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

POST-HEARING SUBMISSION OF JPMORGAN CHASE BANK, N.A. IN SUPPORT OF CONFIRMATION OF THE DEBTORS' MODIFIED SIXTH AMENDED JOINT PLAN

JPMorgan Chase Bank, N.A. ("JPMC") submits this post-confirmation hearing statement in support of confirmation of the Modified Sixth Amended Joint Plan Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Plan") of affiliated debtors Washington Mutual, Inc. ("WMI") and WMI Investment Corp. (collectively, the "Debtors").[2]

SUMMARY

1. The time has come for these chapter 11 cases to move forward. These cases have endured nearly three years of aggressively contested litigation, involving billions of dollars of multi-faceted disputes, prosecuted in multiple fora and then resolved through the Global Settlement, a complex compromise involving multiple parties that took months to negotiate. These cases have also involved multiple investigations pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure, a thorough investigation by the Court-appointed Examiner, two plan confirmation hearings that included over three full weeks of testimony, an

[1] The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification number are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Suite 2500, Seattle, Washington 98104.

[2] JPMC addressed a number of arguments raised by Plan objectors in its pre-hearing Submission in Support of the Debtors' Plan ("JPMC's Pre-Hearing Submission") [D.I. 8112] that is incorporated by reference as if restated herein. A copy of JPMC's Pre-Hearing Submission is attached for the Court's convenience as Exhibit A.

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aggressively fought claim by the TPS Consortium to ownership of the trust preferred securities, and countless filings and hearings. This Court should now confirm the Debtors' Plan, which will implement the Second Amended and Restated Settlement Agreement, dated February 7, 2011, as amended (the "Global Settlement"), and provide for distributions to parties so entitled.

2. The economic terms of the Global Settlement, and the process by which the myriad claims underlying that settlement were litigated and settled, were considered and approved by this Court at the first confirmation hearing. In its January 7, 2011 opinion (the "Opinion"), the Court found the Global Settlement to be "fair and reasonable." (Opinion at 2.) The Global Settlement includes JPMC providing in excess of $7 billion that will promptly be distributed to creditors which, along with a waiver of JPMC's claims, will result in senior creditors being paid in full, and full or substantial recoveries for more junior creditor groups. The Court should reject the persistent efforts by certain objectors to relitigate aspects of the Global Settlement, notwithstanding that these issues were litigated fully and conclusively at the first confirmation hearing and this Court has several times ruled that it will not relitigate them. (Jan. 20, 2011 Hearing Tr. at 51:22-24; Mar. 21, 2011 Hearing Tr. at 119:24-120:1.)

3. In its January Opinion, the Court also required certain changes to the prior plan, which have been faithfully implemented in the modified Plan currently before the Court. The Plan was overwhelmingly approved by voting creditor classes and, as the recently concluded confirmation hearing made clear, the Plan satisfies § 1129 of the Bankruptcy Code. Regardless, certain objectors—led by the Equity Committee and the TPS Consortium (a misnomer for a group owning preferred equity)—continue to assert one objection after another because it is in their interests to see that no plan is confirmed. These are the same groups who pushed the Court

to appoint and the estates to pay for an Examiner, only to demand that the Court ignore his report when it was not to their liking. None of the remaining objections has any merit.

4. The TPS Consortium argues that the Supreme Court's decision in *Stern* v. *Marshall*, 564 U.S. --, 131 S. Ct. 2594 (2011), precludes this Court from approving a settlement that includes a release of the Debtors' claims against JPMC that would be beyond this Court's jurisdiction, as a non-Article III court, to adjudicate on the merits. In effect, the objection argues that a bankruptcy court has no power to approve a waiver or settlement of a debtor's claims that unquestionably are property of the estate under § 541 of the Bankruptcy Code any time the court would not have the power to finally adjudicate those claims. That position lacks credibility. This objection ignores that *both* the Supreme Court and the Third Circuit have previously held that (i) a court approving a settlement is not adjudicating the merits of the settled claim and (ii) a non-Article III court has the power, in approving a settlement in a dispute properly before it, to approve as part of the settlement a release of claims that the court would not itself have the power to adjudicate. *See, e.g., Matsushita Elec. Indust., Co., Ltd.* v. *Epstein*, 516 U.S. 367, 381-82 (1996). Thus, regardless of the fact that this Court would not have the authority to adjudicate the merits of the Debtors' state law "business tort" claims against JPMC, this Court unquestionably has the authority to approve a settlement between the Debtors and JPMC in which those claims, among others, are released.

5. The TPS Consortium also argues that this Court has no power to confirm any plan because they have appealed the Court's determination that they are owners of WMI preferred equity, not trust preferred securities. In other words, the TPS Consortium seeks a *de facto* stay of these proceedings while it pursues an appeal of this Court's order granting the defendants summary judgment in the TPS Adversary Proceeding, even though the TPS

Consortium never sought a stay of that order, which has been in place now for seven months, and would have been unable to meet the requirements for obtaining a stay had they sought one. Of course, this Court retains jurisdiction to implement its order, which is precisely what the Plan does. If the TPS Consortium were correct, then a bankruptcy court could *never* approve a plan affecting a creditor's rights where the creditor's claim was adjudicated and the creditor filed an appeal prior to confirmation. That simply is not the law.

6. At the recent confirmation hearing, the Court heard extensive testimony on the allegations of insider trading by some or all of four hedge funds referred to as the Settlement Note Holders. Some objectors argue that a remedy for this alleged insider trading should be rejection of the Plan. JPMC takes no position with respect to the substance of the insider trading allegations. However, any concerns that the Court may have with the Settlement Note Holders' conduct can and should be addressed post-confirmation, specifically in connection with potential subordination or disallowance of the claims that those four entities have to distributions from the Debtors. It is neither necessary nor fair to adversely affect the interests of others by denying confirmation of the Plan, which can otherwise be approved and the Global Settlement consummated with distributions to other creditors, if the Court determines based on the evidence that the Settlement Note Holders have unfairly profited from trading in this case. Indeed, the Equity Committee already has sought standing to file an adversary proceeding to disallow the claims of two of the Settlement Note Holders, Aurelius Capital Management LP ("Aurelius") and Centerbridge Partners LP ("Centerbridge"), which would provide an appropriate proceeding to resolve any issues with respect to those creditors' claims.

7. The few other objections to confirmation that relate in any way to JPMC are easily disposed of. First, although the TPS Consortium replays it again, the Court has

already heard their position that the Plan is deficient because they were not given a new opportunity to accept the consideration they were previously offered by JPMC to forego litigating the issue of ownership of trust preferred securities. This very argument was rejected by the Court at the March 21st hearing, when it ruled that Class 19 did not have to be resolicited as the TPS Consortium argued. (Mar. 21, 2011 Hearing Tr. at 168:7-14.) As was discussed then, this payment, which the TPS Consortium rejected when it was offered, does not involve a distribution from the Debtors but rather consideration that was offered by JPMC to avoid litigation of an issue that the TPS Consortium nevertheless proceeded to litigate and is still litigating on appeal. All of Class 19 was offered this consideration equally. There thus is no discrimination issue in Class 19, but if there were, JPMC simply would withdraw its voluntary payment from other members of Class 19, which was not resolicited and is deemed to have rejected the Plan. Second, and notwithstanding certain objectors' attempts to raise again issues regarding the essential third party releases, the Plan's releases conform with the requirements set forth in this Court's January Opinion.

8. Third, as explained below, the Equity Committee's arguments relating to the D.C. Circuit's recent decision in the ANICO action provide no justification for reconsidering the reasonableness of the Global Settlement. The ANICO decision, involving claims by bondholders of WMB (not the Debtors), holds merely that claims against JPMC which are pleaded to be entirely independent of the FDIC are not absolutely barred by the FIRREA claims process. However, the decision equally holds that claims that do implicate the FDIC's conduct, like the Debtors' claims brought against JPMC in this Court that challenge the P&A Agreement, are subject to FIRREA. *See Am. Nat'l Ins. Co.* v. *Fed. Deposit Ins. Co.*, No. 10-5245, 2011 WL 2506043, at *6 (D.C. Cir. June 24, 2011). And the decision, of course, says nothing about

whether there is a scintilla of evidence to support any claim against JPMC, much less any evidence to support a claim capable of succeeding, which is the fundamental weakness observed by the Court in the claims contemplated by Debtors.

