UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Chapter 11:

Case Number: 08-12229 (MFW)

Washington Mutual Inc.
Debtors

SHAREHOLDER PHILIPP SCHNABEL
CLOSING ARGUMENTS ON THE PLAN CONFERMATION OF
the Modified Sixth Amended Joint Plan of Reorganization

PRELIMINARY STATEMENT

I am a shareholder, an Interested Party in this case, and am closely following this case and the filings to submit my written closing argument in summation of the facts and issues of law per this Court's instructions.

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 Washington Mutual Inc.'s equity holders.

Closing Argument

Following over five days of testimony from fact and expert witnesses, the presentation of thousands of pages of documentary evidence, and a barrage of court filings it is easy to lose sight of the core questions that this Court must answer in connection with the Plan Confirmation.

Did the Debtors adequately disclose all and any Information of the Confidentiality Agreements during the bankruptcy cases proceedings to the general investing public?

The answer, revealed by the evidence presented to this Court, is "NO."

Did the Settlement Note-holders ("SH")[1] trade on non-public material information?

The answer, revealed by the evidence presented to this Court, is "YES."

Did the SH, as Insiders, influence the bankruptcy case proceedings to their sole advantage over other parties?

The answer, revealed by the evidence presented to this Court, is "YES."

Did the Debtors act unethically and ignore their fiduciary duty to shareholders?

The answer, revealed by the evidence presented to this Court, is "YES."

Request

Accordingly, this Court should deny the Plan Confirmation, remove the *debtor in possession* Status of the Debtor and grant the Equity Committee Motion for Authority to Commence and Prosecute

1 The Settlement Noteholders (Owl Creek Asset Management,L.P., Appaloosa Management, L.P., Centerbridge Partners, LP, and Aurelius Capital Management LP, and several of their respective affiliates) hold claims in various classes, including Senior Notes, Senior Subordinated Notes, and PIERS claims.

claims[Docket: 8179].

1. ***Did the Debtors adequately disclose all and any Information of the Confidentiality Agreement's during the bankruptcy cases proceedings to the general investing public?***

It is unlawful to pass material non-public information to outsiders who may trade. This practice, known as "tipping," involves providing material nonpublic information to any person who might be expected to trade while in possession of that information. See *Dirks v. SEC,* 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983) (duty to disclose), also see *Chiarella v. United States,* 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980).

The Confirmation process has uncovered massive volumes of information never before available to the general investing public, all of which sheds light on the true nature and condition of Washington Mutual's Settlement negotiations . This information is based on an unprecedented number of detailed statements of the Settlement Note-holders, who themselves observed the true conduct and condition of the settlement negotiations in every development stage and the Debtor in the confirmation hearing process.

The courts have produced no blanket rule for all situations to determine whether information has entered the public domain so that it can be the basis for trading without any danger of insider trading liability.

Most courts have taken the view that information is "public" only after there has been public dissemination of some form and the market has had an opportunity to "absorb" the disclosed information[2] Mere disclosure is not enough, for "[t]acking a notice to the loading dock door constitutes disclosure but does not amount to dissemination."[3]

The only evidence present to the court are the Monthly Operating Report's ("MOR") filed by the Debtor as "public disclosure".

Under the SEC rules it is not a disclosure at all, even if they did file the "MOR" as a Form 8-K.

a) The Disclaimer of every single MOR is clear to the point:

"Washington Mutual, Inc. ("WMI") and WMI Investment Corp. (together, the "Debtors") caution investor and potential investors in WMI not to place undue reliance upon the information contained in this Monthly Operating Report, which was not prepared for the purpose of proving the basis for an investment decision relating to any of the securities of WMI. The Monthly Operation Report ("MOR") is limited in scope, covers a limited time period, and has been prepared solely for the purpose of complying with the monthly operating guidelines as described in the Chapter 11 Trustee Handbook, United States Department of Justice, May 2004 in accordance with U.S.C. §586(a)(3). The Monthly Operating Report was not audited or reviewed by accounting principles, does not purport to present the market value of WMI's assets and liabilities or the recover-ability of WMI's assets;.....This disclaimer applies to all information contained herein"

