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
	Re: Docket Nos.: 6966, 6528, 6529, 8068

CLOSING ARGUMENT

OF CHARLES S. McCURRY TO THE MODIFIED SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

Be it known to this honorable Court, that I am an affected and "interested party" to this case before this Court -- as a retail shareholder of preferred and common equity, as well as a retail shareholder of the PIERS. Therefore, I, Charles S. McCurry, file this Closing Argument, pro se,[2] subsequent to the Plan of Reorganization Confirmation Hearing held[3] to consider confirmation of the Debtors Modified Sixth Amended Joint Plan of Reorganization ("The Plan").

Pursuant to the Debtors "Notice Regarding Post-Hearing Written Submissions [...]" this written Closing Argument is filed and served prior to the deadline established of August 10th, 2011.[4]

By reference hereto, this Closing Argument shall also include and incorporate the original Objection filed by this "interested party".[5]

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[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 9810

[2] As pro se, without benefit of legal background, I beseech the court to accept a "substance over style" herein.

[3] Confirmation Hearing of the proposed Plan of Reorganization held July 13th-15th, 2011 continuing July 18th -21st [hereinafter *Confirmation Hearing*]

[4] Docket No. 8344 – Filed July 29th, 2011 – "Notice Regarding Post-Hearing Written Submissions and Closing Arguments with Respect to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code"

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ABBREVIATIONS / REFERENCES

The following terms are used herein:

FDIC	The Federal Deposit Insurance Corporation
FDIC-R	The FDIC as Receiver entity
FDIC-C	The FDIC as Corporate entity
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act of 1989
GSA	Current Global Settlement Agreement – as included in Docket No. 6966
"Prior GSA"	Previous Global Settlement Agreement for prior POR Confirmation and ruled upon in the Opinion of January 7th, 2011 – (Docket No.5548)
JPMC	JP Morgan Chase in its capacity of receiving the assets of Washington Mutual Bank and/or of Washington Mutual Bank FSB
MNPI	Material Non-Public Information
Opinion	The Court's Opinion[6] rendered on January 7th, 2011 regarding the prior Plan of Reorganization, and the associated Global Settlement Agreement
Order	The Court's Order[7] rendered on January 7th, 2011 Denying Confirmation of the prior Plan of Reorganization, and the associated Global Settlement Agreement
POR / "The Plan"	Current Plan of Reorganization – as included in Docket No. 6966
"Prior POR"	Previous Plan of Reorganization considered and ruled upon in the Opinion of January 7th, 2011 - (Docket No. 5548)
SNH	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) who collectively hold (or held) claims in various classes, including Senior Notes, Senior Subordinated Notes, and PIERS claims

INTRODUCTION TO ARGUMENTS

In its *Opinion* of January 7th, 2011, the Court stated "[…] that the Global Settlement is fair and reasonable as the Court concludes […]"[8] (as it related to the GSA at that time).

Subsequently, on February 22nd, 2011 in a filing with the Court, the Debtors argued[9] that any reconsideration of the prior *Opinion* regarding that prior GSA necessarily requires

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[5] Docket No. 8068 -- Filed July 1st, 2011 – "Objection by Charles S. McCurry to the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code" [hereinafter *McCurry Objection*]

[6] Docket No. 6528 – Filed Jan. 7th, 2011 – "Opinion Denying Confirmation of Sixth Amended Plan of Reorganization" [hereinafter *Opinion*]

[7] Docket No. 6529 - Filed Jan. 7th, 2011 – "Order Denying Confirmation of Sixth Amended Plan of Reorganization" [hereinafter *Order*]

[8] *Opinion*, pg. 64.

satisfaction of a high legal standard -- a "high bar" -- by a showing of significantly changed circumstances. I agree. However, unlike the Debtors, I submit that such a showing has now been made based on the record before the Court, and that the Court is now duty-bound to undertake such a reconsideration, *sua sponte* if necessary, and to make a finding that the new, current GSA is, in fact, neither "fair" nor "reasonable".

As the Debtors have stated:

> "Federal Rule of Civil Procedure 59(e), made applicable here pursuant to Bankruptcy Rule 9023, governs motions for reconsideration. See Official Comm. of Unsecured Creditors v. Catholic Diocese of Wilmington (In re Catholic Diocese of Wilmington, Inc.), 437 B.R. 488, 490 (Bankr. D. Del. 2010).

A motion for reconsideration must rely on one of three major grounds:

> (i) an intervening change in controlling law;
> (ii) the availability of new evidence; or
> (iii) the need to correct clear error of law or prevent manifest injustice.
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> Id. at 493 (denying motion for reconsideration because movants failed to "identify any evidence presented but overlooked by the Court that might reasonably have altered the result"); HHCA Texas Health Servs., L.P. v. LHS Holdings, Inc. (In re Home Health Corp. of Am.. Inc.). 268 B.R. 74, 76 (Bankr. D. Del. 2001) (Walrath, J.) (Bankr. D. Del. 2008) ("A motion for reconsideration ... is an extraordinary means of relief in which the movant must do more than simply reargue the facts of the case or legal underpinnings.").
>
> Importantly, a motion for reconsideration is not a proper vehicle to merely attempt to convince the court to rethink a decision it already has made. Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993) (concluding that "there were no manifest errors of law or fact in [the court's] original Opinion," and that there was "no newly discovered evidence that [was] relevant to [that] case" warranting consideration). "

Certainly, as has been previously communicated to the parties by the Court, and has been acceded to by the Equity Committee and others, it is not being suggested here that re-litigation of those issues already decided should gratuitously be attempted at this time. However, pursuant to

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[9] Docket No. 6771 - Filed Feb. 22nd, 2011 - "Debtors' Response to Prevor Request for Reconsideration"

59 F.R.Civ.P and the above cited cases, there have been subsequent novel changes in the law, new facts discovered, and new rulings in this case and other similar actions since the *Opinion* was rendered, which do, in fact, rise to the level of meeting the very high bar required for the Court to reconsider its prior ruling.

Namely, since this Court's *Opinion* was rendered, all of the following have occurred:

(1) There has been an intervening change in controlling law (e.g. Stern v. Marshall, infra, and the ANICO decision, infra);

(2) New and material evidence has subsequently come to light which logically undermines the factual basis of the Court's *Opinion* (e.g., evidence of insider trading by SNH, evidence of undue influence on the GSA process by the SNH, evidence of the lack of any party's reasonable belief that JPMC had a legitimate claim to the $4 billion in bank deposits, evidence that no party had a reasonable belief that WMB bondholders had a legitimate claim on WMI's assets, etc.); and

(3) The need to correct a clear error of law or to prevent manifest injustice has now become apparent.

Additionally, and in the alternative, even if the Court deems that that the requirements of 59 F.R.Civ.P are not met, the fact remains that the current "Global Settlement Agreement" (GSA) is no longer the same GSA on which the *Opinion* was based.

The GSA has changed. In fact, is has changed to an extent that the Court's prior ruling approving GSA version 1.0 should not simply be automatically extended to GSA version 2.0.

Even the parties signing onto this revised and modified GSA have changed. It is a revised and manifestly new -- so-called "Global Settlement Agreement". Ironically it is still

named "Global" even with fewer signers now on board, and certainly without the participation of crucial parties, such as and including the Equity Committee, to make it truly and actually "global". It is a misnomer from the start.

This new GSA is a novel, separate, renegotiated, unique agreement with a change of signatories -- the terms of which must be evaluated anew by this Court in a holistic and comprehensive manner and not piecemeal.

Certainly this Court should not evaluate this new GSA based on the merits of only the portions, albeit substantial in effect, which have changed. It is an integrated and completely new agreement. As such it requires and deserves a *de novo* evaluation as to whether it meets the test of fairness and reasonableness. If nothing else, the billions of dollars at jeopardy for the many stakeholders in this case compel such an approach.

The new GSA has had material - not *merely* ministerial - amendments and modifications, which required publication of a lengthy and substantial 'black-line' version of it and the revised POR – together totaling over 600 pages to address these changes.[10]

Moreover, during the significant period of time that has passed since the Court considered the original POR and prior GSA – important new facts and controlling new law have emerged.

Firstly and most importantly, after the Courts *Opinion* and *Order* – significant and controlling decisions have been announced by both the United States Court of Appeals for the District of Columbia,[11] regarding the ANICO litigation and the scope of FIRREA, and by the

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[10] Docket No. 6754 – Filed Feb. 17th, 2011 – "Notice of Filing of Blacklines Related to the Modified Sixth Amended Joint Plan and Global Settlement Agreement" - (Revised GSA as Appendix H – beginning pg. 132)

[11] See American National Insurance Co. v. Federal Deposit Insurance Co., No. 10-5245 (D.C. Cir. June 24, 2011), [hereinafter *ANICO Decision*]

United States Supreme Court,[12] regarding the scope of Bankruptcy Court jurisdiction as it relates to state and common law cross-complaints by a debtor against claimants which are not part of core bankruptcy issues.

Additionally several lower court rulings in other bank seizure cases, with decisions adversely affecting the legal positions adopted in this case by the FDIC, have emerged, as discussed below.

Also new testimony regarding the $4 billion demand deposit of the Estate, held by JPMC, requires closer evaluation of the validity of the GSA. Although it now appears that certain parties originally attempted to mislead this Court into believing that JPMC's claim to these funds was made in good faith and was legitimate, and that, therefore, compromise of this claim was legitimate consideration for the Debtors to enter into the GSA, it now appears that, in fact, virtually all parties (including JPMC) recognized from the outset that JPMC's claim was bogus and unsustainable, and therefore could not possibly supply any real and valid consideration for release of the Debtors' substantial common law claims against JPMC..