9. And finally, perhaps the most audacious objection of all is Aurelius' position that the Global Settlement, to which it was formerly a party, should now be set aside because the contractually negotiated interest rate being paid on the so-called deposit accounts is not as high as it would like given, in hindsight, the delay that has occurred in confirmation. The fact that the delay to which Aurelius refers has been occasioned in substantial part by proceedings involving Aurelius' own questionable trading practices through which it has earned tens of millions of dollars in profits should be the beginning and end of this objection. JPMC has been ready and willing to consummate the Global Settlement since the day the Court found it to be fair and reasonable, but for months has been forced to sit by while confirmation has been delayed by discovery into the allegedly improper trading by Aurelius and the other Settlement Note Holders, and other inter-creditor squabbles. JPMC has been harmed terribly by this delay—among other things, as the evidence at the hearing revealed, JPMC is *receiving* a *lower* rate of interest on the approximately $2.5 billion in tax refunds to which it is entitled under the Global Settlement but cannot have access pending confirmation, than it is *paying* on the deposit accounts. And the amount JPMC is paying on the deposit accounts, in addition to being a negotiated term of an integrated Global Settlement, is a market rate. This objection is frivolous.

ARGUMENT

I. The Global Settlement Remains Fair and Reasonable and Should Be Implemented as Part of the Plan.

10. This Court, in its January Opinion, conducted a comprehensive review of the economic terms of the Global Settlement and the process by which it was negotiated, and concluded that the "Global Settlement is fair and reasonable." (Opinion at 2.) Those findings are law of the case and the Global Settlement should now be approved as part of a confirmed Plan. This Court has been clear that "with respect to those items I did decide, they're not going to be relitigated." (Jan. 20, 2011 Hearing Tr. at 51:22-24.) Emphasizing the point, the Court informed a *pro se* objector that "I won't" listen to argument about the Global Settlement when it was offered. (Mar. 21, 2011 Hearing Tr. at 119:24-120:1.)

11. Over the course of the seven day presentation of evidence at the confirmation hearing held July 13-15 and July 18-21, 2011 (the "Confirmation Hearing"), the Court heard testimony on many intercreditor and equity holder issues, including extensive testimony relating to the insider trading allegations against the Settlement Note Holders. There was no evidence presented that directly questioned the reasonableness of the Global Settlement. Nonetheless, many of the written objections did just that while the objectors' strategy at the Confirmation Hearing was clear: obstruct confirmation of the Plan and, by extension, prevent the Global Settlement from being consummated. The Court must decide unresolved Plan matters, but should not lose sight of the reasonableness of the Global Settlement and the fact that it resolves billions of dollars in completing claims that would otherwise take many years and great expense to litigate. The Debtors submitted uncontested evidence that voting classes overwhelmingly support the Plan structured to implement the Global Settlement. (*See* Declaration of Robert Q. Klamser, dated July 8, 2011 [D.I. 8113] at ¶ 24.) As these bankruptcy

proceedings approach their third anniversary, creditors are ready to receive their distributions and move forward. The Court should confirm the Plan and approve the Global Settlement.

12. The significance of the Global Settlement cannot be overstated. A clear theme of the testimony at the Confirmation Hearing is that the Global Settlement was reached only after many months of contentious arm's length negotiations. WMI's Chief Restructuring Officer, Mr. Kosturos, testified that a verbal agreement among the settling parties was not reached until the morning of March 12, 2010 just before the Debtors' counsel read the terms into the record in open court. (July 21, 2011 Conf. Tr. at 135:13-136:5.) Even then, negotiations would continue and a final agreement was not documented until May 2010. (July 21, 2011 Conf. Tr. at 136:6-9.) The Global Settlement both resolves the multi-billion dollar litigation pending in this Court and related actions pending in the United States District Courts for the District of Columbia and Delaware, and guarantees receipt by the Debtors' estates of over $7 billion in value contributed by JPMC for distribution to creditors pursuant to the Plan. As a reminder, the proposed disposition of the most valuable assets and assumed liabilities under the Global Settlement are summarized below:

	WMI	**JPMorgan**
Disputed accounts	$4 billion	Releasing claims
Taxes	$3.6 billion (incl. $1 billion to FDIC and $330 million to WMB Bondholders)	$2.4 billion
Trust preferred securities	Releasing claims	$4 billion
BOLI / COLI	$50 million	$5 billion
Pension and medical plans	$274 million	Assuming pension and medical plans; forgiving $274 million WMI debt
Goodwill	$55 million plus further recovery	$356 million plus further recovery
Contracts	$50 million	Assuming WMB liabilities and paying $50 million to satisfy WMI liabilities
Visa shares	$25 million	Acquiring Visa shares and assuming WMI litigation liability
Intercompany debt	$180 million	Paying $180 million debt, for which not otherwise liable

	WMI	JPMorgan
JPMorgan selling stock of HS Loan to WMI	Unquantified value	Unquantified cost
JPMorgan to provide loan servicing to WMI	Unquantified value	Unquantified cost
JPMorgan assuming specified WMI liabilities (e.g., BKK)	Unquantified value	Unquantified cost
Mutual releases	Unquantified	Unquantified
FDIC releases	Comprehensive/Unquantified Value	Limited/Unquantified cost

13. As detailed in JPMC's Pre-Hearing Submission, absent the Global Settlement, JPMC retains all of the litigation positions it had when the Court concluded in its January Opinion that the "Global Settlement provides a reasonable return in light of the possible results of the litigation." (Opinion at 60.) Some of JPMC's positions have strengthened. For example, as multiple witnesses testified, JPMC offered to contribute the entire amount of the additional tax refund created by Section 13 of the Worker Homeownership and Business Assistance Act of 2009, Pub. L. No. 111-92, 123 Stat. 2984 (2009) (the "Second Tax Refund") in recognition of the uncertainty as to whether it would ever be paid.[3] As the Debtors' liquidation analysis reveals, all but approximately $75 million of tax refunds due have now been paid, including the Second Tax Refunds, and those refunds are currently in escrow. (See CONF DX-375 at 2, 4; *see also* July 14, 2011 Conf. Tr. at 110:5-14.) Therefore, the risk associated with the Second Tax Refund no longer exists. JPMC has asserted in litigation that it is entitled, as a matter of law, to the entirety of all tax refunds as property of Washington Mutual Bank ("WMB") purchased from the FDIC. However, even if WMI were to prevail with its claims of ownership, JPMC has, as WMI recognizes, a claim against WMI for the value of tax refunds

[3] *See, e.g.*, Testimony of Mr. Gropper (July 18 Conf. Tr. at 109:5-110:8) and Mr. Bolin (July 20, 2011 Conf. Tr. at 68:19-69:15.)

received under the Washington Mutual Tax Sharing Agreement. (Dec. 2, 2010 Conf. Tr. at 76:25-78:2.) Now that the Second Tax Refund has been paid, JPMC would have a claim against WMI's estate for the full amount of all tax refunds—a $6 billion claim.

14. The Court has already ruled, following a full, contested hearing, that the Global Settlement is fair, reasonable and in the best interests of the Debtors' estates. It should resist all efforts by objectors to relitigate that issue. The Plan should be confirmed so that the Global Settlement finally can be effectuated.

II. This Court Has Jurisdictional Authority to Approve the Global Settlement and Confirm the Plan Following *Stern* v. *Marshall.*

15. The TPS Consortium contends that this Court lacks Constitutional authority to approve the Global Settlement and confirm the Plan based on the Supreme Court's decision in *Stern* v. *Marshall*, 564 U.S. --, 131 S. Ct. 2594 (2011). While the impact of *Stern* on a bankruptcy court to adjudicate the merits of core claims enumerated in 28 U.S.C. § 157(b)(2) is yet to be determined, there can be no serious question that bankruptcy judges retain the ability to consider plans and approve the *settlement* of a debtor's claims in the manner presented here. The TPS Consortium fails to recognize the critical distinction between settlement and adjudication—a distinction the Supreme Court has previously taught. This Court retains statutory and Constitutional jurisdiction to approve the settlement of the Debtors' claims even though, as a non-Article III court, it does not have the Constitutional power to adjudicate the merits of all such claims.

A. The TPS Consortium's Misapplication of the *Stern* v. *Marshall* Decision is Wrong.

16. The TPS Consortium fundamentally misapplies the decision in *Stern* v. *Marshall* in a completely different context: the consideration of a settlement and a plan, both of which are fundamental bankruptcy court functions permitted under the Constitution. This Court

retains ample authority and jurisdiction to determine whether a voluntary settlement is fair and reasonable to the estate, and to enter a final order approving the Global Settlement and confirming the Plan.