SEC pronouncements have tended to be demanding, yet vague. The official SEC position seems to be that "[p]roper and adequate disclosure of significant corporate developments can only be effected by a public release through the appropriate public media, designed to achieve a broad

2 See LOSS & SELIGMAN, supra note 18, at 3505

3 J. Robert Brown, Jr. , THE REGULATION OF CORPORATEDISCLOUSURE § 4.02[3], at 4-7 (3d ed. 1998)

dissemination to the investing public generally and without favoring any special person or group."[4] The first major insider trading case to be litigated in the court, SEC v. Texas Gulf Sulphur Co. .[5]

"Before (an) insider may act upon material information such information must have been *effectively disclosed in a manner sufficient to insure its availability to the investing public.* Particularly here, where a formal announcement to the entire financial news media had been promised in a prior official release known to the media, all insider activity must *await dissemination* of the promised official announcement."[6]

After Texas Gulf Sulphur established the basic rule that no trading should occur until after and probably not *immediately* after the information appears on the Dow Jones News.

Against this non-publication possibility and in furtherance of a sound policy of maximum dissemination, a company would be wise to issue important news widely, e.g., to Dow Jones, to Reuters, to the AP and UPI, broker-dealers and so on.(hereinafter referred to as "recognized channels of distribution").

"Since a merger in which it is bought out is the most important event that can occur in a small corporation's life, to wit, its death, we think that inside information, as regards a merger of this sort, can become material at an earlier stage than would be the case as regards lesser transactions—and this even though the mortality rate of mergers in such formative stages is doubtless high." *SEC v. Geon Industries, Inc.*, 531 F.2d 39, 47-48 (1976).

The Tax refund split and Washington Mutual's Settlement negotiations are truly the most significant corporate developments of Wasington Mutual Inc., which the Settlement Note-holders knew.

b) Significant Corporate Developments are?

See Basic, 485 U.S. at 231-32; *TSC Industries, Inc*, 426 U.S. at 449.
It is impossible to list all types of information that a court might deem material. However, courts have found that information dealing with the following subjects is material:

- earnings estimates;
- significant write-offs or significant increases in reserves;
- significant new products
- major changes in management;
- proposals, plans, negotiations, or agreements, **even if preliminary in nature**, involving significant corporate transactions, such as mergers, tender offers, joint ventures, or purchases or sales of substantial assets;
- public offerings; and
- significant litigation or government agency investigations.

In clear contrast to the statements of Mr. Krueger:**[transcript of Day 5, 7/19/2011 page 138 line 10 to line 21],[transcript of Day 5, 7/19/2011 page 143 line 21 to page 144 line 4],[transcript of Day 5, 7/19/2011 page 164 line 8 to line 17],[transcript of Day 5, 7/19/2011 page 166 line 11 to line 16],[transcript of Day 5, 7/19/2011 page 180 line 2 to line 6].**

"Circumstantial evidence has no less weight than direct evidence as long as it reasonably establishes

4 Faberge, Inc., 45 S.E.C. 249,256 (1973), quoted in Dirks v. SEC, 463 U.S. 646, 645, n.12(1983);accord Jack Schaefer, 8 SEC Docket 261 (1975)
5 258 F. Supp. 262 (S.D.N.Y. 1966), aff'd in part rev'd in part, 401 F.2d 833 (2d Cir. 1968)(en banc)
6 Id. at 854

that fact rather than anything else." *Burrell v. Bd. of Trustees of Ga. Military College, 970 F.2d 785, 788 (11th Cir.1992).*

The insider information in this case meets the materiality standard. *In Basic Inc. v. Levinson, 485 U.S. 224, 238, 108 S.Ct. 978, 987, 99 L.Ed.2d 194 (1988)*, the Supreme Court held that preliminary merger talks can be material well before any agreement is reached. The materiality of an uncertain prospective event "depend[s] at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *Id.* . The Court explained that "a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels," and consider factors such as "board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries." *Id. at 239, 108 S.Ct. at 987.* The determination of materiality "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Indus., Inc., 426 U.S. at 450, 96 S.Ct. at 2133.*

On March 22, 2011, the Supreme Court of the United States issued a decision in the matter of *Matrixx Initiatives, Inc., et al. v. Siracusano, et al., No. 09-1156.*

