non-subordinated notes, which may be subject to legal challenge. A non-subordinated lender presently may have the right, but not the obligation, to accelerate the repayment of the entire $1.6 million principal balance and related penalties and interest outstanding under these notes, which may be subject to legal challenge. The subordinated lenders also may have the right to demand repayment of the entire $3.9 million principal balance and related penalties and interest outstanding under these notes, subject to notification to and prior rights of the secured creditor. Certain of our subordinated note holders have expressed a desire to accelerate the repayment of their notes."

The following disclosures appeared in AmeriVision's Form 10-QSB for the quarterly period ended September 30, 2003 (filed on November 19, 2003):

"The Company is currently engaged in a dispute with LINC Credit concerning the Forbearance Agreement. LINC Credit has not agreed to extend the forbearance period as required by the terms of the Forbearance Agreement. The Company filed a lawsuit against LINC Credit on November 6, 2003 alleging among other claims that LINC Credit breached its obligations under the Forbearance Agreement. On November 10, 2003, the Company obtained a temporary restraining order prohibiting LINC Credit from taking the Company's cash that has been pledged as collateral for the credit Facility."

"The Company is actively pursuing other available financing options that may be available. As discussed further in Note E to the financial statements, if the Company is not successful in obtaining alternative financing, there could be a material adverse effect on the Company's ability to continue as a going concern and to meet its obligations as they come due."

The Company also informed its shareholders of its Chapter 11 filing through the January/February 2004 edition of its newsletter, an excerpt of which is enclosed with this letter. Finally, the Company provides reports concerning its Chapter 11 status on its shareholder web page at www.lifeline.net/pr.

D. AmeriVision Has Disclosed its Investigation by the Commission to the Market

AmeriVision has disclosed its investigation by the Commission to the market in a number of its Exchange Act filings. The following disclosures appeared in AmeriVision's Annual Report on Form 10-K for the fiscal year ended December 31, 2002 (filed on April 15, 2003):

"In late 1995, we commenced an internal investigation to determine whether we might have committed securities law violations in connection with the offer and sale of our restricted securities, and separately whether we should have previously registered our common stock in accordance with the Securities and Exchange Act of 1934. In August 1996, we voluntarily reported our preliminary findings to the Securities and Exchange Commission, which then instituted its own investigation.

In July 1998, the Securities and Exchange Commission issued a cease-and-desist order stating that:

- We, two former directors/officers, and an affiliated company had violated Sections 5(a) and 5(c) of the Securities Act of 1933, as amended and Section 12(g) of the Securities Exchange Act of 1934, as amended and Rule 12g-1 promulgated under the Exchange Act;
- We had violated Section 12(g) of the Exchange Act and Rule 12g-1; and
- The two former directors/officers had caused the violation of Section 12(g) of the Exchange Act and Rule 12g-1.

The Securities and Exchange Commission ordered us, the two directors/officers and the affiliated company to cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act and the two directors/officers and us to cease and desist from committing or causing any violations or future violations of Section 12(g) of the Exchange Act and Rule 12g-1. No monetary fines or penalties were assessed against us, our officers or our affiliate."

E. There Is No Trading in AmeriVision's Securities

The Release provides that in "determining whether the modification of the [Exchange Act] reporting requirements with respect to a particular issuer would be consistent with the protection of investors the Commission will consider the nature and extent of the trading in the securities of the issuer." Additionally, the Staff Bulletin notes that the Staff will review "the nature and extent of trading in the issuer's securities" when considering the issuer's request for modified reporting.

The Company's stock is not listed on a national securities exchange or the NASDAQ Stock Market. There is no established public trading market for AmeriVision's shares of Common Stock. As of December 8, 2003, there were 878,761.185 outstanding shares of Common Stock owned by approximately 1,300 holders of record. The Company is not aware of any market makers or market making activities. The only transfers of securities of which the Company is aware are approximately 13,000 shares issued to directors in compensation for Board service, 5,000 shares issued to Robert Cook as part of his compensation for service as President, and certain transfers between family members, such as from husband to wife. The discrepancy in the number of shares between the bankruptcy filing and the last Form 10-Q filing is attributable to the shares issued to the Board and the President, discussed above, and to certain shares recently cancelled by the Company that were represented by duplicate stock certificates discovered to have been erroneously issued to the same shareholders in the same amount. The fractional shares appear to have been issued in connection with early transactions involving the sale of stock. Simply put, a fractional share was created by dividing the then purchase price per share into the amount offered for the stock. No fractional shares have been authorized for issuance by the Company's current Board of Directors.