17. The result of the TPS Consortium's position, if accepted, is that no bankruptcy court ever could approve the type of debtor's general release that is often both central and integral to plans and settlements. Nothing in *Stern* even hints at that result. Section 1123(b)(3) of the Bankruptcy Code expressly permits the voluntary settlement of claims belonging to the debtor and is not even mentioned in *Stern*. *See* 11 U.S.C. § 1123(b)(3) ("a plan may . . . provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."). The TPS Consortium's argument that approval of a settlement is "adjudication" in the manner at issue in *Stern* (it is not, as discussed below) is a misplaced effort to derail the Plan by rendering this statute unconstitutional. The TPS Consortium has identified no support in *Stern* for this remarkable position.

B. Approval of a Settlement is a Critical Bankruptcy Court Function That Does Not Involve Adjudication of Claims.

18. The TPS Consortium wrongly asserts that the "Bankruptcy Court's approval of a settlement is, in effect, a final adjudication of the compromised claims." (TPS Second Supplemental Objection [D.I. 8100] (the "TPS Objection") at ¶ 26.) That is false. As the Supreme Court made clear more than 15 years ago in the analogous context of finding that a state court had the power to approve a settlement that compromised claims that were exclusively federal (*i.e.,* that had to be adjudicated by an Article III court) and could not have been litigated in state court:

> [w]hile it is true that the state court addressed the general worth of the federal claims in determining the fairness of the settlement, *such assessment does not amount to a judgment on the merits of the claims.*

Matsushita Elec. Indust., Co., Ltd. v. *Epstein*, 516 U.S. 367, 382 (1996) (emphasis added) (citing *TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) ("Approval of a settlement does not call for findings of fact regarding the claims to be compromised" and "the actual merits of the controversy are not to be determined")). Approving a settlement that compromises or releases a claim is fundamentally different than adjudicating the merits of the claim.

19. This is consistent with how bankruptcy settlements are treated. The Supreme Court itself has held that "[c]ompromises are 'a normal part of the process of reorganization.'" *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424 (1968) (quoting *Case* v. *Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939). The Third Circuit has similarly recognized the importance of settlements to the bankruptcy process in proclaiming that "[t]o minimize litigation and expedite the administration of a bankruptcy estate, 'compromises are favored in bankruptcy.' Indeed, it is an unusual case in which there is not some litigation that is settled between the representatives of the estate and an adverse party." *Myers* v. *Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (quoting 9 Collier on Bankruptcy ¶ 9019.03[1] (15th ed. 1993)). To that end, Rule 9019 of the Federal Rules of Bankruptcy Procedure provides that a bankruptcy court "may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a).

20. Approval is a discretionary act that "requires a bankruptcy judge to assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." *Martin*, 91 F.3d at 393 (setting forth the four factors that a bankruptcy court should consider). Therefore, a bankruptcy court does "not decide the numerous questions of law and fact raised" but rather "canvass[es] the issues and see[s]

whether the settlement falls below the lowest point in the range of reasonableness." *Cosoff* v. *Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983); *In re Key3Media Group Inc.*, 336 B.R. 87, 93 (Bankr. D. Del. 2005). That analysis is a far cry from making final factual and legal determinations as the TPS Consortium misleadingly argues in its objection. This long-standing distinction is sensible because if it were "necessary for a bankruptcy court to conclusively determine claims subject to a compromise . . . there would be no need of settlement." *In re Key3Media Group Inc.*, 336 B.R. at 92.

C. Jurisdiction to Adjudicate a Claim is Not Required to Approve a Settlement Compromising That Claim.

21. It is well settled that jurisdiction to adjudicate a claim is not required in order for a court to approve a settlement releasing that claim. *See Grimes* v. *Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994) (stating that "it is widely recognized that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment.") (citations omitted). Perhaps the clearest example, which effectively disposes of the TPS Objection, is the Supreme Court's decision in *Matsushita*. In *Matsushita*, the Supreme Court found that, where it has jurisdiction over the parties and the case, a state court is permitted to approve a settlement that includes a release of federal claims that would require trial in an Article III federal district court were the claims to be litigated. *Matsushita*, 516 U.S. at 381-82 (enforcing preclusive effect of Delaware Chancery Court's release of federal securities claims even though state court prohibited from adjudicating those claims); *see also Grimes*, 17 F.3d at 1563-64. As another example, an administrative law judge is permitted to approve a general release that includes claims for which she could not adjudicate the merits. *Flynn* v. *Federal Express*, No. 08-2455, 2008 WL 2188549, *3 (E.D. Pa. May 23, 2008) (quoting *Grimes*, 17 F.3d at 1563-64). This general rule applies to bankruptcy courts as well and makes clear that *Stern*

has no impact on this Court's ability to enter a final order approving the Global Settlement merely because the matters being released include claims that, if adjudicated on the merits, would have to be litigated in an Article III court. Indeed, one bankruptcy court in fact has already noted that *Stern* did not prevent it from considering whether a debt arising from the settlement of a tort claim was dischargeable. *See Musich* v. *Graham (In re Graham)*, No. 11-01073, 2011 WL 2694146, *3 n.27 (Bankr. D. Colo. July 11, 2011) (acknowledging *Stern* and proceeding because "[t]his Bankruptcy Court is dealing only with the question of dischargeability").

22. The TPS Consortium ignores *Matsushita*, *Grimes* and this clear rule of law, instead relying on two inapposite lines of authority in support of its incorrect proposition that approval of a settlement is "in effect" an adjudication of the merits. First, the TPS Consortium points to cases holding that an order approving a settlement is final for purposes of appeal. (TPS Objection at ¶ 26.) Second, the TPS Consortium cites cases holding that an order approving a settlement is *res judicata* and the issue may not be relitigated. (TPS Objection at ¶ 27.) There is nothing surprising about these results, but neither line of cases is at all relevant here. The TPS Consortium's Objection has no legal basis and should be rejected.

D. The Bankruptcy Court Has Constitutional and Statutory Authority to Approve the Amended Global Settlement and Confirm the Plan.

23. Article I of the Constitution provides Congress with the power "[t]o establish uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4. The Supreme Court in *Stern* reaffirmed that Article III of the Constitution requires that "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Stern*, 131 S. Ct. at 2609 (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18

How. 272, 284 (1856). Nonetheless, *Stern* did not alter the ability of Congress to exercise its Article I power to assign to the bankruptcy courts the responsibility to implement the Bankruptcy Code and adjudicate matters relating to rights created by the Bankruptcy Code.

24. As this Court noted in its January Opinion (at 11), approval of the Global Settlement and confirmation of the Debtors' Plan are core proceedings. *Stern* does not restrict the bankruptcy court's exercise of that statutory jurisdiction here. The Debtors' claims being compromised through the Global Settlement are property of the estate. *See, e.g., In re RNI Wind Down Corp.*, 348 B.R. 286, 293 (Bankr. D. Del. 2006) (noting that "when a corporation files for protection under the Bankruptcy Code, causes of action . . . become property of the estate"). A bankruptcy court's oversight of disposition of debtor's property is a fundamental bankruptcy function. *See, e.g., In re Abitibibowater, Inc.*, No. 09-11296, 2010 WL 6570889, *1 (Bankr. D. Del. Sept. 29, 2010) (holding that the bankruptcy court has jurisdiction to approve a motion to approve a section 363 sale and rule 9019 settlement). In fact, Section 363 of the Bankruptcy Code prevents a debtor from selling or using property of the estate without approval of the Court. 11 U.S.C. § 363(b); *see Goodwin* v. *Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.)*, 292 B.R. 415, 421 (9th Cir. B.A.P. 2003) (holding that "[w]e agree with the Third Circuit that the disposition by way of 'compromise' of a claim that is an asset of the estate is the equivalent of a sale of the intangible property represented by the claim" and implicates both section 363 and rule 9019) (quoting *Myers* v. *Martin (In re Martin)*, 91 F.3d at 394-95).