Finally, the Debtors inexplicable recent attempt to abandon assets, without explanation of the potential impacts to the valuable NOLs available to the Estate, requires the Court to consider the motives for this action, since the Debtors have never offered an explanation, even though this move could have an important impact on the rights of stakeholders.

Parenthetically, but respectfully, it is submitted that, despite the Court's obvious good intentions in attempting to facilitate an expeditious final resolution of these complex proceedings by decisive action, the Court has substantially erred in substituting its own "expert opinion" in its evaluation, in support of the GSA, of the prospects of success in adversary proceedings by the

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[12] See Stern v. Marshall, No. 10-179 (U.S. June 23, 2011) [hereinafter *Stern Decision*]

Debtors against JPMC and FDIC, as a substitute for actual, admissible, and credible evidence which was otherwise lacking. Although this issue is now on appeal, and may eventually be finally decided through the normal appellate process, it is submitted that, in order to avoid equitable mootness, and in view of the changed circumstances detailed above, in good faith this Court must reconsider its decision in this regard, and recognize that, in the absence its own highly unusual findings, this POR and the GSA must fail.

Therefore, this lowly shareholder, on behalf of all such similarly situated shareholders, respectfully submits that this Court, given the substantial new facts and law that have developed since this Court's approval of the original GSA, and consistent with the need to correct a clear error of law and to prevent manifest injustice which has now become apparent, must reconsider whether the GSA as proposed is in fact "fair and reasonable", and should accordingly reject the current POR which is necessarily dependent on that unholy GSA.

Therefore, the following arguments are submitted.

I. Pursuant to 59 F.R.Civ.P and/or Bankruptcy Rule 9023:

New Rulings have emerged since the *Opinion* and *Order* of January 7th, 2011.

1. The *Opinion* reasoned that claims of the Estate similar to the ANICO claims were not likely to have substantial value to the Estate.

A New legal basis now exists to bring this specific element of the *Opinion* into question.

The Court noted that the Business Tort Claims based on the ANICO allegations may have limited value due to their dismissal by the D.C. District Court;[13] however, the Court also noted that this decision was under Appeal.[14]

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[13] *Opinion, pg.* 53-54 (x. Business Tort Claims) – "On April 13, 2010, the DC Court dismissed the ANICO Litigation finding that under FIRREA the receivership was the exclusive claims process for claims relating to the sale of WMB. *ANICO v. JPMorgan Chase & Co.*, 705 F. Supp. 2d 17, 21 (D.D.C. 2010).

This Court found that "The ANICO suit has already been dismissed on the basis that it had to be brought in the FDIC receivership action",[15] and therefore this Court concluded "[T]hat the Debtors' likelihood of success on the Business Tort Claims is not high".[16] However, subsequent to this *Opinion*, a new, controlling substantial fact has occurred in that an appellate ruling has been rendered. The United States Court of Appeals for the District of Columbia in the *ANICO Decision,* has reversed this dismissal by the District Court, and remanded the ANICO case back to District Court.

On June 24th, 2011, The United States Court of Appeals concluded that:

"[...] First, subsection (ii) of § 1821(d)(13)(D) bars only claims that relate to an act or omission of the failed bank of the FDIC-as-receiver, and appellants' suit is simply not a "claim" under FIRREA. In FIRREA, the word "claim" is a term-of-art that refers only to claims that are resolvable through the FIRREA administrative process, and the only claims that are resolvable through the administrative process are claims against a depository institution for which the FDIC is receiver. **Because appellants' suit is against a third-party bank for its own wrongdoing, not against the depository institution for which the FDIC is receiver (i.e., Washington Mutual), their suit is not a claim within the meaning of the Act and thus is not barred by subsection (ii).**

[...] **Appellants' suit seeks relief from JPMC for its own conduct**; the mere fact that JPMC now owns assets that Washington Mutual once (USCA Case #10-5245 Document #1315055 Filed: 06/24/2011 Page 8 of 15) owned does not render this suit one against or seeking a determination of rights with respect to those assets. See *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 394 (3d Cir. 1991)." (emphasis added)

Pursuant to this successful Appeal, the ANICO related claims are deemed no longer restricted by the requirements of FIRREA, and are now clarified to be direct claims against JPMC only. Therefore, this Court's assumptions or

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[14] *Opinion, pg.* 54 (x. Business Tort Claims) – "That order is presently on appeal. (Kosturos Decl. at ¶ 25.)"
[15] *Opinion, pg.* 55-56.
[16] *Opinion, pg*; 55.

evaluations as to the as to the likelihood and value of the ultimate resolution of such claims, whether in the D.C. Circuit Court or by way of the Debtors' adversarial counterclaims in these bankruptcy proceedings, is undermined.

Additionally, the ANICO filing was originally filed in Texas based solely on state common law theories, and due specifically to the unwarranted intervention of the FDIC (erroneously claiming that FIRREA applied) was first removed over to the District Court for the Southern District of Texas, and subsequently transferred to D.C. District Court where items related to FIRREA are statutorily required to be adjudicated.

The current Disclosure Statement for the POR being considered states: [17]

> "On or about February 16, 2009, various insurance company plaintiffs, including American National Insurance Company, filed suit in the **122nd District Court of Galveston County, Texas**, in the case captioned American Nat'l Ins. Co., et al. v. JPMC Chase & Co., et al. (Case No. 09-CV-0199) (the "American National Action"). [...]
>
> Subsequent to the filing of the American National Action, JPMC and the FDIC Receiver, an intervening defendant, **removed the action to the United States District Court** for the Southern District of Texas (Case No. 09-00044). Upon the motion of the FDIC Receiver, by order, dated September 9, 2009, the **United States District Court for the Southern District of Texas then transferred the American National Action to the D.C. District Court** (Case No. 09-cv-01743 (RMC))." (emphasis added)

With the decision of the Court of Appeals that FIRREA does not apply to any claims directly against JPMC as a consequence of its business torts, and that therefore the FDIC has no standing for its intervention, the matter may now be returned to the Texas court system as originally intended by the plaintiffs.

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[17] Docket No. 6966 – "Disclosure statement of the POR and GSA" - pg. 109 [hereinafter *Disclosure Statement*]

Moreover, as matters of state law which are properly seen as non-core counterclaims, the business torts alleged against JPMC are now beyond the jurisdiction of this Bankruptcy Court to adjudicate according to the Supreme Court's recent *Stern Decision*.

Additionally, the current proposed Plan of Reorganization and Global Settlement Agreement proposes and require that post-confirmation, these ANICO-related tort claims would be subject to the settling parties' obligation to "[...]use their best efforts to seek rulings from the D.C. District Court, the Bankruptcy Court, or the relevant appellate court (a) enjoining the plaintiffs in the American National Action and any other plaintiffs [...]"[18]

"As noted above, the Plan incorporates, and is **expressly conditioned** upon the effectiveness of the Global Settlement Agreement which proposes to compromise and settle certain issues in dispute among the parties thereto. [...]
Pursuant to the Global Settlement Agreement, WMI, the FDIC Receiver and the FDIC Corporate **will use their best efforts to seek rulings from the D.C. District Court, the Bankruptcy Court**, or the relevant appellate court (a) **enjoining the plaintiffs in the American National Action and any other plaintiffs who have brought or may in the future bring such claims** from taking any action inconsistent with the Debtors' and the FDIC Receiver's ownership and exclusive control over such claims and causes of action, including, without limitation, prosecution of the American National Action and (b) **enjoining any other person from instituting or prosecuting any claims** on behalf of WMI, WMB or the Receivership.

On the effective date of the Global Settlement Agreement, or as soon thereafter as is practicable following **entry of an order of the D.C. District Court and/or the Bankruptcy Court** or an appellate court consistent with clauses (a) and (b) above, solely to the extent that a final non-appealable judgment has not been entered previously against the plaintiffs in the American National Litigation as of such date, WMI, the FDIC Receiver, and FDIC Corporate will take any and all actions reasonably requested by WMI, the FDIC Receiver, and FDIC Corporate or JPMC **to dismiss, with prejudice, the American National Litigation.**" (emphasis added)

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[18] *Disclosure Statement* - pg. 110

Additionally, this Court's authority to approve certain post-confirmation activities, such as dismissal of District Court actions as proposed by the Plan of Reorganization and Global Settlement Agreement – are now called into question by the *Stern Decision*.

> *In re Craig's Stores* (*citing Industrial Addition Ass'n v. Comm'n of Internal Revenue*), [19] it clarifies:
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> [...]Furthermore, parties cannot create bankruptcy court jurisdiction by consent or waiver." (emphasis added)

Thus, with the ANICO dismissal now overturned, and that litigation reinstated, and yet with the Plan of Reorganization and Global Settlement agreement still inextricably tied (and "expressly conditioned") to an agreement requiring this Court to exercise its available powers to approve, bless and support the dismissal of ANICO and related complaints in the District Court, this Court is now in a dilemma resulting from the *Stern Decision*. The GSA is expressly conditioned upon (1) the assumption that the ANICO case would remain dismissed, and (2) that this Court had jurisdiction to hear and decide state law business tort counterclaims claims by WMI against JPMC. With the *ANICO Decision* and *Stern Decision*, these fundamental assumptions are impossible of realization.