The Court reaffirmed the traditional test of *Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)* and *TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)*, that the materiality requirement under Section 10(b) of the Exchange Act is satisfied when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." In Basic, the Court had rejected a bright-line test for determining materiality, observing that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Id., at 236.*

In SEC v. Mayhew, 121 F.3d 44 (2d Cir. 1997), where the merging companies had retained a consulting firm, signed confidentiality agreements, and held meetings between top officials, the Second Circuit concluded that the "substantial steps" requirement was satisfied, despite the fact that the companies had not settled on a tender offer as the form of the merger. *Id. at 53.*

In this case there were meetings between executives and Settlement Note-holders, which was followed by due diligence procedures and a confidentiality agreement, from which Settlement Note-holders realized that the deal had to go down fast. These activities, which did result in a settlement proposal, were substantial steps for purposes of Rule 14e-3.

The only publication was the MOR, which itself can not serve as a basis for action and may not, according to the Disclaimer, which clearly says "... caution investor and potential investors in WMI not to place undue reliance upon the information contained.." and far more important all the information was not contained, WMI published only selected facts. That alone was inadequate.

The MOR is not an official announcement of the company, because with an official announcement a shareholder of the company can hold the company accountable for the statement, that is not the case with the MOR; the disclaimer clarifies this point.

The MOR in fact did not comply with GAAP*, it was never intended. GAAP are imposed on companies so that investors have a minimum level of consistency in the financial statements they use when analyzing companies for investment purposes.

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* *Generally Accepted Accounting Principles* (US-*GAAP* [gæp])

To be effective , information "must be disseminated in a manner calculated to reach the securities market place in general trough recognized channels of distribution...."[7]

Non-public information may include, in addition to corporate developments not yet announced, information available to analysts, brokers, or institutional investors and undisclosed facts that confirm or disprove widely circulated rumors; disclosure to institutional investors, as the Settlement Note-holders, for example, does not constitute public disclosure and such intentional selective disclosure, in addition to being highly risky, is prohibited under Regulation FD unless simultaneous public disclosure of the information is made.

"So, in this instance, the only information that we had that wasn't disclosed in the monthly operating report was the back and forth with JPMorgan, in which the parties were very, very far apart."[transcript of Day 4, 7/18/2011 page 84 line 7 to line 10]

The Settlement negotiations were not made public by the Debtor, as the case law clearly shows that was non-public material.

"Yes.I mean, again, the parties were very, very far apart."[transcript of Day 4, 7/18/2011 page 83 line 5 to line 6]

That is irrelevant, if they were are very far a part, the Settlement Note-holders learned a very useful information and could use it as an advantage, because the general public was unaware of the any Settlement negotiations between the Debtor and JPM[8].

That would require the Debtor to issue a disclosure, which did not happen.
The fact of disclosure is bitter sweet, even more if you look at the statement of Mr. Dan Gropper:

"When the wall came down, I brought to the attention of our research team the footnote that I had previously mentioned in the monthly operating report. It is not a research input that our team had focused on, prior to the wall coming down, as I mentioned, it was a period of extreme stress in the financial markets, and we had relegated the analysis of the monthly operating reports to a junior analyst who did not pick it up." [transcript of Day 4, 7/18/2011 page 94 line 17 to line 23]

It was only possible to point to this information, because he used non-public material information, which he got from the confidential period. How should have a normal investor have known that this information was this important to Washington Mutual Inc?

It is clear from the facts a disclousre as required, under the law, never took place. The general investing public was unaware of the information, which the Settlement Note-holders got from the Debtor. The general investing public got a MOR, which was only published and not broadcast by the recognized channels of distribution and therefore, was not a disclosure; a MOR which included only selected information[#] and not the full base of information the Settlement Note-holders knew.(See **[transcript of Day 4, 7/18/2011 page 84 line 7 to line 10],[transcript of Day 4, 7/18/2011 page 156 line 21 to page 158 line 7], [transcript of Day 5, 7/19/2011 page 70 line 9 to line 13]**)

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7 Faberge, Inc., 45 S.E.C. 255 (1973)(emphasis added)

8 JP Morgan Case

[transcript of Day 7, 7/21/2011 page 148 line 21 to page 149 line 14]

Unusual market activity may also trigger a requirement for immediate public disclosure. "This is particularly true where the company knows or has reason to believe that material non-public information has been made selectively available to certain market participants and that this selective availability may be the cause of unusual market activity." *SEC Release No. 32-182713,* (November 19, 1981). Thus, if rumors or unusual market activity indicate that information on impending developments has become known, a clear public announcement may be required, even though the matter may not have yet been presented to the company's board of directors.