25. Furthermore, Bankruptcy Code section 1123(b)(3) permits a debtor to settle through a plan "any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3). A bankruptcy court then considers any settlement submitted pursuant to

Bankruptcy Rule 9019. As a result, the Court's approval of the Global Settlement arises directly from the Bankruptcy Code and is a proper exercise of authority pursuant to Article I of the Constitution. There is nothing about approval of a settlement agreement that requires adjudication by an Article III court. *See In re Okwonna-Felix*, No. 10-31663-H4-13, 2011 WL 3421561, *4 (Bankr. S.D. Tex. Aug. 3, 2011) (holding *Stern* inapplicable to the Bankruptcy Court's consideration of a settlement under Bankruptcy Rule 9019.) This Court's approval of the Global Settlement and confirmation of the Plan under the Bankruptcy Code is plainly fundamental to "the restructuring of debtor-creditor relations," and is unaffected by *Stern*. *Stern*, 131 S. Ct. at 2617 (citing *Langenkamp* v. *Culp*, 498 U.S. 42, 44 (1990). *See also Turner* v. *First Cmty. Credit Union*, No. 10-03300, 2011 WL 2708907, *5 (Bankr. S.D. Tex. July 11, 2011) (finding *Stern* inapplicable to a claim for violation of the automatic stay, due to the "central role of the automatic stay in the bankruptcy scheme" and the status of the claim as "a right established by . . . the Bankruptcy Code"). This Court retains jurisdiction to approve the Global Settlement and confirm the Plan, and the TPS Objection must be rejected.

III. This Court is Not Divested of Jurisdiction to Consider Plan Provisions Relating to the Trust Preferred Securities.

26. The TPS Consortium's argument that this Court is prohibited by the judge-made "divestiture rule" from considering any provision of the Plan concerning the trust preferred securities is baseless. As explained in JPMC's Pre-Hearing Submission (at 9-13):

- This Court issued its order granting summary judgment to the defendants in the TPS Adversary Proceeding[4] over seven months ago. The TPS Consortium never sought a stay of that order pending appeal, thereby subjecting them to the consequences of its enforcement.

[4] *Black Horse Capital L.P.* v. *JPMorgan Chase Bank, N.A.*, Adv. Pro. No. 10-51387 (MFW) [D.I. 180] (the "TPS Adversary Proceeding").

- The TPS Consortium retains any rights it has to pursue available remedies should this Court enter an order confirming the Plan, including appealing the confirmation order and seeking a stay pending appeal.

- The TPS Consortium is asking the Court to effectively grant a pre-emptive stay that would preclude consideration and consummation of any plan including the trust preferred securities—*i.e.* any plan that could be entered in this case and result in a distribution to creditors—notwithstanding that this Court held that the TPS Consortium has no interest in trust preferred securities but owns preferred equity.

- The TPS Consortium's efforts to derail the Global Settlement and the Plan are particularly inequitable given that the TPS Consortium delayed for two years before asserting their now-rejected claims, which already could have been litigated through appeal had they been asserted promptly.

- Even if the divestiture rule were applicable (and it is not), this Court retains jurisdiction to implement its order in the TPS Adversary Proceeding, and that is exactly what the Plan does.

27. This Court continues to have jurisdiction to order confirmation of the Plan and to enforce its Order entered January 7, 2011 in the TPS Adversary Proceeding holding that the members of the TPS Consortium own WMI preferred equity.

IV. The Court Should Confirm the Plan Irrespective of the Evidence Against the Settlement Note Holders.

28. The Court heard testimony spanning four days relating to allegations that the Settlement Note Holders engaged in insider trading by using material non-public information they received as direct or indirect participants in settlement negotiations. JPMC takes no position with respect to whether any or all of the Settlement Note Holders in fact engaged in insider trading in violation of the securities laws, as alleged. Rather, no matter how the Court views that evidence, consideration of an appropriate remedy should be separately addressed to those four entities. The trading of these four hedge funds should not be allowed to threaten confirmation, which would harm the other creditors and others interested in confirmation of the Plan, none of whom was a participant in the trading under scrutiny. Even if it confirms the Plan,

the Court has the equitable power to disallow the claims of, or modify any recovery by, any Settlement Note Holder that the Court determines acted improperly. 11 U.S.C. § 105(a). As the Court is aware, the Equity Committee has filed a motion seeking authorization to file an adversary proceeding to request that the Court equitably disallow the claims of Auerlius and Centerbridge [D.I. 8179]. The Court can permit claims to proceed against the Settlement Note Holders in that proposed action if it determines that the Equity Committee has presented colorable claims of insider trading. But those allegations against certain creditors do not impose a reason to further delay confirmation of the Plan.

29. While the insider trading arguments took center stage, the evidence introduced at the Confirmation Hearing establishes that the Plan satisfies the requirements of § 1129 of the Bankruptcy Code. That is the relevant question when considering confirmation and, therefore, this Plan should be confirmed.

V. The Evidence Further Discredits Aurelius' Objection Regarding the Reasonableness of the Global Settlement.

30. Despite the Court's clear directive that the reasonableness of the Global Settlement will not be reconsidered, Aurelius has invited the Court to do just because of the delay in confirmation of the Plan *caused by the Court's direction to investigate Aurelius* and the other Settlement Note Holders. Specifically, Aurelius argues that JPMC should provide additional value in the form of more interest on the disputed deposit accounts. (Aurelius Objection [D.I. 7951] at ¶¶ 3, 5.) The Court should decline even to consider this objection given the Court's repeated statements that it is not reconsidering issues—like the reasonableness of the Global Settlement—already decided.

31. In any event, Aurelius' position is baseless, even without considering the fact that Aurelius' own conduct is the cause of the very delay in confirmation that is at the heart

of its objection. Aurelius introduced no evidence or testimony at the Confirmation Hearing in support of its objection. To the contrary, the evidence in the record establishes—without contradiction—the following: (i) the rate of interest accruing on the disputed accounts was a negotiated term, and is but one of many terms in a complex, fully integrated settlement that cannot be viewed or changed in isolation (Declaration of William C. Kosturos, dated November 23, 2010 [D.I. 6083] at ¶ 44; Testimony of Mr. Kosturos, July 21, 2011 Conf. Tr. at 143:20-144:1); (ii) Aurelius became a party to that very global agreement containing that very interest term in March 2010 (Testimony of Mr. Gropper, July 18, 2011 Conf. Tr. at 121:19-122:5); (iii) the rate being paid by JPMC on the disputed accounts is equal to or better than the return Debtors have been able to obtain on any of their other cash (Testimony of Mr. Goulding, July 14, 2011 Conf. Tr. at 157:6-9); and (iv) the rate being paid by JPMC on the disputed accounts is higher than the interest rate being earned on the tax refunds, including the approximately $2.5 billion in tax refunds to which JPMC is entitled under the Global Settlement but which it cannot access because of the delay in confirmation caused by the Settlement Note Holders and other Debtor creditors and equity holders. (Testimony of Mr. Goulding, July 18, 2011 Conf. Tr. at 156:22-157:9.) On this record, there is no basis for the Court to change course and reject the same Global Settlement it has already found to be fair and reasonable. Whatever incremental costs have been necessitated by the investigation of Aurelius and the other Settlement Note Holders did not cause the terms of the Global Settlement to fall below the lowest point in the range of reasonableness.

32. Moreover, JPMC has not caused any delay, much less any delay from which it is seeking to profit. JPMC has continuously been ready to consummate the Global Settlement through a confirmed Plan since the Global Settlement was first executed in May

2010. JPMC has been a mere bystander since the Court's January Opinion while various intercreditor disputes have unfolded before this Court. Furthermore, as explained in JPMC's Pre-Hearing Submission (at 4-5), JPMC continues to suffer substantial harm by the delays in confirmation of the Plan and consummation of the Global Settlement, including an inability to access cash and other assets it is to receive under the Global Settlement, an inability to fully integrate the pension and other employee benefits plans it has agreed to assume, and a continuing inability to proceed forward with its acquisition of WMB's assets from the FDIC free of the cost, distraction and uncertainty that caused it to agree to the Global Settlement in the first place.