In light of the above developments, this Court must reconsider that part of its *Opinion* regarding whether the GSA is "Fair and Reasonable" given the

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[19] *Craig's Stores*, 247 B.R. at 652 (citing *Industrial Addition Ass'n v. Comm'n of Internal Revenue* No. 118, 323 U.S. 310, 312 (1945)).

renewed substantial value of these claims[20] as they are now "back on the negotiating table" and likely do have, as Plan Opponents previously believed, substantial value to the Estate, in contradiction to the Court's prior conclusions and subsequent *Opinion*. The Court's reasoning and conclusion that WMI's counterclaims had little value was in large part based on a then-dismissed and defunct ANICO litigation. The factual basis of that conclusion is now undermined.

Accordingly, it is submitted that the new developments discussed above must be considered as "new evidence" and "new controlling law" justifying and mandating reconsideration of its *Opinion* pursuant to 59 F.R.Civ.P.

2. External to this case, the decision of the United States Supreme Court in Stern v. Marshall, No. 10-179 (U.S Supreme Court,. June 23, 2011) undermines the *Opinion* and prevents confirmation of the current Plan of Reorganization and associated Global Settlement Agreement.

Certainly the recent *Stern Decision* calls into question the fundamental differences between Article III and Article I Courts and the relative jurisdictional boundaries governing what kinds of decisions can be made in each. And certainly Bankruptcy Courts are now in the process of evaluating the ruling by the Supreme Court and the scope and affect implied by it.

So much so that many Bankruptcy Courts have recently issued requests of the parties to provide their opinions on how the *Stern Decision* may affect the case at hand. As example, on July 22nd, 2011, *in re DBSI Inc., et al.*, Case No. 08-12687 (PJW), that Court issued a Memorandum Opinion requesting information

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[20] *Opinion, pg.* 55 - "The Plan Objectors contend that the Business Tort Claims are valid and valuable claims, meriting denial of approval of the Global Settlement."

from the parties regarding their stance on the Stern Decision and the applicability to that case.

Judge Walsh stated:

"I am not entering an order at this time because I am concerned that this Court's jurisdiction may be in question in light of the Supreme Court decision in Stern v. Marshall, 131 S.Ct. 2594 (2011). Before proceeding further with this matter, I am inviting the parties to file written submissions on whether Stern v. Marshall permits me to issue an order."

The issue was similarly brought to the Court's attention as recently as July 13th, 2011 - in the Confirmation Hearing:[21]

> MR. STARK: (Brown Rudnick LLP for the Ad Hoc Group of Trust Preferred Holders) - The second issue is a little bit more substantive. We've raised some, what I think, very significant jurisdictional issues in our papers, and we're going to need to talk about that. [...]
>
> THE COURT: Well, let me ask you: If I agree with your position that I don't have jurisdiction to decide these issues, is not the procedure that I hear the evidence and present proposed findings and conclusions to the District Court?
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> MR. STARK: It would be, Your Honor, and so that's one way that we can handle it. There's a variety of other ways, but that's a perfectly legitimate way to proceed [...]
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> THE COURT: I understand, but I think that we can proceed with the testimony and make a ruling on what issues, if any, I have jurisdiction to decide on a final basis or what issues, if any, I can only do a proposed ruling on.
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> MR. STARK: Understood. Thank you, Your Honor.

The unresolved issue as to whether this Court even has jurisdiction to render a final order on disputes presented for decision which are central to the POR and/or GSA, or even to approve a compromise by the parties of those disputes which are otherwise outside this Court's jurisdiction, is the pink elephant

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[21] Confirmation Hearing, Transcript of July 13th, 2011, pgs: 60:1-19, 61:8-11

in the courtroom which the settling parties are trying to persuade the Court to ignore.

Ironically, scant days ago, on August 5th, 2011 in an unrelated Bankruptcy case – one of the parties of *this* case – JPMC, filed suit claiming the *Stern Decision* was relevant in the Lehman Brothers Holdings Inc. Bankruptcy Case. As reported in the press:[22]

> "JPMorgan Chase & Co. (JPM), sued for $8.6 billion by bankrupt Lehman Brothers Holdings Inc. (LEHMQ), said the defunct firm's common law claims against it must be decided by a U.S. district court judge rather than a bankruptcy judge.
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> In a court filing yesterday in Manhattan, the New York- based bank said the U.S. Supreme Court ruling in the Anna Nicole Smith case limited the power of bankruptcy judges to rule on such claims"

The Court must consider this new information as justifying reconsideration of its *Opinion* pursuant to 59 F.R.Civ.P.

> **Several lower court rulings in other bank seizure cases, with decisions adversely affecting the legal positions adopted in this case by the FDIC, have recently emerged. Thus new legal bases now exist to bring specific elements of the *Opinion* into question.**

a) "Team Financial" and Tax Refunds.

In the matter of the "Team Financial"[23] bank, on April 27th, 2010, Chief Bankruptcy Judge Robert E. Nugent (Bankruptcy Court for the District of Kansas) rejected the claims by the FDIC that it, and not the Estate, was entitled to certain tax refunds as receiver of a seized bank. Evaluating issues very similar to those in

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[22] **Bloomberg**, "U.S. District Court Must Decide Lehman Claims, JPMorgan Says" - Linda Sandler - Aug 6, 2011

[23] Case No. 09-10925 – Bk. Court of Dist. Of Kansas – "*Team Financial Inc et al v. FDIC et a"l* (Doc. No. 53) [hereinafter *Team Opinion*]

this case, where Washington Mutual Bank was part of a "tax sharing" arrangement with WMI, Judge Nugent wrote:

> "The FDIC claims a tax refund emanating from the plaintiffs' 2008 consolidated tax return that is payable to the plaintiffs under a Tax Allocation Agreement entered into on January 8, 2008 by plaintiffs, TeamBank, and other affiliated entities. The FDIC contends that the tax refund is not property of the bankruptcy estates of these debtor bank holding companies, but rather should be paid to the FDIC as receiver as the separate property of the failed banks."[24]

Again, similar to *this* case, post-seizure and post-petition, the Tax Refunds were placed in escrow in a co-named account, pending the decision of that Bankruptcy Court as to the ownership of those monies. From the *Team Opinion*:

> "On March 20, 2009, the United States Comptroller of the Currency closed TeamBank and CNB and the Federal Deposit Insurance Corporation ("FDIC") was appointed their receiver. On April 5, 2009 Team, TFAS and Bancorp each filed voluntary chapter 11 petitions. The debtors filed this adversary complaint on May 22, 2009. The parties agreed to the entry of an order providing for the deposit of all tax refunds in an escrow account jointly titled in the plaintiffs and the FDIC pending a determination by the Court regarding the ownership of the refunds.[25]
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> [...]Plaintiffs deny the existence of an agency or trust relationship and contend that the TAA[26] is nothing more than an agreement or contract concerning how the Consolidated Tax Group would deal with tax liability and refunds. Team claims that it owns the tax refund, that it is property of the bankruptcy estate, and that the closed banks and their receiver are merely Team's creditors."

That Court ruled that the Tax Refunds are the property of the Estate.

> "Having concluded that the TAA does not create a trust relationship wherein Team holds any tax refund it receives from the IRS for the benefit of TeamBank or CNB, **the Court concludes that Team owns the tax refund and it is property of the bankruptcy estate.** This conclusion is supported by certain provisions and language of the TAA as well as *In re*

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[24] In orig. Adv. Dkt. 37.
[25] In orig. Adv. Dkt. 25.
[26] *Team Opinion* -"This Consolidated Tax Group entered into a Tax Allocation Agreement ("TAA") on January 2, 2008."

Franklin Sav. Corp.[27] and *In re First Central Financial Corporation.*"[28] (emphasis added)

While conceding that the ruling of another bankruptcy trial court is not precedent binding on this Court, it is submitted that the persuasive value of Judge Nugent's decision, given an almost identical fact pattern, is substantial. The arguments made in that case by the FDIC are quite similar to the arguments made by the FDIC and others in this case, to wit, that the FDIC has a valid legal claim to the Tax Refunds pursuant to WMI's "Tax Sharing" agreement. In fact, as found by Judge Nugent, the FDIC does not have such a valid claim, and thus another underpinning of the argument that the GSA is "fair and reasonable" is removed.

The current GSA attempts to divide Tax Refunds, including NOLs, and among the proposed recipients, are the FDIC as receiver of the bank, and with additional portions allocated to JPMC as purchaser of certain assets formerly of Washington Mutual Bank. (As an aside, it should be noted that the Purchase and Assumption Agreement by and between the FDIC and JPMC purported to transfer only certain listed assets, and very few liabilities. Tax assets were not among those listed in the P&A Agreement.)

Parenthetically, JPMC may also be constrained from receiving such Tax Refunds as they were a recipient of TARP funds. The Court noted this in the *Opinion.*[29]

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[27] In orig 159 B.R. 9 (Bankr. D. Kan. 1993), aff'd 182 B.R. 859 (D. Kan. 1995).
[28] In orig. 269 B.R. 481 (Bankr. E.D. N.Y. 2001).
[29] *Opinion*, pg 30 – "Even if JPMC is precluded from claiming the tax refunds because it took TARP money or because it only bought WMB's assets and is not WMB's successor, the FDIC as Receiver argued that it had a claim to the portion of the tax refunds which is due to WMB under the Tax Sharing Agreement."