The Tax Refund-split and the Settlement got a proper distribution on March 12, 2010 with the official press release; every recognized channel of distribution reported the amount of 5.6 billion dollars and how the amount would be split. This was the first time this news was made public in a proper way under the law.

2. ***Did the Settlement Note-holders trade on non-public material information?***

Most of the stock purchases were made immediately after the removal of the restriction. A Settlement Note-holder who uses confidential information in a wrongful manner to buy or sell securities is guilty of securities fraud.(See **[transcript of Day 4, 7/18/2011 Page 174 line 10 to line 22],[transcript of Day 5, 7/19/2011 Page 50 line 19 to page 51 line 15],[transcript of Day 5, 7/19/2011 Page 53 line 8 to line 18],[transcript of Day 6, 7/20/2011 Page 128 line 7 to line 11],[transcript of Day 6, 7/20/2011 Page 275 line 17 to line 20],[transcript of Day 6, 7/20/2011 Page 275 line 25 to page 276 line 11],clear to the point [transcript of Day 6, 7/20/2011 Page 305 line 1 to line 8],**)

Every Trade took place right after the removal of the restriction, as it is unlawful, shown by the case law.

"Q. And what were your first transactions after the debtor's disclosure of the amount of its estimate of the second net operating loss-related tax return -- tax refunds?
A. We bought peers and we continued to buy senior subs on 12/31, which we had been doing for the two quarters prior.
Q. And if you go down the rest of page 18 and 19, there's a fairly significant number of trades in that first week of January, right?
A. Uh-huh."[transcript of Day 6, 7/20/2011 Page 254 line 15 to line 23]

That is the next day, after the "disclousre", which was not a discloure at all under the law.

The trading record clearly shows, the Settlement Note-holders did not wait a single second to get the trading started. The Settlement Note-holders did use the material non-public information, as an advantage over the general public investor, which did not get this information as required under the law, because a disclousre never took place and the market had never a chance to get an understanding.

a) *May Insider, as the Settlement Note-holders, wait with their "fingers on the Button" and place their orders the instant the information becomes "public" by showing up on a recognized channel of distribution?*

In *Texas Gulf Sulphur* the answer was no and the Second Circuit clearly indicating that an insider should not be allowed to sit with her finger on the telephone speed dailer in order to call a stockbroker the second the information appears on the recognized channel of distribution.Rather the court indicated, there should be no trading by insiders until a period of time has passed to enable the market to absorb the information in order to allow investors a chance to make an informed decision.

Not surprisingly, there is no clear rule regarding what period of time constitutes a reasonable period for absorption. The issus has to be addressed on a case by case basis with two of the determinative factors being the nature and the complexity of the information.

Even after public disclosure of information regarding the Corporation, you generally must wait a period of two or three days[9] for the information to be absorbed by public investors before you can treat the information as public. Non-public information may include:

- Information available to a select group of analysts or brokers or institutional investors;
- Undisclosed facts that are the subject of rumors, even if the rumors are widely circulated; and
- Information that has been entrusted to the Corporation on a confidential basis until a public announcement of the information has been made *and* enough time has elapsed for the market to respond to a public announcement of the information (normally two days).

As a rule of thumb[9],companies generally allow one to three days (depending on the nature of the market for the company's securities) after public disclosure of information (a press release, for example) regarding the company for investors to absorb the information and the company to treat the information as public.

The Settlement Note-holders did not wait a single second to execute their actions. That is clear from the testimony and the trading records. WaMu debt spiked immediately after each of the confidentiality periods ended.