VI. The ANICO Appeal is Irrelevant.

33. Both the Equity Committee and the TPS Consortium have argued that the D.C. Circuit's decision in the ANICO litigation somehow presents cause for reconsideration of the reasonableness of the Global Settlement despite the Court being clear it would not do so. Their argument is misguided; the ANICO decision is irrelevant. In response to questions from counsel for the TPS Consortium, Mr. Kosturos noted that "I don't know if the decision in ANICO relates to anything of this case." (July 21, 2011 Conf. Tr. at 244:8-12.) In fact, it does not. For example, while holding that claims related to purported acts of JPMC need not be submitted to the FDIC receivership claims process, the D.C. Circuit was equally clear that claims asserted by WMI in this Court—such as the counterclaim in the JPMC Adversary Proceeding attacking the Purchase & Assumption Agreement itself—can proceed only pursuant to the FIRREA process. *See Am. Nat'l Ins. Co.* v. *Fed. Deposit Ins. Co.*, No. 10-5245, 2011 WL 2506043, at *6 (D.C. Cir. June 24, 2011) ("Where a claim is *functionally*, albeit not *formally*,

against a depository institution for which the FDIC is receiver, it is a 'claim' within the meaning of FIRREA's administrative claim process.") (emphasis in original).[5]

34. The objectors' insinuation that the ANICO decision causes a drastic increase in the value of the Debtors' potential business tort claim against JPMC finds no support in the confirmation record or anywhere else. As explained in JPMC's Pre-Hearing Submission (at 2-3 n.4):

- The Court's determination that the Global Settlement is fair and reasonable was not premised on the FIRREA jurisdictional bar. The fact that the ANICO plaintiffs' appeal was proceeding was known to the Court and in the record of the prior confirmation hearing. (Dec. 6, 2010 Conf. Tr. at 265:6-9.)

- This Court's Opinion did not give credence to the merits of the business tort allegations and noted that any claim for damages would require the Debtors to take positions inconsistent with other claims. (Opinion at 56.)

- No evidence has been submitted at either the Confirmation Hearing or the prior confirmation hearing that the business tort claim possesses any merit.

- The question of applicability of the FIRREA jurisdictional bar in this case is unresolved as JPMC's appeals of this Court's FIRREA decisions remain pending and would be decided in this Circuit.

- The ANICO case itself is irrelevant because all claims with respect to bonds and securities of WMI remain dismissed with prejudice.

There is nothing about the D.C. Circuit's decision in the ANICO case that impacts the reasonableness of the Global Settlement before this Court. The objection must be rejected.

VII. The Essential Third Party Releases Contained in the Plan Should be Approved.

35. The Plan provides for releases of claims against JPMC and its affiliates by third parties who vote in favor of the Plan and do not opt out of the release (or, as with Class 19,

[5] Even if a claim could be asserted, any business tort claim asserted against JPMC could not be finally adjudicated by this Court under the U.S. Supreme Court's recent decision in *Stern* v. *Marshall*, 564 U.S. --, 131 S. Ct. 2594 (2011).

previously opted in to the third party release). The Plan also requires that any creditor receiving a distribution grant the third party release. The releases have been modified from the prior plan in order to comply with the standards detailed in the Court's Opinion. (*See* JPMC's Pre-Hearing Submission at 5-7; Opinion 83-86.) At the January 20 conference following the Court's Opinion, the Court noted that it appeared that the proposed modifications to the releases addressed the concerns expressed in the Opinion. (Jan. 20, 2011 Hearing Tr. at 29:13-23, 30:21-23.)

36. During questioning from counsel for the TPS Consortium at the Confirmation Hearing, Mr. Goulding testified as to the importance of the releases contained in the Global Settlement:

> [I]ntegral to that deal [the Global Settlement] are the releases. And therefore, if you can't grant them, then all of the claims that are still outstanding would spring back. I believe the Court addressed this issue in its opinion where it talked about fifty-plus billion dollars of claims coming back if you're not willing to grant releases. There's no settlement agreement if that doesn't occur; the result only gets worse.

(July 14, 2011 Conf. Tr. at 135:13-19.) At the first confirmation hearing, Mr. Goulding similarly testified in an exchange with JPMC's counsel that:

> Q. And that settlement agreement was dependent upon the provision of those third party releases, wasn't it, sir?
> A. That's how I understand it.
> Q. So no releases, no settlement agreement, no value?
> A. Right.

(December 3, 2010 Conf. Tr. at 126:16-20.)

37. JPMC is contributing through the Global Settlement virtually every dollar of the more than $7 billion to be distributed to creditors pursuant to the Plan. JPMC has also agreed in the Global Settlement to waive distributions on billions of dollars of claims. Therefore, it is eminently reasonable for JPMC to require a release from any creditor receiving a

distribution of a portion of that value. As this Court made clear in its January Opinion, the third party releases are effective if the creditor "affirmatively consent[s] to it by voting in favor of the Plan and not opting out . . . ." (Opinion at 84.) The essential third party releases contained in Section 43.6 of the Plan are structured that way and should be approved.

VIII. The Evidence Further Supports the Treatment of Class 19.

38. The TPS Consortium's objection that the Plan discriminates among creditors of Class 19 of the Plan is without merit. As an initial matter, the Court already decided this issue and should not consider the TPS Consortium's argument here. (*See* Opinion at 102-103.) Moreover, the Court rejected the TPS Consortium's attempt to reargue this issue at the March 21st hearing when it stated:

> I disagree with the Trust Preferred consortium argument regarding their ability to revote; however, I agree with JPMorgan that I've already made that decision. And in addition, I find that to the extent they are allowed to revote, JPMorgan has asserted that the distribution to their class is only available to those who previously voted to give the release. So I think it would be a big waste to go ahead and revote that class.

(Mar. 21, 2011 Hearing Tr. at 168:7-14.)

39. In any event, the Plan deems Class 19 to have rejected it. As explained in JPMC's Pre-Hearing Submission (at 7-9), the release election for Class 19 in the prior plan was an opt-in; some creditors accepted JPMC's offer of a supplemental distribution from JPMC in exchange for foregoing litigation but many did not, including the members of the TPS Consortium. Those creditors who chose not to grant the releases will not receive JPMC's settlement distribution pursuant to the Plan; they will instead retain any claims they might have, including against JPMC. (July 21, 2011 Testimony of Mr. Kosturos, Conf. Tr. at 215:9-15.)

40. The TPS Consortium rejected the offer of a cash payment in exchange for foregoing litigation and granting the third party release. JPMC was therefore forced to litigate

the question of ownership of the trust preferred securities at great expense. The TPS Consortium rolled the dice and lost, and one of the consequences of that decision is that they are not entitled to a second opportunity to receive a payment from JPMC that was offered to avoid litigation. As the Court recognized in rejecting this same objection at the disclosure statement hearing when the TPS Consortium demanded that Class 19 be resolicited rather than simply being deemed to have rejected the Plan, this is a payment from JPMC—not from the Debtors—and JPMC is free simply to not make the payment to anyone. (Mar. 21, 2011 Hearing Tr. at 168:8-14.) The Court should reject the TPS Consortium's objection and confirm the Plan.

CONCLUSION

41. JPMC respectfully submits that the remaining objections should be overruled, and urges the Court to confirm the Plan and effectuate the Global Settlement.

Dated: August 10, 2011
Wilmington, Delaware

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WASHINGTON MUTUAL, INC., et al.,[1]	Case No. 08-12229 (MFW)
Debtors.	Jointly Administered
	Ref. No. 6696

SUBMISSION OF JPMORGAN CHASE BANK, N.A. IN SUPPORT OF CONFIRMATION OF THE DEBTORS' MODIFIED SIXTH AMENDED JOINT PLAN

JPMorgan Chase Bank, N.A. ("JPMC") submits this statement in support of confirmation of the Modified Sixth Amended Joint Plan Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Plan") of affiliated debtors Washington Mutual, Inc. ("WMI") and WMI Investment Corp. (collectively, the "Debtors").[2]

A. This Court Held the Global Settlement Reasonable and it Should be Approved.

1. The foundation of the Plan remains the comprehensive, integrated settlement that enabled the Debtors to seek confirmation of a plan that provides over $7 billion in value contributed by JPMC for the benefit of the estates' creditors. The economic terms and structure of that truly "global" settlement were approved by this Court in its opinion, dated January 7, 2011 (the "Opinion"), that ultimately denied confirmation of the Sixth Amended Joint Plan (the "Original Plan"). Despite vociferous protests from objectors, including the Official

[1] The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Suite 2500, Seattle, Washington 98104.

[2] This submission addresses only certain issues and arguments raised by Plan objectors and does not constitute acceptance or agreement with any other objection. These and other objections are separately addressed by the Debtors in their responses and JPMC expressly reserves its rights to respond to all interposed objections at the Plan confirmation hearing.