Thus, the decision in the *Team Financial* case, and with JPMC being a TARP recipient, calls into question the validity of the current GSA in this case, with its attempt to effect a similar division of Tax Refund monies to the FDIC and portions to JPMC, and its attempt to compel this Court to condone the looting of a highly valuable multi-billion asset away from the Estate.

b) "The Colonial BancGroup Inc." case and the "Right of Setoff".

On January 24th, 2011, seventeen days after this Court's *Opinion* and *Order*, the FDIC received yet another judicial rebuke against its greedy legal tactics in the case of *"The Colonial BancGroup"*, a matter before Judge Dwight H. Williams, Jr., U.S. Bankruptcy Court for the Middle District of Alabama.[30]

As summarized in the Morrison-Foerster report,[31]

> "The FDIC claimed a right of setoff under both federal and state law. First, the FDIC asserted a statutory right of setoff under 12 U.S.C. § 1822(d), which generally provides that the FDIC can withhold payment of a portion of the insured deposit of any depositor in a depository institution in default under certain circumstances.
>
> Ultimately, **the court rejected both of the FDIC's setoff arguments.** The court found that the DDA balances were a BB&T liability, and not an FDIC liability, and thus there was no mutual debt between the FDIC and the Debtor. Once BB&T assumed liability for the Debtor's accounts, the mutual debts between the Debtor and the FDIC "ceased to exist."[32] Judge Williams also noted that the FDIC "had a right under 12 U.S.C. § 1822(d) to offset the mutual debt" upon receivership;[33] however, **the FDIC lost that right once BB&T assumed liability."**
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> In this respect, the holding of Colonial BancGroup, Inc. **appears to limit the FDIC's ability to exercise its setoff right under federal law—**

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[30] *In re The Colonial BancGroup, Inc.*, No. 09-32303-DHW, 2011 WL 239201 (Bkrtcy. M.D. Ala. January 24, 2011).

[31] Feb. 3, 2011 – "The Colonial BancGroup, Inc.: FDIC Denied Right to Setoff Against Demand Deposit Accounts" (Barbara R. Mendelson, Larren M. Nashelsky, Alexandra Steinberg Barrage, and Jeremy R. Mandell) - http://www.mofo.com/files/Uploads/Images/110203-Colonial-BancGroup-FDIC.pdf

[32] In orig. *In re The Colonial BancGroup, Inc.*, 2011 WL 239201, at *9.

[33] *Id.*

> barring a circumstance where the FDIC, in its discretion, specifically excludes demand deposit accounts under the terms of a purchase and assumption agreement—to the span of time between receivership and purchase and assumption." (emphasis added)

This lack of setoff available to the FDIC directly affects its dubious claim that if the Court were to issue the summary judgment returning the $4 billion to the Estate, that the FDIC would have a corresponding setoff claim against those monies. Once again, while conceding that the ruling of another bankruptcy trial court is not precedent binding on this Court, it is submitted that the persuasive value of Judge William's decision, given a similar fact pattern, is substantial.

The claims made by the FDIC regarding their rights to nearly $4 billion on deposit by the Estate at JPMC were central to this Court's reasoning in its *Opinion*. From the Court's *Opinion*:[34]

> "On November 4, 2009, the FDIC filed a Motion seeking relief from the stay to permit it to exercise its right under the P&A Agreement to have JPMC transfer the Deposit Accounts back to the FDIC (**to allow the FDIC to set off against them claims it asserts it has against the Debtors**). (Ex. D-59.) The parties asked the Court to consider the Debtors' Summary Judgment Motion with the FDIC's Motion; oral argument on the motions was continued several times to permit settlement discussions.
>
> On March 12, 2010, the parties announced that they had reached a settlement of all issues regarding the disputed property and the claims of the FDIC and JPMC (the "Global Settlement"). (Kosturos Decl. at ¶ 36.)" (emphasis added)

A debtor's bankruptcy estate is composed of, at least in part, "all legal and equitable interests of the debtor in property as of the commencement of the case," according to 11 U.S.C. § 541(a)(1). As reflected in this expansive language,

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[34] *Opinion* pgs. 6-7

Congress intended a broad range of property to be included in property of the estate, as seen in *United States v. Whiting Pools Inc.*[35]

Therefore, to the extent that the GSA proposes to "settle" the "claims" of the FDIC against the nearly $4 billion on deposit by WMI with JPMC, any valuation or consideration given in "settlement" of this issue is invalid and therefore no consideration at all.

The Court must consider this <u>new</u> information as justifying reconsideration of its *Opinion* pursuant to 59 F.R.Civ.P.

B. <u>New Facts</u> have emerged since the *Opinion* and *Order* on January 7th, 2011.

1. The *Opinion* reasoned that a collection against JPMC may not be *"easily collectable" "especially if it is in the billions of dollars"*. <u>New</u> bases exist to bring this specific element of the *Opinion* into question.

The Court concluded in its *Opinion* that:

> "The collapse of WMB itself demonstrates that bank deposits (especially in the amount of $4 billion) may not be easily collectible without resulting in another bank collapse. Further, given the economic turmoil in 2008, when even huge institutions like Lehman Brothers and AIG faced financial difficulties, the Court concludes that it is not possible to say that any judgment against JPMC would not face difficulty in collection, especially if it is in the billions of dollars as the Plan Objectors contend."[36]

Subsequent to this *Opinion*, the Court has heard in the *Confirmation Hearing*, that early into the negotiations for the GSA, and across numerous proposed "term-sheets" - that JPMC was agreeable to returning the $4 billion on

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[35] Bankruptcy Law Watch – July 31st, 2011 - David Carickhoff and Alan Root – "Turning Losses Into Gains: Bankruptcy Battles Over Tax Refunds"

[36] *Opinion, pg.* 58

deposit from the Estate and that from early on in the negotiations, JPMC was not likely to be able to seriously challenge this return to the Estate.

Ironically, for reasons which appear inexplicable absent nefarious intent, the Debtors continued a public façade as to this $4 billion deposit, repeatedly asking this Court , effectively, to 'wait a bit longer' to render the *Opinion* the Debtors *seemingly* sought in its original filing for summary judgment on this matter. In fact, the Court on several occasions made it clear that the Court was ready to rule on the $4 billion deposit issue.

> "The parties completed briefing on the Debtors' motion for summary judgment in the Turnover Action, which motion and the oppositions thereto – filed by the FDIC Receiver, JPMC, and the Bank Bondholders – were considered at a hearing before the Bankruptcy Court on October 22, 2009. The Bankruptcy Court's decision with respect to the Debtors' summary judgment motion remains *sub judice*, although the Bankruptcy Court has indicated it is prepared to rule."[37]

Even the FDIC interposed into this apparent gamesmanship and misdirection.

On October 22nd, 2009 the FDIC claimed in open court that even if the Court was to rule that the $4 billion was to be turned over from JPM to the Estate, that the FDIC would incredulously intercede and 'take away' those monies. John Clarke (DLA Piper) on behalf of the FDIC Receiver stated:

> "Under Section 9.5 of the P&A Agreement, the FDIC Receiver or FDIC corporate if the receivership is over, may direct JPMorgan to withhold the deposit balance of any depositor of a failed bank and return the deposit balance to the FDIC Receiver, at which point JPMorgan's liability to the depositor will be relieved.[38] [...]

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[37] Disclosure Statement of POR/GSA – Docket 6966 pg 109-110
[38] Hearing Transcript, Oct 22, 2009 – pg. 61:10-15

> Well, in that case, we'll take the accounts back and we'll litigate about the setoff at that point."[39]

The FDIC was apparently implying that as long as its ally-in-adversary proceedings, JPMC got to keep the $4 billion deposit, the FDIC would leave it alone. So partisan was the spin heard from the FDIC, that it was clear that it would act only if JPMC was ordered, in summary judgment by this Court, to turn over the $4 billion to the Estate, thereby threatening to moot this Court's potential summary judgment ruling.

Later, the FDIC again attempted to mislead the Court on this issue of the $4 billion summary-judgment. It must be remembered that it was learned later that the FDIC was 'not yet onboard', and had not yet signed, the Prior GSA. From the Transcript of February 5th, 2010:[40] (emphasis added)

> THE COURT: [...] Do you want me to hold off any ruling until the continued hearing on that?
>
> MR. ROSEN (Debtors): On the 9.5 motion that has been adjourned. Nothing further, Your Honor. **You can do as you wish.**
>
> <Interjecting over audio>
>
> MR. CLARK (FDIC): Your Honor, this is John Clark from DLA Piper. If I might be heard on that question?
>
> THE COURT: Yes.
>
> MR. CLARK: The FDIC Receiver does believe the Court should **hold off** on that ruling, on the summary judgment motion. **Obviously, the parties have different points of view on that.**
>
> MR. ROSEN: Your Honor, **the parties understanding was that the Court could make a determination with respect to the summary judgment ruling** if the Court did do so; however, the FDIC could come in and seek some form of expedited relief and we would have a hearing at that time.

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[39] Hearing Transcript, Oct 22, 2009 – pg. 61:25,62:1-2
[40] Transcript of Hearing Feb 5, 2010 at pg. 52:17-25, 52:1-14

THE COURT: When is it continued to March 4th?

MR. ROSEN: March 4th, Your Honor.

THE COURT: Well I'm going to hold off until the March 4th date. I don't need any more emergencies. All right, we're done then today?