F. Continued Compliance Would Cause an Undue Hardship on AmeriVision and Its Limited Financial and Administrative Resources

AmeriVision believes that continued compliance with the reporting requirements of the Exchange Act would cause an undue hardship on AmeriVision's limited financial and human resources. AmeriVision intends to reorganize in order to recapitalize the Company and currently is in the process of restructuring its debt within the provisions of the Bankruptcy Code. AmeriVision does not anticipate ceasing its operations. Rather, the Company is working to streamline its operations and increase its efficiency. The Company presently is under a cash collateral order from the Bankruptcy Court. Pending approval of the plan of reorganization, the Bankruptcy Court retains and exercises the authority to approve or disapprove any action of the Company, including the expenditure of funds for legal and accounting advisors. The Bankruptcy Court has not approved the Company's retention of an outside auditing firm. The Company requested approval of the Bankruptcy Court to retain an accounting firm in connection with its reporting obligations under the Exchange Act, but its request drew substantial objection from its principal secured creditor and the U.S. Trustee. It is important to note that the Company's principal secured creditor has stated that it will not approve the professional fees and costs associated with preparing the reports required under the Exchange Act, and the Company's current outside auditor, Cole & Reed, CPA, has stated that it will not waive its pre-petition claim for the purpose of allowing it to become qualified as an "independent" accountant to conduct post-petition audits. The Company talked with another accounting firm regarding the possibility of conducting an audit of the Company's books, but the firm stated it would be difficult for it to accept an engagement, citing the Company's financial condition and the increased risks associated with Sarbanes-Oxley. In view of the objections voiced by the Company's principal secured creditor and the U.S. Trustee, and the fact that the Company did not have an accounting firm willing to undertake an audit, the Company withdrew its request for approval. Thus, the Company has been unable to engage an auditor to audit its 2003 financial statements because it does not have the funds available to pay for this service.

AmeriVision relies on a limited corporate staff for all its financial reporting, which has increased substantially because of the additional bankruptcy reporting requirements. Accordingly, AmeriVision believes that continued full compliance with the Exchange Act reporting requirements, combined with the additional reporting tasks resulting from the bankruptcy filing, would pose an undue hardship on its limited staff. As a result of the bankruptcy filing, this staff is primarily engaged in dealing with bankruptcy-related matters including administering the Chapter 11 case, preparing detailed budgets, formulating and preparing disclosure materials relating to the Chapter 11 case, analyzing accounts payable and accounts receivable, compiling the financial information required for the Monthly Operating Reports, restructuring AmeriVision's corporate operations, and preparing a plan of reorganization. In addition, these corporate employees must handle the financial, administrative and accounting services for AmeriVision and involve themselves in the various activities relating to the continuing conduct of AmeriVision's business operation. Thus, preparing the Exchange Act reports requires time and resources that AmeriVision's limited accounting and financial reporting staff does not have. In addition, the Company recently reduced the number of persons working on general ledger preparation, which is essential for both audit work and the Company's bankruptcy filings, from four full time and one part time, to three full time and one part time.

For all of the above reasons, AmeriVision submits that the costs, both monetary and administrative, of fully complying with its Exchange Act reporting requirements would cause an undue hardship given its current situation.

G. Modified Reporting Procedures Will Benefit AmeriVision's Creditors

The compilation of financial and non-financial data and the preparation of an Annual Report on Form 10-K would require expending additional resources contrary to the Company's creditors' best interests. AmeriVision's available cash is limited and, during the reorganization process, such cash will be needed to pay creditors and administrative expenses, including, but not limited to, ordinary course of business expenses and payments to other outside professionals, including AmeriVision's bankruptcy attorneys, financial advisors, and crisis manager. Any reduction in AmeriVision's Exchange Act reporting expenditures would directly benefit AmeriVision's creditors.