Committee of Equity Security Holders (the "Equity Committee") and the TPS Consortium, this Court concluded after comprehensive review of the terms of the agreement that the "Global Settlement is fair and reasonable." (Opinion at 2.) These findings are law of the case and the Second Amended and Restated Settlement Agreement, dated February 7, 2011, as amended (the "Global Settlement") should now be approved.[3]

2. This Court has not waivered since issuing its January Opinion in affirming that "with respect to those items that I did decide, they're not going to be re-litigated." (Jan. 20, 2011 Hearing Transcript at 51:22-24.) This fact has been acknowledged by the Equity Committee, whose counsel has stated on the record that "[t]he terms of the settlement are fixed. The Court has issued an order approving those terms as fair and reasonable." (Feb. 8, 2011 Hearing Transcript at 87:3-5.) The Equity Committee notes in its Plan Objection (D.I. 8073, the "Equity Committee Objection") that it "has promised not to relitigate" whether the Global Settlement is fair and reasonable. (Equity Committee Objection at ¶ 93.)[4]

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[3] The economic terms of the Global Settlement remain constant although the agreement was modified consistent with the Court's Opinion.

[4] Of course, the Equity Committee and the TPS Consortium could not resist including in their objections a misguided invitation to reconsider the Global Settlement based on the D.C. Circuit's decision in the ANICO litigation. (Equity Committee Objection at ¶¶ 93-94; TPS Supplemental Objection, D.I. 8100, at ¶ 35.) That decision does not impact the reasonableness of the Global Settlement at all. First, this Court's determination that the Global Settlement was fair and reasonable was not premised on the FIRREA jurisdictional bar. Moreover, this Court's Opinion did not give credence to the merits of the business tort allegations and noted that any claim for damages would require the Debtors to take positions inconsistent with their other claims. (Opinion at 56.) In fact, not a shred of evidence was offered at the confirmation hearing on the Original Plan that the business tort claims possess any merit. Second, the question of the applicability of the FIRREA jurisdictional bar in this case is unresolved as JPMC's appeals of this Court's FIRREA decisions remain pending and would ultimately be decided in this circuit by a different Court of Appeals. Regardless, while holding that claims related to purported acts of JPMC need not be submitted to the FDIC receivership claims process the D.C. Circuit was equally clear that claims such as those asserted by WMI in this Court—such as the counterclaim in the JPMC Adversary Proceeding attacking the Purchase & Assumption Agreement itself—can proceed only in the D.C. District Court pursuant to the FIRREA process. *See Am. Nat'l Ins. Co.* v. *Fed. Deposit Ins. Co.*, No. 10-5245, 2011 WL 2506043, at *6 (D.C. Cir. June 24, 2011) ("Where a claim is *functionally*, albeit not *formally*, against a depository institution for which the FDIC is receiver, it is a 'claim' within the meaning of FIRREA's administrative claim process.") (emphasis in original). Third, the ANICO case itself

3. Notwithstanding the Court's clear directive, Aurelius Capital Management, LP ("Aurelius")—one of the so-called "Settlement Noteholders" who has been a subject of the insider trading inquiry ordered by the Court—has withdrawn its support for the Plan and invites this Court to revisit the reasonableness of the Global Settlement. The reasonableness of the Global Settlement is not at issue before this Court and Aurelius' arguments must be rejected. Aurelius brazenly asserts that the Global Settlement should not be approved unless JPMC provides additional value to offset the cost of delay *caused by the Court's direction to investigate Aurelius* and the other Settlement Noteholders. (Aurelius Objection, D.I. 7951, at ¶¶ 3, 5.) JPMC has not caused any delay. In fact, JPMC has continuously been ready to consummate the Global Settlement through a confirmed Plan since the Global Settlement was first executed in May 2010. Since that time, JPMC has supported both the Original Plan and this modified Plan, and the efforts of the Debtors and the Official Committee of Unsecured Creditors to obtain approval of those Plans so that distributions can be made to creditors. Having reached a comprehensive, complex, and integrated agreement to resolve disputes involving billions of dollars of claims and assets, JPMC has been a mere bystander since the Court's January Opinion as various intercreditor (and equity holder) disputes have unfolded and played out before this Court. The Court has a number of important issues to consider at the Plan confirmation hearing; the reasonableness of the Global Settlement is not one of them.

4. In the event the Court is inclined to consider Aurelius' argument (it should not), the objection must still be denied. Nothing since January has caused the Global Settlement to become any less fair or reasonable. In the Opinion, the Court explained that it "does not have to be convinced that the settlement is the best possible compromise" but only that it "be above

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is irrelevant because all claims with respect to bonds and securities of WMI remain dismissed with prejudice.

the lowest point in the range of reasonableness." (Opinion at 17, citing *In re Coram Healthcare Corp.*, 315 B.R. 321, 330 (Bankr. D. Del. 2004).) Whatever incremental costs have been necessitated by the Court-ordered insider trading investigation did not cause the terms of the Global Settlement to fall below the lowest point in the range of reasonableness.

5. JPMC retains the same litigation positions that it had when the Court concluded in its January Opinion that the "Global Settlement provides a reasonable return in light of the possible results of the litigation." (Opinion at 60.) JPMC still possesses every legal and factual argument it had when the Court first considered the terms of the agreement and, absent the Global Settlement, JPMC would prevail as a matter of law on virtually all competing claims to the most valuable asset categories in dispute. Moreover, as the Debtors' Chief Restructuring Officer testified at the confirmation hearing on the Original Plan, absent a settlement, litigation of the parties' numerous and complex claims and defenses will take three to four years at minimum, with continued accrual of post-petition interest and professional expenses throughout that period. (Declaration of William C. Kosturos, dated Nov. 23, 2010, D.I. 6083, at ¶ 30.)[5]

6. Aurelius' objection complains—for the first time by any party in connection with confirmation of either this Plan or the Original Plan—about the rate of interest accruing on the disputed funds credited to accounts in WMI's name now held at JPMC. (Aurelius Objection at ¶ 7.) But Aurelius of course ignores the fact that the interest rate to be paid on those funds was a negotiated term contained in Section 2.2 of the Global Settlement and

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[5] The Equity Committee's suggestion that JPMC's willingness to settle claims to the funds credited to the disputed accounts as part of a global settlement proposal signals a weakness in JPMC's perception of its claims to those funds is wrong. (*See* Equity Committee Objection at ¶ 20.) It is axiomatic that a proposal to settle $25 billion worth of disputed assets and liabilities would require JPMC to give up substantial claims and that any settlement proposal is without prejudice to JPMC's litigation positions.

therefore is but one part of a complex, fully integrated settlement and cannot be viewed (or changed) in isolation. Moreover, while Aurelius attempts to frame the delays in the effective date of the Global Settlement as a benefit to JPMC, the reality is that JPMC continues to suffer substantial harm by these delays. For example, JPMC agreed to assume the WaMu Pension Plan pursuant to the Global Settlement but continues to have no control over that plan's assets. Similarly, JPMC continues to have no control over the BOLI/COLI assets more than a year after the Global Settlement resolved the disputes with respect to those assets. Most significantly, JPMC remains without access to its portion of the tax refunds that remain in escrow pending the effective date of the Global Settlement and also without the ability to utilize the assets collateralizing the Trust Preferred Securities. Together, these represent billions of dollars in assets owned by JPMC that remain tied up and unavailable pending confirmation of the Plan and consummation of the Global Settlement. Aurelius cannot credibly believe that JPMC should increase its negotiated contribution through the Global Settlement because of a delay caused by the actions of others, including Aurelius itself.

7. This Court determined that the Global Settlement was fair and reasonable for all creditors in January and it remains so today. Therefore, the Global Settlement should be approved as part of confirmation of the Plan.

B. The Essential Third Party Releases Contained in the Modified Plan Comply With This Court's Order and Should be Approved.

8. The Plan provides for releases of claims against JPMC and its affiliates by third parties who vote in favor of the Plan and do not opt out of the release (or, as with Class 19, previously opted in to the third party release). The Plan also requires that any creditor receiving a distribution grant the third party release. (*See* Plan § 43.6.) These releases have been modified from the Original Plan to comply with standards detailed in the Court's Opinion. The releases,

moreover, satisfy Third Circuit standards for approval because they are an essential component of the integrated Global Settlement, critical to implementation of the Plan and provided in exchange for substantial value. After all, JPMC is contributing through the Global Settlement virtually every dollar comprising the more than $7 billion that will be available for prompt distribution to creditors pursuant to the Plan. JPMC is therefore reasonable in requiring a release from any creditor receiving a distribution of that value.