In hindsight, the Debtors may have been attempting to negotiate with the FDIC at this point. At that moment, no complete signed agreement to the nascent GSA had been reached. This key information, while hidden by the Debtors (and likely known to the SNHs) -- remained material – but unknown to the public and of course also was undisclosed and unknown to the Court.

This Court now should know that even on March 12th, 2010 when the original "Global Settlement Agreement" was announced, that even then, the FDIC was not on board, a material fact withheld from the Court and from the Public. But it was a material fact, presumably known to the SNH, the Debtors, and the FDIC.

The Court was not made aware that the settlement announced in Court, and read into the record, was missing a **major** party as a signatory, the FDIC. And so was the public, and so was this injured "interested party". (Indeed, one cannot help but speculate as to how differently this case might have played out had the Court been permitted to rule on the $4 billion deposit issue at an early stage in this case, rather than having been inveigled by the parties not to do so in a timely manner.) However, due to new testimony, this Court has now heard that this was all an elaborate charade. JPMC was perfectly willing to turn over the $4 billion to the Estate. It was a material term-sheet item that remained unchanged

throughout all negotiations. And certainly the FDIC, as a member/signer of the GSA was aware of this condition.

Additionally, subsequent to this *Opinion*, a scant seven days after the *Opinion* and *Order* was rendered – JPMC, on January 14th, 2011 issued a press release that it had reserved $9.7 billion, for dispersal in 2011 for employee performance incentives based on 2010 fiscal year results, in order to pay bonuses to executives and other employees for their good work in maximizing JPMC profits.[41] While this news was carried widely among the media, the impact of it – occurring immediately following the Courts *Opinion* -- was further proverbial salt in the wound to this injured party and to WMI shareholders around the world. And, of course, made the statement in the Court's *Opinion* that JPMC would potentially be harmed by a judgment against it for $4 billion even further incredulous to this party, and to many of the Plan Opponents. One can only imagine the fat cats on Wall Street sitting around their big conference tables with their big cigars and guffawing at the idea.

Due to the substantial obfuscation displayed by the Debtors to the material facts of the likely disposition of the $4 billion deposit – inherently unknown to the Court or the public – but yet certainly known to the Debtors through numerous term-sheets, as well as the exceptional bonuses of $9.7 billion being paid by JPMC that further demonstrate that reconsideration is required of the Court's original *Opinion*. These material facts, not disclosed or known at the time of the Courts *Opinion*, demand that the Court reconsider its January 7th, 2011 *Opinion*

[41] JPMC Press Release – January 14th, 2011 – http://investor.shareholder.com/jpmorganchase/releasedetail.cfm?ReleaseID=591337

that "concludes that [...] any judgment against JPMC would [...] face difficulty in collection, especially if it is in the billions of dollars".

The Court must consider this new information as justifying reconsideration of its *Opinion* pursuant to 59 F.R.Civ.P.

C. The Court may have erred in its factual assumptions and by interjecting itself as an "expert witness" in the absence of other, credible, competent evidence at the prior POR/GSA hearing, thereby creating a manifest injustice in its resulting *Opinion*.

1. The Court reasoned that the FDIC has limited resources to pay for claims against it. The Court needs to correct this assumption to adjust to the true facts.

In the *Opinion*:

> "The FDIC as Receiver of WMB has significantly fewer assets than the claims of creditors, making any recovery for equity unlikely."[42] And that such recovery would be complicated by other potential claims against the FDIC Receivership making any recovery without a "meaningful distribution".[43]

This is incongruent with the fact that the FDIC is not limited by its direct funding through the collection of premiums from the banks it insures, or by the 'purchase price' received by any acquiring bank of the assets that the FDIC acquires under a receivership.

In the D.C. District Court, on Nov 4th, 2009, Judge Collyer explored that there may be little distinction between the FDIC-C and FDIC-R as it came to liability. The separation is a contrived convenience of the FDIC for having

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[42] *Opinion, pg.* 57 (b. Difficulties in Collection) – "The FDIC as Receiver of WMB has significantly fewer assets than the claims of creditors, making any recovery for equity unlikely. "

[43] *Opinion, pg.* 58 "[I]t would be but one of many claims against the receivership with little prospect of any meaningful distribution. (Hr'g Tr. 12/2/2010 at 71.)"

different legal teams handling different matters, but in fact, it remains a singular Federal Agency.[44]

> THE COURT: Okay, so although you're separately represented, FDIC-Corporate and FDIC-Receiver are merely different **functions** within the FDIC and this has to assume that the plaintiffs, WMI's claims have merit and that the FDIC would be found liable for paying that. **It doesn't matter** whether we have FDIC-Receiver and/or FDIC-Corporate in the **litigation because in the end it's all the FDIC.** It's just different functions.
>
> MS. DOHERTY (FDIC): There are several things that I would say to that, Your Honor. First is the word merely. When you said merely corporate and merely receiver is much too mild. In fact, the plaintiffs have acknowledged the legal separate capacity of the two by suing both of us. I mean if corporate were liable automatically for what receiver did and receiver were liable automatically for what corporate did, there'd be no point in suing both of us. They have sued us separately as they need to do and they need to allege that each of us, they need to allege specific facts showing that each of us has done something wrong. Saying something as to one is not to say something as to the other.
>
> THE COURT: But if I sued the Department of Justice, **it wouldn't matter whether I sued** the Department of Justice Environmental Enforcement branch or the Department of Justice Environmental Defense branch. I could sue the Department of Justice or whatever having to do with its enforcement or defense in the environmental area? (emphasis added)

The FDIC operates as a Federal Agency,[45], backed by the "Full faith and credit" of the United States,[46] and has access to a substantial line of credit established by law.[47]

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[44] Transcript of Collyer hearing (CV 09-533) - Nov 4th, 2009 – pgs:76:24-25, 77:1-24 (emphasis added)

[45] "The Federal Deposit Insurance Corporation is an independent federal agency created in 1933 to promote public confidence and stability in the nation's banking system " - http://www.fdic.gov/consumers/banking/confidence/symbol.html

[46] "[S]tated that a joint resolution of Congress (H.R. Con. Res. 290) adopted in March 1982, which reaffirmed that the United States pledges its full faith and credit behind the federal deposit insurance funds, may have served as a moral pledge on the part of Congress to support the deposit insurance funds should they ever need it" - http://www.fdic.gov/regulations/laws/rules/4000-2660.html

[47] "[I]f ever needed, the FDIC can draw on a line of credit with the U.S. Treasury." - http://www.fdic.gov/consumers/banking/confidence/symbol.html

The Court failed to acknowledge in its *Opinion* that the FDIC had at the time of WMB's seizure immediate access to $100 billion without restriction, and now has up to $500 billion available upon consultation and approval. This enhanced limit was enacted into law on May 20, 2009 (after the Bankruptcy Petition) within the legislation titled "Helping Families Save Their Homes Act of 2009" (Pub.L. 111-22). While it is nominally true that FDIC Receiver is an administratively separate entity from FDIC Corporate, where, as here, the claims of WMI would be not so much focused against only the limited funds held in the receivership account, but against the FDIC entity as a whole for torts based on its negligence, it can hardly be said that the FDIC is "judgment proof".

Thus the Court must reconsider the erroneous statement of fact in its *Opinion* that a judgment against the FDIC would be a recovery without a "meaningful distribution".[48]

2. The Court reasoned that the Debtors performed a complete Rule 2004 Examination of JP Morgan.

The *Opinion* states the assumption that "the Debtors conducted discovery of JPMC under Rule 2004 regarding the Business Tort Claims."[49]

To the Court's knowledge at the time of the *Opinion*, the Court had provided the Debtors the access to conduct enhanced Discovery of JPMC under Rule 2004. It was stated by in the Kosturos Declaration and in the *Opinion* that such Rule 2004 discovery was done.[50]

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[48] *Opinion, pg.* 58
[49] *Opinion, pg.* 54
[50] *Opinion, pg.* 54 - [T]he Debtors conducted discovery of JPMC under Rule 2004 regarding the Business Tort Claims which are similar to the various claims asserted in the ANICO Litigation. (Id. at ¶ 26.)

However, subsequent testimony to the Court, challenges this assumption. In fact, the Debtors failed to conduct any meaningful Rule 2004 discovery of JPMC, contradicting the assumption in the Court's *Opinion* that the GSA is "Fair and Reasonable" as a result.

3. The Court erred in substituting itself as an "expert witness".

At the first POR/GSA Confirmation Hearing, the Court interjected itself as a virtual "expert witness" as a substitute for other actual, separately competent, credible, and admissible evidence, which was not otherwise presented by the Debtors. It ruled, in effect, that although the Debtors has not produced any expert witness or attorney work product to explain and justify its proposal to abandon litigation against adversary parties as a part of the GSA, that the court itself could evaluate such legal claims on the records before it. The Equity Committee has already appealed this seemingly novel decision, so it will not serve to belabor the point. However, it is respectfully submitted that in light of the new evidence subsequently developed and referred to herein, the Court may come to the conclusion that, given the totality of all the circumstances, is was misled into making that decision in a vacuum of the Debtors' own deliberate making. Accordingly, that decision may have contributed to those circumstances in this particular case which justify reconsideration of its original *Opinion* pursuant to 59 F.R.Civ.P.

II. The Plan of Reorganization and the Global Settlement Agreement are corrupted by efforts made in Bad Faith.

A. The collusion of the SNHs and the Debtors to use the "MOR" as the disclosure mechanism was corrupted and obfuscated by the Disclaimer included in 33 of 34 MORs.