Aurelius admited there was only one model for WMI, which every trader of Aurelius could use to make investment desicions on the stock of WMI.That model contained recovery forecasts and those forecasts were in real-time , i.e., reflected settlement negotiations. Any trader reviewing that model wouldn't have to speak to Aurelius' counsel to receive either the knowledge that settlement talks were ongoing or their content.(See **[transcript of Day 5, 7/19/2011 page 92 line 16 to page 93 line 3],[transcript of Day 5, 7/19/2011 page 95 line 10 to line 20],[transcript of Day 5, 7/19/2011 page 95 line 10 to page 96 line 7],[transcript of Day 5, 7/19/2011 page 95 line 10 to line 20]**)

The Second Circuit noted initially that the key to whether illicit trading has occurred is when the insider placed the order, not when the order was executed.[10]
It would be a huge error of this court to look only at the execution time of the trades.

b) Fairness issue

The evaluation of fairness in the field of securities regulation must involve an assessment of an activity's equity in reference to some individual or group, most importantly the party or parties impacted by that activity, rather than being based purely upon metaphysical theory.
The fairness issue evaluated by the Court in *O'Hagan*[11] involved fairness to the corporate source of

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9 The American Exchange recommends that insiders wait from 24 to 48 hours after general publication of information.

10 See Texas Gulf Sulphur, 401 F.2d at 853 n.17

11 United States v. O'Hagan 521 U.S. 642 (1997). In O'Hagan, the Supreme Court decided the broad legal

the inside information. The essence of the misappropriation theory is that it is unfair-an inequity nearing fraudulence-for an investor, through deceptive nondisclosure to the source, to profit from inside information intended solely for a corporate purpose.

This type of unfairness does exist in the trading of the Settlement Note-holders, in which the tipping of inside information was involved.

The information the Settlement Note-holders got, should have never been used to trade in securities of the Debtor.[12] That is in violation of Exchange Act Sections 10(b) and Section 14(e), and Rules 10b-5 and 14e-3. The general investing public suffered harm from the Settlement Note-holders use of non-public information in purchasing the securities of the Debtor. The threat to fair and honest markets, investors confidence and market integrity comes from the mere fact that the information used by the Settlement Note-holders was nonpublic.

3. Did the Settlement Note-holders ("SH"), as Insider, influence the bankruptcy cases proceedings to their sole advantage over other parties?

The decision, *Schubert v. Lucent Techs. (In re Winstar Communications, Inc.)*, 554 F.3d 382 (3rd Cir. 2009), confirms that a corporate entity need not have actual managerial control over a debtor in order to be considered an insider subject to the longer reach back period under 11 U.S.C.§ 547(b). Instead, a non-statutory insider exerts control over a debtor by forcing transactions with the debtor that are not at arm's length.

In Winstar Communications , even in the absence of actual control, a significant degree of influence over a prospective debtor's affairs and conduct, coupled with non-arm's length dealings, can lead to an "insider" designation for a creditor in connection with preference litigation or estate causes of action challenging the priority or validity of a creditor's claims.

In *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman)*, the relationship must be "close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." The alleged insider's degree of control over the debtor is relevant but not dis-positive. Under the Third Circuit's ruling in *Winstar Communications*, when a creditor is able to control a debtor's actions to such an extent that the debtor becomes a "mere instrumentality," the creditor qualifies as a non-statutory insider.

The Settlement Note-holders have used their "blocking" position in debt securities of Washington Mutual Inc. to get information and used it to exercise power over the Debtor, who would otherwise have never made contact with the Settlement Note-holders. The treatment of the Equity Committee shows this fact true to its core.(See**[transcript of Day 4, 7/18/2011 Page 164 line 4 – page 165 line 12]**)

On his direct examination, Kosturos finished up by asserting that the debtors were in complete control of the negotiations that led to the GSA. However, on cross-examination, Kosturos appeared completely unfamiliar with billion-dollar concessions being offered by JPM Chase Bank. Generally, Kosturos simply is not credible as the leader of the debtor negotiations but more as the figurehead for the debtors while the Settlement Note-holders were the driving force. In his first questions

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issues involved and remanded the case to the Eighth Circuit for a ruling consistent with the guidelines established by the Court. See United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998), on remand from 521 U.S. 642 (1997).