9. The Court expressly held that third party releases are effective if the creditor "affirmatively consent[s] to it by voting in favor of the Plan and not opting out . . . ." (Opinion at 84.) Furthermore, the Court rejected any argument that conditioning a distribution on granting a third party release is improper. (*See* Opinion at 85-86.) That is because courts routinely have held that a vote in favor of a plan containing third party releases binds those creditors. *See e.g.*, *In re Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004) ("[T]o the extent creditors or shareholders voted in favor of [the Plan], which provides for the release of claims they may have against the Noteholders, they are bound by that."); *In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (where a release is "consensual, there is no need to consider the *Zenith* factors"); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (approving release of "claims of any creditor who actually voted in favor of the Plan"); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2007).

10. There is no Global Settlement, and therefore no Plan and no value to distribute to creditors without the third party releases, as Mr. Goulding, WMI's Treasurer, testified at the confirmation hearing on the Original Plan. In an exchange with JPMC's counsel, Mr. Goulding confirmed:

Q: So no releases, no settlement agreement, no value?

A: Right.

(Transcript of Confirmation Hearing, dated December 3, 2011, at 767:6-8.) The Court recognized the importance of the Plan releases when it stated that "releases of JPMC . . . are necessary to the Debtors' reorganization and confirmation of the [Original] Plan." (Opinion at 65.) Similarly, the third party releases contained in the Plan should be approved now that they are structured as consensual releases pursuant to this Court's directive.

11. The Equity Committee's argument that the third party releases are coercive and therefore violate 11 U.S.C. § 1129(a)(7) is a straw man. The fact remains that without JPMC's agreement to terms of the Global Settlement—a settlement that includes JPMC receiving third party releases—the Debtors would have minimal assets available for immediate distribution and, as the Court noted in its Opinion, would face an additional $54 billion in claims. (*See* Opinion at 95-96.) Any equity holder (or any other creditor) that wishes to retain its claims against JPMC or any other third party had the right to do so by opting out of the third party release and foregoing a distribution. Furthermore, the Plan provides that no third party releases are granted absent a vote, so a creditor who did not return a ballot retains all of its third party claims unless and until it chooses to grant a release and receive a distribution funded by JPMC. The third party releases should be approved.

C. The Plan's Treatment of Class 19 is Appropriate.

12. The TPS Consortium's objection that the Plan discriminates among creditors in Class 19 of the Plan is without merit. As an initial matter, the Court already decided this issue in its January Opinion and should not reconsider the TPS Consortium's arguments here. This Court previously rejected arguments of discrimination with respect to Class 19 because "[t]o the extent the REIT Holders are receiving anything more than other preferred

shareholders, they are receiving it directly from JPMC in exchange for releases." (Opinion at 102.)[6]

13. In any event, the Plan deems Class 19 to have rejected it. Under the terms of the Original Plan, JPMC provided the opportunity for creditors in Class 19 to receive a distribution from JPMC in exchange for foregoing litigation and granting the third party releases contained in Section 43.6. The release election for Class 19 was an opt-in; some creditors accepted JPMC's offer but most did not, including the members of the TPS Consortium. The TPS Consortium instead chose to roll the dice and litigate ownership of the Trust Preferred Securities at great expense and risk to JPMC. They lost. Now, they have the audacity to argue discrimination because they were not provided a second opportunity to receive a settlement payment from JPMC after litigating the issue to conclusion and losing. The Court must reject this baseless objection.

14. JPMC had no interest in offering additional settlement payments to members of Class 19 once it was forced to litigate the question of ownership of the Trust Preferred Securities (and, in fact, had no obligation to include any supplemental distribution in the modified Plan). Although the Original Plan was not confirmed, JPMC voluntarily agreed to nonetheless honor the elections from the Original Plan and to provide the settlement distribution to those Class 19 creditors who agreed to release JPMC in good faith and forego litigation. The

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[6] The Court recognized this at the hearing approving the disclosure statement for the Plan, where in response to this precise argument by the TPS Consortium, Your Honor had the following exchange with counsel for the TPS Consortium:

> THE COURT: Well, but didn't I decide already that a class can have, this class, specifically, can get two different distributions depending on whether they have opted in?
>
> MR. COFFEY: You absolutely did, Your Honor.
>
> THE COURT: So why are we re-litigating this?
>
> (Mar. 21, 2001 Hearing Transcript at 76:9-13.)

TPS Consortium's arguments should be rejected so that those creditors who agreed to forego litigation can receive the supplemental value from JPMC. In the event that the Court agrees with the TPS Consortium that the Plan cannot be confirmed without re-solicitation of Class 19, JPMC will remove the supplemental settlement payments from the Plan altogether.[7]

D. This Court is Not Divested of Jurisdiction to Consider Plan Provisions Relating to Trust Preferred Securities.

15. The TPS Consortium asserts that this Court is somehow prohibited by the judge-made "divestiture rule" from considering any provision in the Plan that concerns the hybrid securities referred to as the Trust Preferred Securities. This argument is baseless and is nothing more than the latest attempt by the TPS Consortium to derail the Plan and Global Settlement while holding hostage all parties in interest to these bankruptcy proceedings. The argument should be rejected.

16. First and foremost, the TPS Consortium will retain whatever rights it has with respect to appeal should this Court determine to confirm the Plan. The TPS Consortium would be free to pursue an appeal of the confirmation order. If the TPS Consortium is concerned about the effect of implementation of the Plan, it is free to seek a stay pending appeal of the confirmation order. As the Third Circuit has made clear, it is incumbent on the appellant to seek a stay to preserve the status quo. *See Nordhoff Invests., Inc.* v. *Zenith Elecs. Corp.*, 258 F.3d 180, 186-87 (3d Cir. 2001) ("Because of the nature of bankruptcy confirmations, we have held that it is obligatory upon appellant to pursue with diligence all available remedies to obtain a stay

[7] Like the Equity Committee, the TPS Consortium's arguments with respect to distributions from the Debtors' estates are misguided. (*See* TPS Consortium Objection, D.I. 7480, at ¶¶ 57-59.) The members of the TPS Consortium chose not to grant the third party release contained in the Original Plan (and are similarly found in the modified Plan) and instead retain direct claims they might have against JPMC. The members of the TPS Consortium are treated the same as all other creditors under the Plan: the third party release must be granted in order to receive an estate distribution funded by JPMC.

of execution of the objectionable order . . . ."); *see also In re Chateaugay Corp.*, 988 F.2d 322, 326 (2d Cir. 1993) ("The party who appeals without seeking to avail himself of that [stay] protection does so at his own risk.").[8] Instead, the TPS Consortium is asking the Court to effectively grant a pre-emptive stay that would preclude consideration of *any* Plan including the Trust Preferred Securities (that this Court held the TPS Consortium has no rights to). Moreover, if the Court were to adopt the TPS Consortium's novel interpretation of the divestiture rule there would be no need for a plaintiff to seek a stay during appeal because no court would be able to enforce that judgment through a plan of reorganization, indefinitely delaying emergence from chapter 11 in the process. In these circumstances, and in light of the TPS Consortium's failure to seek a stay of the TPS Order, applying the divestiture rule in the manner suggested by the TPS Consortium would be particularly inequitable and damaging to the underlying bankruptcy case.

17. The indefinite hold up of these chapter 11 proceedings would be especially egregious in this case where the TPS Consortium waited almost two years after the Conditional Exchange occurred and was announced to commence the TPS Adversary Proceeding. If the members of the TPS Consortium had any legitimate challenge to the Conditional Exchange they could have brought a timely claim and the matter would have been adjudicated long ago. Instead, the TPS Consortium created any timing issue by waiting until two months after the Global Settlement was announced to file its complaint in an obvious attempt to hold up these proceedings. Their objection to the Plan is more of the same and should be rejected.

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[8] It is telling that the TPS Consortium never sought a stay to prevent enforcement of this Court's order (the "TPS Order") granting summary judgment to the defendants in *Black Horse Capital L.P.* v. *JPMorgan Chase Bank, N.A.*, Adv. Pro. No. 10-51387 (MFW), D.I. 180. (the "TPS Adversary Proceeding.")