In the recent hearings, this Court has learned that there was not one, but two, secret agreements between the Debtors and the Settlement Note Holders (SNH).

This Court has also learned that specific language was added to this agreement, at the specific request of the SNHs – in a flawed attempt to put the burden of disclosure of Material Non-Public Information (MNPI) on the Debtors, so that the SNHs could trade with impunity in very securities that they were working to cover via a settlement waterfall, and jettison those securities which were not favorable in the latest confidential term-sheet exchanges.

To recap from the *McCurry Objection*,

> "[...] [T]he Commission [SEC] held that a broker who traded while in possession of nonpublic information he received from a company director violated Rule 10b-5. **The Commission adopted the "disclose or abstain rule"**: insiders, and those who would come to be **known as "temporary" or "constructive" insiders**, who possess material nonpublic information, **must disclose it before trading or abstain from trading** until the information is publicly disseminated.
>
> Several years later in the case of *SEC v. Texas Gulf Sulphur Co.*, a federal circuit court supported the Commission's ruling in *Cady*, stating that **anyone in possession of inside information is required either to disclose the information publicly or refrain from trading.** The court expressed the view that no one should be allowed to trade with the benefit of inside information because it operates as a fraud [to] all other buyers

and sellers in the market. This was the broadest formulation of prohibited insider trading."[51] (emphasis added)

The shallow attempt at creating a 'safe harbor' by erroneously claiming transfer of responsibility for disclosure, and inferring that the designation of what is material information is the onus of the Debtors, is in direct conflict to what the SEC has previously ruled, and is an obvious attempt to emasculate the long existing rules for disclosure. By arbitrary agreement, the SNHs cannot change the requirements of the law regarding of their own disclosure obligations, or the inherent restrictions from trading until such disclosures are made.

But even this artificially manufactured and so-called 'safe harbor' was fatally flawed. The apparently secretive agreement between the Debtors and the SNHs was falsely represented as satisfying the requirements of disclosure. This agreement required the Debtors to surreptitiously publish, at regular intervals via the required Monthly Operating Report, obscurely footnoted disclosures of only a subset of the material non-public information held by and known to the SNHs. This has been discovered by in-court testimony, illuminating the communications between the Debtors and the SNHs[52] and the SNHs documented participation at various negotiations. This is not the kind of behavior required by law.

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[51] Speech by SEC Staff: Insider Trading – A U.S. Perspective. Remarks by Thomas C. Newkirk, Associate Director, Division of Enforcement. Melissa A. Robertson Senior Counsel, Division of Enforcement, U.S. Securities & Exchange Commission - 16th International Symposium on Economic Crime, Jesus College, Cambridge, England September 19, 1998 - http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm

[52] Docket 8004 – Pgs. 58 & 69 (Attachments E & G) – "Aurelius Capital Management, LPs Objection to Motion of the Official Committee of Equity Security Holders for an Order Compelling Production of Documents" [also email images in *McCurry Objection* pg, 9]

Yet, the Disclaimer, prominently at the top of the Monthly Operating Reports, carries the explicit and dire warning that the MOR shall not be used for any investment decision, may be incomplete, unaudited, and cannot be relied upon as factual.

The following Disclaimer (or ministerial similar) appears on *every* single MOR, with *only* the exception of the first MOR filed after petition.

"DISCLAIMER

> Washington Mutual, Inc. ("WMI") and WMI Investment Corp. (together, the "Debtors") **caution investors** 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 providing the basis for an investment decision relating to any of the securities of WMI.**
> The Monthly Operating Report is limited in scope, covers a limited time period, and has been prepared **solely** for the purpose of **complying** with the monthly reporting **requirements** of the Bankruptcy Court and the United States Trustee. The Monthly Operating Report was not audited or reviewed by independent accountants; does not purport to present the financial statements of WMI in accordance with generally accepted accounting principles; **does not purport to present the market value** of WMI's assets and liabilities or the recoverability of WMI's assets; is in a format prescribed by applicable **bankruptcy laws**; and is subject to **future** adjustment and reconciliation.
> There can be no assurance that, from the perspective of an investor or potential investor in WMI's securities, the Monthly Operating Report is complete. Results set forth in the Monthly Operating Report should not be viewed as indicative of future results.
> This disclaimer applies to all information contained herein." (emphasis added)

The argument made by the SNHs that a disclosure in the MOR meets the requirements for disclosure by an "insider", and that subsequent investing decisions by them, and by retailers, were accordingly "fair" under SEC rules - runs completely against what the MOR specifically states: The MORs each state that it "was not prepared for the purpose of providing the basis for an investment decision relating to any of the securities of WMI." (emphasis added). Additionally the MOR is a requirement of the Bankruptcy

system, in accordance with 28 U.S.C § 586(a)(3), and clearly is not remotely intended to be a mechanism for Hedge Fund MNPI disclosure.

No reasonable investor would ignore such a disclaimer. No reasonable investor would subsequently believe or even be aware that the MOR was the 'secret' tool for disclosure of Material Non-Public Information. And no reasonable investor would believe that such a notation, a disclosure in a footnote in a MOR, would be the basis for the SNHs to immediately re-enter the marketplace, armed with the latest still-confidential term-sheet information.

(From the *Confirmation Hearing*, on July 18th, 2011):[53]

> Q. And this is -- this was the way in which the debtors made that public disclosure, in a footnote to this monthly operating report. Were you --
> A. It's a note. I don't know if it's a footnote but it's a note.
> Q. It's a note.
> A. Yes.

This Court has also heard that such post-petition trading by the SNHs enabled them to enter a "Blocking" level of ownership of certain securities.

(Also from the *Confirmation Hearing* , on July 18th, 2011):[54]

> Q. The first thing you do in this e-mail is to show Mr. Kostoros that Aurelius and Owl Creek had nearly a blocking position in the subordinated bonds and the junior subordinated bonds, correct?
> A. That's incorrect.
> Q. Well, let's see. It says please note -- it sets out a list of holdings. It says, "please note that the above holdings represent nearly a blocking position in both the subordinated bonds and junior subordinated bonds." Do you see that?
> A. I do. But just to be clear, you referred to Aurelius and Owl Creek, and this e-mail was sent on behalf of Aurelius, Owl Creek and Elliott.
> Q. Elliott, all right. So what is a blocking position?

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[53] Transcript of July 18th, 2011, at 142:17-23 – (Q. By Mr. Parker Folse of the Equity Committee, A. By Mr. Dan Gropper of Aurelius Capital Management, LP)
[54] Transcript of July 18th, 2011, at 164:4-25, 165:1-4 – *Id.*

A. It is a holdings of more than a third of a particular class of a security within a debtor.
Q. And what does it allow the holder to block?
A. Well, sometimes nothing because if a plan is crammed down it doesn't allow you to block anything.
Q. Well, what did you mean when you said blocking position here?
A. I meant that we owned nearly thirty-three percent. It's just a term of art used in bankruptcies to indicate that a creditor group owns more than a third of a particular position, recognizing that an affirmative vote of a class under a bankruptcy plan would require two-thirds.

The Debtors stated that such a settlement, and abandonment of certain assets, would generate a NOL that the SNHs could exploit. And the Debtors exclaimed that "it's about time that the seniors figured this out."

(From the previous Confirmation Hearing, on Dec. 2, 2010[55]):

Q. [...] "They had an idea that the going forward business of reorganized WMI will have the benefit of a large NOL based on the company's ability to claim a worthless stock deduction related to its WMB stock." Do you see that?
A. Yes.
Q. It is true that in the final settlement there is a reorganized WMI that may have a large NOL, correct?
A. Yes, that's correct.
Q. And point 4 is all parties to the settlement would work together to provide finality on all points. Do you agree with those points that the creditor constituency made in March of 2009?
A. I wouldn't agree or disagree. I'm just reading the e-mail with you at this point.
Q. Well, you respond and you state it's about time the seniors figured this out. Is that your position in March 2009?
A. I don't know what else to tell you. [...]
Q. **You say it's about time that the seniors figured this out**. How long had you thought that the best resolution of the estate was a global settlement with JPMorgan?
A. I don't know. (emphasis added)

The Court must consider this new information, and evaluate this new evidence as it relates to the original Global Settlement agreement as substantially drafted by the

[55] Transcript of Hearing held Dec. 2, 2010 - pgs. 95:13-25, 96:1-6 (Q. by Mr. Nelson of the Equity Committee, A. by Mr. Kosturos of the Debtors)

Settlement Noteholders and blessed by the Debtors wishing that "it's about time the seniors figured this out" (that the SNHs could see a significant NOL profit over and above their cash payouts from the Estate.)

The Prior GSA was significantly authored by these very same SNHs. The current GSA continues to incorporate substantially similar settlement terms benefiting these same SNHs and still maintains the significant NOL windfalls to the SNHs, excluding other stakeholders.

B. The Adversary issues with JPMC necessitated the Debtors to retain a 'Special Litigation and Conflicts Counsel' to avoid certain conflicts of interest. Recent evidence to the Court shows this was purely window dressing. Negotiations of the settlement – involving JPMC - were greatly influenced by the conflicted counsel. And this was the specific reason that Quinn Emanuel was hired, and paid by the Estate, to avoid.