H. Modified Reporting Procedures Will Adequately Protect Shareholders

Shareholders will not obtain any significant benefits from AmeriVision's continued full compliance with the periodic disclosure requirements of the Exchange Act. AmeriVision has kept its shareholders informed of material developments in its financial condition through its Exchange Act filings. The filing if its bankruptcy petition was promptly disclosed in a press release on December 10, 2003 and in a report filed on Form 8-K on December 11, 2003. The Company President/CEO also sent a letter to the shareholders disclosing the bankruptcy filing on December 10, 2003. AmeriVision's Form 10-K for its fiscal year ended December 31, 2002, and its Form 10-Qs for the first three quarters of fiscal 2003 disclosed the Company's drastic decline in net sales, the Company's default with its credit facility and its subordinate and non-subordinate notes, and its uncertainty about its ability to continue as going concern and to meet its obligations as they come due.

AmeriVision believes that the information contained in the Monthly Operating Reports and other material information concerning developments in its bankruptcy proceedings, if filed with the Commission as proposed herein, will be sufficient to protect shareholders. The Monthly Operating Reports provide relevant financial information to shareholders concerning developments in the bankruptcy proceeding and the Company's overall financial condition. Specifically, the Monthly Operating Reports include, among other things, a profit and loss statement detailing AmeriVision's revenues, expenses and net profit or loss for the month, a detailed listing of AmeriVision's cash receipts and cash disbursements, a schedule setting forth the aging of AmeriVision's accounts payable and receivable, information with respect to payments made by AmeriVision to its secured creditors during the month, a schedule of AmeriVision's tax liabilities and insurance and a narrative description of significant events occurring in the bankruptcy case. Although the Monthly Operating Reports will be in a different format from the Exchange Act forms and will contain slightly different information, AmeriVision believes that the Monthly Operating Reports will provide shareholders with most of the financial and other data that they might consider important. Further, the Monthly Operating Reports will be filed more often, include additional information, and can be prepared at a lower incremental cost to the Company in terms of financial and administrative resources.

Moreover, AmeriVision believes that given the fact that there is no trading in the Company's securities, there is no guaranty that the shareholders will retain any equity interests after bankruptcy, and the Company is essentially restructuring its debt, the filing of periodic reports under the Exchange Act will not serve disclosure and investor protection purposes and stockholders would most likely find such reports of little or no value.

Under the provisions of the Bankruptcy Code, AmeriVision is required to file monthly financial statements and operating reports with the Bankruptcy Court. AmeriVision proposes to file with the Commission under cover of Form 8-K copies of each Monthly Operating Report within 15 calendar days following the date on which the said report is filed with the Bankruptcy Court

I. The Timing of the Issuer's Request for Modified Reporting

The Staff Bulletin and related no-action correspondence states that a request is submitted promptly if it is filed before the date the issuer's first period report is due following the issuer's filing for bankruptcy.[1] AmeriVision's request for relief was filed on March 15, 2004, which was in advance of its next required filing, an Annual Report on Form 10-K (required to be filed on March 30, 2004).

IV. Request for Relief

AmeriVision proposes to file with the Commission under cover of Form 8-K copies of each Monthly Operating Report within 15 calendar days following the date on which the said report is filed with the United States Bankruptcy Court. AmeriVision will also promptly file reports on 8-K to disclose any material events related to its bankruptcy case and its reorganization efforts. This modified reporting procedure would replace the periodic reports required under the Exchange Act until the reorganization or liquidation of AmeriVision is complete. Upon confirmation of AmeriVision's plan of reorganization, AmeriVision will file an appropriate report on Form 8-K that would include an audited balance sheet, and thereafter will file periodic Exchange Act reports for all periods that begin after the plan becomes effective.

AmeriVision believes that the proposed modified reporting procedure will best serve the interests of all its shareholders. Accordingly, we respectfully request that the Staff provide us with written assurance that it will not recommend any enforcement action to the Commission against AmeriVision if the modified reporting procedures set forth above is implemented. We are requesting that AmeriVision's reporting obligations be modified as set forth herein effective as of March 30, 2004, the date upon which the filing of AmeriVision's Form 10-K was first required.

[1] *See* Focus Surgery, Inc. (October 3, 1996).

In accordance with Release No. 33-6269 (December 5, 1980), we have enclosed seven addition copies of this letter. If you have any questions regarding this matter or if you need additional information, please do not hesitate to contact me directly at (918) 591-5323. If for any reason the Staff believes that they will be unable to respond affirmatively to this request, we would appreciate the opportunity to confer with the members of the Staff by telephone, in advance of a formal written response.

Sincerely,

Lesley R. Ford

Lesley R. Ford of
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.

LRF:dj