18. Second, as the TPS Consortium acknowledges in its objection (at ¶ 14), this Court retains the right to enforce the order granting the defendants summary judgment in the TPS Adversary Proceeding. Notwithstanding the judge-made divestiture rule founded on prudential considerations, lower courts—including bankruptcy courts—retain jurisdiction to "enforce, implement, or otherwise treat as valid" appealed orders as long as the bankruptcy court does not "disturb the issues on appeal." *Georgine* v. *Amchem Prods., Inc.*, No. 93-cv-0215, 1995 WL 561297, *7 (E.D. Pa. Sept. 18, 1995). The TPS Consortium distorts the concept of disturbing the issues on appeal. This is not a matter of mootness or preserving the status quo (like a stay would do) but rather of ensuring that the lower court does not modify or vacate the appealed order itself. As the court in *In re Mazzocone* explained, the bankruptcy court "lacks jurisdiction to vacate or modify an order which is the subject of a pending appeal" or to "reconsider" an issue but retains jurisdiction to "enforce, implement or otherwise treat as valid" the order subject of the pending appeal. *In re Mazzocone*, No. 94-5201, 1995 WL 113110, *4 (E.D. Pa. Mar. 16, 1995). This distinction is important because "[a]dopting a broader divestiture of jurisdiction rule in the bankruptcy context would severely hamper the bankruptcy court's ability to administer its cases in a timely manner." *Id.* (quotation omitted). Moreover, "[a]s a prudential doctrine, the [divestiture] rule should not be applied when to do so would defeat its purpose of achieving judicial economy." *Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90, 97 (3d Cir. 1988). Here, consideration of the Debtors' Plan is of paramount importance to all creditors of the Debtors' estates.

19. In a separate opinion dated January 7, 2011, the Court granted summary judgment for the defendants in (the "TPS Opinion"). In reaching its conclusion, this Court determined that "[u]nder the express terms of the applicable Agreements, the Conditional

Exchange occurred automatically once the OTS declared that an Exchange Event had occurred and directed that the Conditional Exchange occur." (TPS Opinion at 11, emphasis in original.) The Court went on to reject the arguments proffered by the TPS Consortium that certain ministerial steps contained in the operative agreements were instead conditions precedent to the Conditional Exchange. (TPS Opinion at 12.) Therefore, "under the express language of the Trust Agreements and the Exchange Agreements, the Court conclude[d] that the certificates held by the TPS holders are no longer TPS but are deemed to be Depositary Shares tied to WMI Preferred Shares." (TPS Opinion at 13.) In other words, this Court concluded that the members of the TPS Consortium hold WMI preferred shares and not Trust Preferred Securities. The Plan simply implements that order. The Plan provides for treatment of those securities as WMI preferred shares. The Plan further resolves the dispute between JPMC and WMI with respect to the Trust Preferred Securities, but contrary to the TPS Consortium's statements otherwise, there was never a dispute between JPMC and WMI as to whether the Conditional Exchange itself occurred; it did. Rather, the Plan resolves the dispute as to what happened to the Trust Preferred Securities *after* the Conditional Exchange and confirms that JPMC will be the sole legal owner of the Trust Preferred Securities on the Effective Date of the Global Settlement.

20. The cases cited by the TPS Consortium are consistent with this Court having the ability to enforce the TPS Order through confirmation of the Plan. The TPS Consortium relies on a readily distinguishable non-controlling First Circuit case, *In re Whispering Pines Estates, Inc.*, in support of its divestiture argument. There, the court was not being asked to enforce an order, as is being done here through the Plan, but rather grant relief from the automatic stay to permit the sale of property that would effectively modify the order on appeal. *In re Whispering Pines Estates, Inc.*, 369 B.R. 752, 761 (B.A.P 1st Cir. 2007.) Here, no

modification of the TPS Opinion is requested; rather implementation of that order is requested through the Plan. Similarly, none of the TPS Consortium's other cases involved a situation where the Court was being told it lacked jurisdiction to enforce an order through consideration of a debtor's plan. Rather the other cases cited by the TPS Consortium involved arguments where the lower court was being asked to take action that would modify the interlocutory orders on appeal. *See, e.g., In re Trimble*, Adv. Pro. No. 07-2115, 2008 WL 782581, *4 (Bankr. D. N.J. Mar. 18, 2008) (staying proceedings until motion for leave to pursue interlocutory appeal of denial of motion to dismiss pending arbitration is heard). In fact, the court in *In re Urban Development Limited., Inc.* permitted a debtor to proceed with a sale of property pursuant to Section 363 of the Bankruptcy Code despite that property being the subject of an appeal. *In re Urban Dev. Ltd., Inc.*, 42 B.R. 741, 744-45 (Bankr. M.D. Fla. 1984).[9]

21. The reading of the divestiture rule suggested by the TPS Consortium would improperly expand its scope, eliminate the need to ever seek a stay pending appeal, and most importantly, would prevent a bankruptcy court from confirming a plan of reorganization if that plan requires the enforcement of a different order that is separately on appeal. This would undermine the bankruptcy process. This Court retains jurisdiction to consider confirmation of the Plan and to enforce the TPS Order through the confirmation order. The TPS Consortium's objection should be overruled.

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[9] JPMC and WMI opposed the TPS Consortium's appeal of the TPS Order, in part, as procedurally improper because Counts VII-IX of the complaint were voluntarily dismissed without prejudice and therefore the appealed order is non-final. To the extent the TPS Consortium's appeal is improper, this Court cannot be divested under jurisdiction under any circumstances. *See, e.g., Sea Star Line LLC* v. *Emerald Equip. Leasing, Inc.*, No. 05-245, 2009 WL 3805569, *3 (D. Del. Nov. 12, 2009) (stating that an improper appeal does not have the effect of divesting the lower court of jurisdiction). Furthermore, this Court is well aware of the "frivolity exception" to the divestiture rule. *See U.S.* v. *Leppo*, 634 F.2d 101, 105 (3d Cir. 1980) (holding that an appeal does not divest a lower court of jurisdiction if that court has found the appeal to be frivolous). The TPS Consortium's appeal falls within that exception when considering the plain language of the operative documents.

E. This Court Has Subject Matter Jurisdiction to Consider the Global Settlement.

22. Last evening, mere days before the Plan confirmation hearing, the TPS Consortium filed a supplemental objection to the Plan (D.I. 8100) asserting a new argument that the U.S. Supreme Court decision in *Stern* v. *Marshall*, No. 10-179, 2011 WL 2472792 (U.S. June 23, 2011), prevents this Court from considering and approving the Global Settlement. JPMC has only had a brief opportunity to review this argument but can nonetheless conclude—as this Court should conclude—that the argument is meritless. The Supreme Court in *Stern* was clear that it was deciding a "narrow" question with respect to a bankruptcy court's jurisdiction to finally adjudicate the merits of a debtor's state law counterclaim. *Stern*, 2011 WL 2472792 at *26. The *Stern* decision in no way suggests that this Court lacks jurisdiction to approve a settlement that includes a debtor's voluntary discharge of various claims to achieve a fair and reasonable settlement. Here, the Global Settlement does just that and provides more than $7 billion to be distributed to creditors of the Debtors' estates. The effect of the TPS Consortium's argument would be that no bankruptcy court could ever permit a debtor to grant a general release to a non-debtor as part of a settlement or a plan. This would imperil the bankruptcy process and is not what is intended by the Supreme Court's opinion in which the majority wrote that the decision "does not change all that much." *Id.* As this Court noted in its January Opinion, approval of the Global Settlement and confirmation of the Debtors' Plan are core matters. (Opinion at 11.) The Global Settlement should be approved and the Plan confirmed.

RESERVATION OF RIGHTS

23. JPMC reserves the right to supplement this submission or otherwise reply, by written submission or argument at any hearing, including but not limited to the confirmation hearing, to objections or statements filed or made in connection with confirmation of the Plan. JPMC does not waive any of its rights, at law or in equity, by submitting this or any other response, reply, or statement in connection with confirmation of the Plan.

Dated: July 8, 2011
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

AFFIDAVIT OF SERVICE

STATE OF DELAWARE)
) SS
NEW CASTLE COUNTY)

Anthony C. Dellose, being duly sworn according to law, deposes and says that he is employed by the law firm of Landis Rath & Cobb LLP, attorneys for JPMorgan Chase Bank, N.A. in the above-referenced cases, and on the 10th day of August, 2011, he caused a copy of the following:

POST-HEARING SUBMISSION OF JPMORGAN CHASE BANK, N.A. IN SUPPORT OF CONFIRMATION OF THE DEBTORS' MODIFIED SIXTH AMENDED JOINT PLAN

to be served upon the parties identified on the attached service list in the manner indicated.

Anthony C. Dellose

SWORN TO AND SUBSCRIBED before me this 10th day of August, 2011.

Notary Public

MICHELLE L. IFILL
NOTARY PUBLIC
STATE OF DELAWARE
MY COMMISSION EXPIRES OCT. 26, 2011

WASHINGTON MUTUAL, INC.
BANKRUPTCY CASE NO. 08-12229 (MFW)

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