On April 8th, 2009, in Docket No. 888 the Debtors filed an Application[56] to retain Quinn Emanuel Urquhart Oliver & Hedges, LLP, as Special Litigation and Conflicts Counsel to the Debtors. This filing further clarifies that Weil, Gotshal & Manges (WG&M), had significant conflicts in any matters relating to JPMC and its involvement in this Bankruptcy Case.

The conflicts of Weil, Gotchal & Manges are clear from the Examiner's published Document No. 4550[57]. This JPMC document is a signed agreement to retain Weil, Gotchal & Manges **by** JPMC, dated March 19th, 2008 for legal services to be provided by Weil **to** JPMC. This agreement, between Weil and JPMC specifically limits the ability of

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[56] April 9th, 2009 – Docket No. 888 – "Application of the Debtors Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code and Bankruptcy Rule 2014 for Authorization to Employ and Retain Quinn Emanuel Urquhart Oliver & Hedges, LLP, as Special Litigation and Conflicts Counsel to the Debtors, Nunc Pro Tunc to April 3, 2009"

[57] Examiner's published Document No.4550 – "JPMorgan Chase Request for Proposal for Legal Services 200812009 " - WMI_PC_701361067.00001.PDF

Weil to involve itself in activities, subsequently highly related to this case, that involve JPMC. Specifically forbidden in the retention of Weil **by** JPMC are:

> "We want to confirm the key standard terms **that must be agreed upon** between JPMC and your firm {WG&M}, which agreement signifies that your firm is considered a "sourced" law firm eligible to receive JPMC own-account engagements. [...]
>
> The firm {WG&M} **cannot be involved** in any of the following[...]
>
> The **prosecution** of **any proceeding to recover any monies** or other consideration paid **or transferred to JPMC** by or on behalf of a debtor as a voidable transfer under the United States Bankruptcy code or other applicable law or any such other avoidance theory." (emphasis added)

Pursuant to this conflict, the request of the Debtors for retention of Quinn Emanuel states:

> "After JPMorgan Chase commenced the JPMorgan Adversary and moved to intervene in the FDIC Action, the Debtors determined that it would be necessary to retain special counsel to represent them in connection with the JPMorgan Actions, due to a conflict that prevented Weil Gotshal from representing the Debtors in these actions. In that regard, at the October 30, 2008 hearing regarding the Debtors' application to retain Weil Gotshal, and in the Affidavit of Brian S. Rosen filed in support of the Debtors' application, Weil Gotshal notified this Court and parties in interest of the **need for the Debtors to utilize conflicts counsel in certain circumstances involving JPMorgan Chase**, including, but not limited to, a lender liability or avoidance action." (emphasis added)

Subsequently, JPMC, through its interjection of Adversary claims against the Estate, became a key party in the negotiation of the various term-sheets and the resulting POR and GSA. No viable POR or GSA can exist without resolution of the JPMC Adversary claims. Yet, in testimony before the Court, and in exhibits filed to this Court, communications regarding settlement negotiations consistently went back and forth directly to and from Brian Rosen of Weil Gotshal, the conflicted firm. Little evidence exists of participation by Quinn Emanuel in these settlement negotiations, or even in its role as "Special Litigation and Conflicts Counsel".

As has been disclosed[58] in Docket No. 8304, of July 25th, 2011, the Equity Committee reported several proposed Exhibits consisting of emails and letters between settling parties. While the full content of these exhibits is not specifically known to this interested party, the list of recipients and the brief description of their contents clearly reveals that settlement negotiations of claims to be litigated, involving JPMC were not being handled by Quinn Emanuel as intended. As example, a subsection of Exhibits from Docket No. 8304 shows this pattern of communications with the SNHs as largely being between the conflicted counsel and not Quinn Emanuel.

Exhibit No.[59]	Description:[60]
EC 7	Email from G. Balasingam to **B. Rosen** re term-sheet sent to Appaloosa/Centerbridge (Gropper) (Melwani) (Kosturos)
EC 8	Email from **B. Rosen** to B. Pfeiffer re JPMC response to draft proposal (Gropper) (Kosturos)
EC 10	Email from **B. Rosen** to B. Pfeiffer re term-sheet response proposal (Gropper)
EC 15	Letter from **B. Rosen** to G. Uzzi re aggregate financial holding of Aurelius and Oak Creek (Gropper) (Kosturos)
EC 32	Letter to from M. Roose to **B. Rosen** from M. Roose re meeting between Appaloosa, Centerbridge and the debtors (Bolin)
EC 32A	Email from S. Goldring to **B. Rosen**
EC 34	Letter E. Scheler to **B. Rosen** re Appaloosa and Centerbridge meeting with WMI (Bolin)
EC 35	Email from B. Kosturos to **B. Rosen** re JPM term-sheet (Bolin)
EC 36	Email from **B. Rosen** to M. Roose re WMI Confidentiality Agreement (Bolin)
EC 41	Email from J. Buono to **B. Rosen**, B. Kosturos re WMI term-sheet (Bolin)
EC 116	Email from **B. Rosen** to M. Roose, B. Kosturos re WMI Confidentiality Agreement (Melwani) (Kosturos)
EC 124	Email from M. Toose to **B. Rosen**, K. Rodden, T. Sapeika re NDA call (Melwani) (Kosturos)
EC 125	Email from J. Buono to **B. Rosen**, B. Kosturos re WMI plan term-sheet (Melwani) (Kosturos)
EC 126	Email from **B. Rosen** to M. Roose re WMI 2/25/2010 meeting agenda (Melwani)
EC 147	Email from **B. Rosen** to M. Kronfeld re tax refund litigation (Kruedger)
EC 202	Email from U. Gerard to M. Wash, **B. Rosen** re Wamu follow up (Kosturos)
EC 203	Email from **B. Rosen** to Fried Frank, White Case, Akin Gump re FDIC Conference call (Kosturos)
EC 204	Email from **B. Rosen** to C. Smith, B. Kosturos re term-sheet (Kosturos)

[58] Docket No. 8304 – July 25th, 2011 – "Notice of Filing Final Confirmation Hearing Exhibit List of the Official Committee of Equity Security Holders"
[59] *Id.*
[60] *Id.*

EC 212	Email from B. Kosturos to **B. Rosen** re JPMC term-sheet (Kosturos)
EC 216	Email from B. Pfeiffer to **B. Rosen**, B. Kosturos re final holdings of Centerbridge and Appaloosa
EC 236	Email from B. Scheler to **B. Rosen** re May 7, 2010 meeting
EC 273	Email from J. Buono to **B. Rosen**, B. Kosturos re WMI Plan term-sheet
EC 274	Email from **B. Rosen** to B. Kosturos re WMI meeting
EC 275	Email from M. Roose to **B. Rosen**, B. Kosturos re WMI meeting
EC 276	Email from **B. Rosen** to M. Roose re WMI meeting agenda
EC 277	Email from B. Scheler to **B. Rosen**, M. Roose, B. Kosturos re WMI FDIC
EC 278	Email from M. Roose to **B. Rosen** re objection to Owl Creek claim
EC 280	Email from **B. Rosen** to B. Scheler re JPM and FDIC
EC 281	Email from B. Scheler to **B. Rosen** re JPM and FDIC
EC 282	Email from B. Scheler to B . Rosen, B. Kosturos re proposed meeting
EC 289	Email from B. Scheler to **B. Rosen**, M. Roose re meeting
EC 297	Email from **B. Rosen** to C. Smith enclosing draft Settlement Agreement
EC 298	Email from **B. Rosen** to S. Friedman enclosing draft Settlement Agreement
EC 304	Email from **B. Rosen** to C. Smith re settlement communication
EC 309	Email from **B. Rosen** to S. Nagle

Thus, it appears that Debtors and Weil Gotshal consistently used Quinn Emanuel as a mere fig leaf to cover up its naked conflict of interest as to JPMC, and continued to deal directly with JPMC despite that conflict. This calls into question the "Good Faith" of how a negotiated "Global Settlement Agreement", negotiated apparently by a conflicted counsel, can be confirmed by this Court.

C. The abandonment of certain Estate assets, to cause an irrevocable path for creating of NOLs favorable to the SNHs comes with little to no disclosure of the facts justifying such course of action.

Debtors, through filing a motion for an order[61] authorizing them to "abandon" certain assets of the Estate, appear to attempt to sneak in, and commit to the diversion of the NOLs down a single track, for the sole benefit of the SNHs. They have done so even before the Court has had an opportunity to approve a Plan of Reorganization, which

[61] Docket No. 5885 – Filed Nov. 12, 2010 – "Debtors' Motion Pursuant to Section 554(a) of the Bankruptcy Code for Authorization to Abandon WMI's Equity Interests in Washington Mutual Bank"

would be controlling on how Estate assets including the NOLs, were to be allocated. The motion of the Debtors requests of this Court to grant powers, that once executed by the Debtors, are irrevocable – even if a better outcome regarding NOLs could be realized. In their motion, the Debtors request to be "[...] authorized, in their sole and absolute discretion, at any time, to abandon their equity interests in the WMB Stock""

As the Columbia Business Law Review notes,[62] "Frequently, one of the most valuable assets of a debtor is the use of its NOL carryovers." This Court certainly understood this when early into this case, it issued its Order[63] to restrict to restrict ownership levels in certain securities, to preserve the NOLs, as important to the Estate.