12 See Rothberg v. Rosenbloom, 771 F.2d 818 (3rd Cir. 1985), rev'd on other grounds after remand 808 F.2d 252 (3rd Cir. 1986), SEC v. Lenfest, 949 S Supp. 341, 345 (E.D. Pa. 1996) , SEC v. Maio 51 F.3d 623, 634 (7th Cir. 1995), SEC v. Cherif, 933 F.2d 403, 410 (7th Cir. 1991), cert. denied 502 U.S. 1071 (1992), SEC v. Clark 915 F.2d 439, 435 (9th Cir. 1990), United States v. O'Hagan 521 U.S. 642 (1997)

Sargent was able to establish that lawyers representing some of the Settlement Note-holders were present at the meeting with JPM Chase Bank in which a settlement offer was presented while on direct examination, Kosturos claimed that the Settlement Note-holders were not told of the upcoming meeting with JPM Chase Bank and thereby suggested that the Settlement Note-holders were in the dark.

The Settlement Note-holders gained a power over the Creditor Committee, beause they held more than 50% of two Trustee's debt claims[13] apparently creating huge angst for the Trustees to go against the will of the Settlement Note-holders. The change in the behavior of the PIERS Trustee shows this fact clearly.

The Settlement Note-holders used the "blocking" position's power to get inside the bankruptcy case and by being there, the hedge funds gained valuable knowledge (i.e. the interest rate Washington Mutual intended to pay, the likely timing of a settlement, the rough outlines of the negotiations, the positions of the parties and likelihood of successful lawsuits against the FDIC[14] and JPM.)

With this knowledge the Settlement Note-holders directed the way this bankruptcy has gone, because if the Debtor went against the Settlement Note-holders, they would have blocked the plan of reorganization, because no class of debt would have approved the plan of reorganization.

"So I wasn't happy as a matter of process that the debtors had gone off and negotiated without, let alone seeking our input, but even telling us about it. So I expressed my displeasure in that regard to Mr.Kostoros."
[transcript of Day 4, 7/18/2011 page 73 line 13 to line 16]

Why should the Debtor consult with Aurelius and "seek" the input from them, if they did not want to control the settlement negotiations?

The testimony of the Settlement Note-holders regarding their direct negotiations with JPM Chase Bank was very significant because it clearly established that as early as July, 2009, at least two of the Settlement Note-holders, Centerbridge and Appaloosa, believed that they possessed the authority to negotiate a settlement for billions of dollars with JPM Chase Bank. Even more significantly, the testimony established that JPM Chase Bank responded back to the Settlement Note-holders which showed that JPM Chase Bank took the settlement offer seriously and also believed that the Settlement Note-holders were effectively in control of the debtors. (See**[transcript of Day 6, 7/20/2011 page 54 line 20 to page 55 line 23],[transcript of Day 6, 7/20/2011 page 57 line 4 to page 58 line 12],[transcript of Day 6, 7/20/2011 Page 130 line 12 to page 131 line 8]**)

"Q. What was the purpose of talking to JPMorgan without the debtors?
A. On the heels of the disaster that the March sessions were, it became apparent that there were a lot of different voices involved with – competing agendas. It was going to be very difficult, at least initially, to get a consensus agreement under all of the parties. We thought since we had a significant amount of claims in the unimpaired classes, that if we made an approach to JPMorgan and tried to find a common ground, that that ultimately could become the basis for what could be a settlement agreement."[transcript of Day 6, 7/20/2011 page 55 line 8 to line 18]

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13 Appaloosa and Centerbridge combined had, as the confirmation record shows [transcript of Day 6, 7/20/2011 page 122 line 24 to page 123 line 11], hold more than 46.5% of senior subordinated notes, 41% of PIER and over 14% of the senior notes, that does not include Aurelius and Owl Creek, which would push this numbers up by far.

14 Federal Deposit Insurance Corporation

This statement of Mr. Bolin is clear to the point, The Settlement Note-holders throught they had the power to negotiate the basis of an Settlement of billions of dollar, on behalf of Washington Mutual and later take it to the Debtor. This way of negotiations clearly favored the Settlement Note-holders, because they never had any interest that common shareholders of the Debtor would get anything, as the statement indicates the Settlement Note-holders held claims of debt and did only represented these claims at the table, which was not in the best interest of all creditors and shareholders of the Debtor. The Settlement Note-holders "Basic" became the foundation of the settlement agreements, that fact never did change. The estate never did challenge this fact.