The NOLs come in various shapes and sizes, depending on complex tax factors and other regulations. Certainly "who" uses the NOLs and "how" the NOLs are created, has significant impact on the valuation of the NOLs thus created. With the Debtors request to abandon WMI's Equity Interests in Washington Mutual Bank, this abandonment certainly creates one form of NOLs, shaped to the proposal of the current POR and the GSA (to benefit the SNHs). But there are other forms of NOLs that can, in the alternative, be created. The Debtors have proffered little to any alternative analysis on how, by instead retaining this valuable asset to the Estate, may generate a different set of NOLs, benefiting a wider community of stakeholders. Therefore this Court must not support this action, and certainly not allow the Debtors to decide, prior to confirming to a POR how NOLs shall be distributed nor created. Nor should this Court confirm a POR and GSA which creates such a windfall of NOLs to be given to the SNHs, thereby

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[62] Columbia Business Law Review – Volume 1994, Issue 2- http://cblr.columbia.edu/archives/10699

[63] Docket No. 0243- Filed Nov. 7th, 2008 - "Interim Order Pursuant to Sections 105(a) and 362 of the Bankruptcy Code (i) Establishing Notification Procedures and Approving Restrictions on Certain Transfers of Interests in the Debtors' Estates, and (ii) Scheduling a Final Hearing"

creating an excess of compensation well beyond that to which they would otherwise be entitled to in justice and equity.

Additionally, the Debtors filed with this Court a "Certification of No Objection"[64] in this specific abandonment matter. Blatantly ignoring the objections made by Daniel Hoffman in his filing[65], and the oral objections made on Dec. 7th, 2010 by Ilene Slatko.[66]

> MS. SLATKO: At the outset, I'd like to say that **I support, and reiterate**, Dan Hoffman's objection to any provisions in the global settlement agreement, or plan, that provide for the abandonment of 1, WMI's lawsuit against the FDIC, or 2, **abandonment of WMI's equity in WMB**. Section 554 of the Bankruptcy Code, requires that property can't be abandoned unless it is shown to be of inconsequential value and benefit to the estate, and Mr. Kosturos inability to state the value of the FDIC claims, urges that the motion to abandon should be denied. (emphasis added)

Subsequently to this "Certification of No Objection", the Court signed the Motion of the Debtors[67]. However the debtors, after-the-fact, withdrew[68] their "Certification" upon the uproar of certain stakeholders.

Given the similar concerns of misdirection and misleading of this Court as to the true nature of the $4 billion dispute, *this* similar request for abandoning a valuable Estate asset should demand the Court take close scrutiny as well, and not be 'quick' to grant the Debtors the ability to make an unilateral and irrevocable abandonment of this Estate asset.

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[64] Docket No. 8104 - Filed July 8th, 2011- "Certification of No Objection Regarding Debtors' Motion Pursuant to Section 554(a) of the Bankruptcy Code for Authorization to Abandon WMI's Equity Interests in Washington Mutual Bank"

[65] Docket No. 5802 – Filed Nov. 8th, 2010 - "Objection to Any Provisions in the GSA or the Plan Which Require Abandonment or Any Form of Release of the WMI Claims Filed by Daniel Hoffman"

[66] Transcript of Hearing on Dec. 7th, 2010 – pg:246:12-21

[67] Docket No. 8135 - Filed July 11th, 2011 - "Order Authorizing Washington Mutual, Inc. to Abandon Its Equity Interests in Washington Mutual Bank"

[68] Docket No. 8119 - Filed July 8th, 2011 - "Notice of Withdrawal of Certification of No Objection Regarding Debtors' Motion Pursuant to Section 554(a) of the Bankruptcy Code for Authorization to Abandon WMI's Equity Interests in Washington Mutual Bank"

Once again, this course of events calls into question the "Good Faith" of the Debtors apparently bowing to a singular stakeholder group, the SNHs, to manufacture this specific version of a NOL – through the abandonment of these Estate assets - to solely benefit the SNHs, at the exclusion of alternative ways to create NOLs likely more valuable to all stakeholders.

IN SUMMARY

I respect this Court. I respect the perceived urgency to resolve this case. However, as we have seen here, the secrets keep coming out. This Court should be outraged by what has been kept from its eyes and is now only coming into light.

We have what *ought* to be a fictional novel, an unbelievable tale, living in *reality* in front of us. The characters include:

- A government agency acting in draconian fashion, initially to arbitrarily seize a solvent bank and picking and choosing - in the time of economic crisis - winners and losers[69] -- and then doing everything it can come up with to keep stakeholders out of the picture. And unlike virtually every seizure before, this agency didn't lose a dime.[70] And yet, it is now coming back to the plate for second helpings.
- A debtor who avoids pursuit of opportunities and legal remedies calculated to accomplish the most basic of Bankruptcy tenants – to maximize recoveries for the Estate.
- An adversary, who already received billions of dollars of assets for a pittance of "1.5 cents on the dollar"[71], then publicly gloats about how they could have gotten

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[69] Senate Testimony – Apr. 13th, 2010 – former Washington Mutual CEO Kerry K. Killinger – "[WaMu was...] excluded from hundreds of meetings and telephone calls between Wall Street executives and policy leaders that ultimately determined the winners and losers in this financial crisis. For those that were part of the inner circle and were "too clubby to fail," the benefits were obvious. For those outside of the club, the penalty was severe."

[70] FDIC Press Release – (Last Updated Apr. 8th 2010) - "FDIC Rebuts Inaccurate Op-ed" – "The FDIC managed the receivership and sale of Washington Mutual Bank – a $299 billion institution with derivatives, covered bonds and other investment portfolios in addition to its core mortgage lending and depository operations. This resolution resulted in no costs to the Deposit Insurance Fund." - http://www.fdic.gov/news/letters/rebuttal_04072010.html

[71] Puget Sound Business Journal - Dec. 27th, 2009 (Kirsten Grind) - "Calculating the price based on assets minus deposits, JPMorgan paid $1.88 billion for assets of $119 billion - about one and a half cents on the dollar for WaMu."

everything, billions in assets, for "One Dollar"[72] -- and reports quarterly on how many further billions of profit occur off those same assets – yet is still consumed with utter greed to extort further payments from the Estate.

- And intertwining into this mix are the players in the dark shadows, investing in the depressed securities, then sitting at the negotiating table, seeking to line their pockets and supplanting the debtors in negotiations, all the while in possession of ostensibly material information that the Court and the public did not know. Who then with Machiavellian precision, author the original 'settlement' agreement to favor themselves, and the debtors' adversaries, to the detriment of other stakeholders.

This Court can adjudicate what is in front of it. But when the Debtors, the Adversaries including a Governmental Agency and a powerful Wall Street bank, and the addition of profiteering Hedge Funds – *all* – appear to keep facts and material information from the Court, and intentionally keep Equity "out of the money" – how is any ruling by the Court "just" when it is necessarily based on an intentionally obscured reality?

For the forgoing reasons stated in this Closing Argument, this Court cannot confirm the proposed "Modified Sixth Amended Joint Plan" and also must find that the revised and new "Global Settlement Agreement" is no longer "fair and reasonable".

As Justice Brandeis famously said in a 1913 *Harper's Weekly* article, "sunlight is said to be the best of disinfectants". In fact, sunlight ensures that fundamental *fairness* in the judicial process is extended to all affected parties, and as such it is the cornerstone of real justice.

With my profound respect to the Court, witness my hand to this Closing Argument:

August 9th, 2011

Charles S. McCurry

[72] *Id.* "In July of 2009, Dimon sat at a conference room table in the Seattle Grand Hyatt, explaining his purchase of WaMu to reporters and television crews. [...] The company could have bought WaMu for $1, he said."

I, Charles S. McCurry, do certify that one copy of this Closing Argument was served via first class mail upon all of the following parties:

(i) Washington Mutual, Inc. 925 Fourth Avenue, Seattle, Washington 98104 (Attn: Charles Edward Smith, Esq.), on behalf of the Debtors;

(ii) Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (Attn: Brian S. Rosen, Esq.), as counsel to the Debtors;

(iii) Richards Layton & Finger P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware 19899 (Attn: Mark D. Collins, Esq.), as co-counsel to the Debtors;

(iv) Quinn Emanuel Urquhart & Sullivan, LLP, 55 Madison Avenue, 22nd Floor, New York, New York 10010 (Attn: Peter Calamari, Esq.), as Special Litigation and Conflicts Counsel to the Debtors;

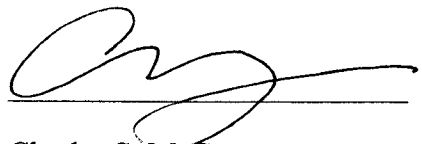
(v) The Office of the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19899-0035 (Attn: Jane Leamy, Esq.);

(vi) Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, New York 10036 (Attn: Fred S. Hodara, Esq.), as counsel to the Creditors' Committee;

(vii) Pepper Hamilton LLP, Hercules Plaza, Suite 5100, 1313 N. Market Street, Wilmington, Delaware 19801 (Attn: David B. Stratton, Esq.), as co-counsel to the Creditors' Committee;

(viii) Susman Godfrey, L.L.P., 1201 Third Avenue, Suite 3800, Seattle, Washington 98101 (Attn: Justin A. Nelson, Esq.), as counsel to the Equity Committee; and

(ix) Ashby & Geddes, P.A. 500 Delaware Avenue, 8th Floor, P.O. Box 1150, Wilmington, Delaware 19899 (Attn: William P. Bowden, Esq.), as local counsel to the Equity Committee



August 9th, 2011

Charles S. McCurry