The Settlement terms are produced by a single powerful Creditor Group, which led the negotiations and chose the outline of the settlement in every single point.

The Debtor was only a Puppet in the Eyes of JPM and FDIC, the direct negotiations with the Settlement Note-holders are clear to the point. The Debtor was under the control of the Settlement Note-holders.

"Q. Okay. And your lawyers wanted you to have a meeting to discuss the communications with JPMC and FDIC even though you weren't restricted?
A. It's not clear to me who requested the meeting and who wanted me to be there. I was told that JPMorgan wanted us there."
[transcript of Day 6, 7/20/2011 page 91 line 10 to line 15]

JPMorgan wanted the Settlement Note-holders at the meeting, because JPM knew, the Settlement Note-holders were the "Drivers" of the Estate at that time and only if the Settlement Note-holders would accept the offer, it would be a real settlement. This clearly showes the power of control, which the Settlement Note-holders got over the Debtor.

With this power the Settlement Note-holders could freely influence the bankruptcy process as they liked: they did move the waterfall, to a point, so as to let the Settlement Note-holders gain a huge profit.

Settlement Note-holders, bullied and threatened the Washington Mutual Inc. into taking actions that were designed to benefit only the Settlement Note-holders. The term sheets proposed to JPM were in fact prepared by the Settlement Note-holders.

It is clear from the facts, the Settlement Note-holders chose not to be on the Creditor Committee, because it would restrict the trading of the Settlement Note-holders, but the Settlement Note-holders influenced the bankruptcy process nontheless, as if they were on the Creditor Committee.

4. Did the Debtor act unethically and ignore their fiduciary duty to shareholders?

This Court takes seriously any allegation that professionals involved in cases before it are conflicted or have acted unethically. See, e.g., *In re Universal Bldg. Prods., (Bankr. D. Del. Nov. 4, 2010)*; *In re eToys, Inc., 331 B.R. 176, 194 (Bankr. D. Del. 2005)*

Further, a conflict of interest may result in a finding that a plan of reorganization has not been proposed in good faith. See, e.g., *In re Coram Healthcare Corp., 271 B.R. 228, 234-40 (Bankr. D. Del. 2001)*

A conflict of interest arising from the relationship between the Debtor's chief executive officer and largest creditor can taint the entire reorganization effort.

It is unlawful to pass material non-public information to outsiders who may trade. This practice, known as "tipping," involves providing material nonpublic information to any person who might be expected to trade while in possession of that information. See Dirks v. SEC, 463 U.S. 646 (1983). The Debtor, as the record and the case history clearly shows, passed non-public information to the Settlement Note-holders, who then traded on this information over the course of this bankruptcy. (See **[transcript of Day 4, 7/18/2011 Page 153 line 17 to page 154 line 12])**

This non-public information includes:

- proposals, negotiations, or agreements, **even if preliminary in nature**, with JPM and the FDIC
- the success probability of significant litigation
- amount of significant tax refunds and how they would be split

With the testimony and cross-examination of Maxwell on 7/15. The Equity Committee was able to show that there was a significant and credible amount of about $150+ million divergence on the value of the reorganized Washington Mutual Inc. which shows that the Debtors were not maximizing the estate value.

There are several avenues of external suits (Directors and Officers, Goldman Sachs, Ratings agencies, appraisers.. etc) that have never been pursued by the Debtors. And those suits, not pursued by the Debtors - add to the estate a significant value.These should have been added long ago, and if they were added, valued by the court and go into the Waterfall.(See **[transcript of Day 7, 7/18/2011 Page 208 line 6 to line 11])**

A normal operating debtor would have filed long ago to bring these suits. The valuations of these potential suits have not been pursued by the debtor. It could be an intentional act by the debtor to allow some claims to be statutorily passed.

The litigation valuation of these potential debtor assets was not presented, a fact Mr. Kosturos confirmed when he said he "was not in the business of valuing litigation."

"It was publicly filed as an exhibit to the 10-K. And so the only way the subsidiary could get at the tax asset was to exercise its right under the tax sharing agreement. Well, that's an intercompany claim, and the purchase and sale agreement specifically carved out intercompany claims."[transcript of Day 4, 7/18/2011 page 70 line 15 to line 19]

The Debtor never pushed that claim and it clearly shows JPM has no legal claim against the tax refunds, which by law they are not allowed to get.

" We thought they were very solid fraudulent conveyance claims, and they were being settled for, under this proposal, zero."[transcript of Day 4, 7/18/2011 page 71 line 5 to line 7]

The fraudulent conveyance claims are a very high value of the Debtor and under the GSA they are settled for nothing.

"[T]here is little doubt that the relationship between a corporation and its shareholders engenders the type of trust and confidence to which the U.S. Supreme Court referred [in Chiarella v. United States, 445 U.S. 222 (1980)]."

The Debtor betrayed this trust and confidence, only to get the benefit of releases for anything the Director & Officer's could have done wrong, which were included into the first Plan of

Reorganization.

"Q. And so, at the end of this internal meeting with the debtor and certain settlement noteholders and their counsel, how was it determined what proposal to actually make to JPMorgan?
A. After a lengthy meeting, certain of the creditors of the White & Case group as well as the unsecured creditors' committee had kind of coalesced around an offer that they would like to present to JPMorgan. It was higher in value than the debtors' idea of a proposal. And after much discussion, we collectively agreed to deliver the creditors' proposal to JPMorgan."[transcript of Day 7, 7/21/2011 page 103 line 22 to page 104 line 7]

Every single time you look at the proposals of the Debtors, they are low ball proposals. The only beneficiary of that is JPM and not the estate. The Debtor never pushed for a recovery of the estate, which have put the Equity into the money, let alone the creditors. That is a clear misconduct by the Debtor, which has an obligation to maximize the estate for every single stakeholder of the bankruptcy.

Not a single proposal of the Debtor pushed for a higher return to the estate, that is a fact of this case.

"If I determine the enemy's disposition of forces while I have no perceptible form, I can concentrate my forces while the enemy is fragmented. The pinnacle of military deployment approaches the formless: if it is formless, then even the deepest spy cannot discern it nor the wise make plans against it."
-- Sun Tzu, "The Art of War"

This Plan of Reorganization never got a real form, it is really hard to fight against something which never was final orreally included all information, as we learned at this confirmation a lot of assets were never valued or presented to this court. The NOLs got 4 Billion more, which would take us in the close range of 17 billion Dollar NOLs. The litigation against third party's was never valued or prosecuted. The Debtor did never do their fiduciary job.

The Debtor never disclosed anything about the value of the litigation against JPM and FDIC nor the true position about the litigation against JPM and FDIC to the general public, but they did share it with the Settlement Note-holders, that is a huge advantage against the general public.

The settlement negotiations are very important information to every investor, but it was only disclosed to a selected group of creditors, not the general investing public.

The Debtor did not meet the law with the "disclosure" they did, because it was never a disclosure to begin with.

Conclusion

I renew my Objections to the Plan of Reorganization and Global Settlement Agreement [Docket 5964,6178,8288] under the new case law of Stern and ANICO.

- The Acts of the Debtor and the Settlement Note-holders are unethical in their entirety.
- The Settlement Note-holders did trade on non-public material information. Any trade of the Settlement Note-holders done before March 12, or done on March 12 and March 13, is under the law a Insider Trade, because the information was not accessible to the general public.
- The Settlement Note-holders were the driving force in the bankruptcy and used that to gain a unlawful profit.
- The Settlement Note-holders are Insiders under the law, or at least non-statutory Insiders.
- The Debtor acted unethically and ignored their fiduciary duty to shareholders.
- The Debtor's tipping of non-public material to the Settlement Note-holders is unlawful and a violation of the trust of company's shareholders.
- The Debtor did not act in the best interest for all stakeholders of the company, instead, they acted for the benefit of a small group of creditors and even more for powerful third parties..

The debtors never really bothered to do their fiduciary job.

Respectfully submitted,

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