IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
	)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., *et al.*,	)	Jointly Administered
	)	
Debtors.	)	**Objection Deadline: January 4, 2012 @ 4:00 p.m.**
	)	**Hearing Date: January 11, 2012 @ 2:00 p.m.**
		Related to Docket Nos. 9178, 9179, 9180 & 9181

MOTION OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS FOR STAY OF CONFIRMATION PROCEEDINGS PENDING APPEAL

The consortium of holders of interests (the "TPS Consortium"[1] or "Movants") subject to treatment under Class 19 of the Seventh Amended Joint Plan of liquidation proffered by the above-captioned Debtors (the "Plan") [Docket No. 9178], by and through undersigned counsel, hereby files this Motion for stay of further confirmation proceedings concerning the Plan, pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure, pending final resolution of the appeal of this Court's January 7, 2011 ruling in the adversary proceeding captioned Black Horse Capital, LP, et al. v. JPMorgan Chase Bank, N.A., et al., Adv. Pro. No. 10-51387 (the "TPS Litigation"). In support of this Motion, the TPS Consortium respectfully represents as follows:

[1] The TPS Consortium is comprised of holders of interests (as set forth more fully in the Verified Fourth Amended Statement of Brown Rudnick LLP and Campbell & Levine LLC [Docket No. 7916], as such may be amended) proposed by the Debtors to be treated under Class 19 of the Plan [Docket No. 9178] and described in the Plan and Disclosure Statement as the "REIT Series." For the sake of clarity, the TPS Consortium maintains its position that its members continue to hold "Trust Preferred Securities" as a result of the failed transaction by which those interests were to have been exchanged for "REIT Series."

PRELIMINARY STATEMENT

1. The TPS Consortium owns approximately $1.5 billion in Trust Preferred Securities. Knowing that the ownership of those securities is still subject to dispute, and that the TPS Consortium has appealed the ownership issue to the District Court, the Debtors and JPMorgan nonetheless persist in proposing a Plan that purports to transfer the Trust Preferred Securities to JPMorgan "free and clear" of claims by the TPS Consortium, and asks the Court to endorse various plan provisions designed to destroy the TPS Consortium's right to appeal this Court's decision. For the Court to compromise the TPS Consortium's rights in this fashion raises serious property and due process issues, and essentially denies the TPS Consortium a full and fair opportunity to litigate its rights, a fundamental tenet of our federal judicial system.

2. These fundamental principles in part underlie the Divestiture Rule. It is a bedrock of federal civil litigation that – subject to limited exceptions – the filing of a notice of appeal from the judgment of a trial court divests the trial court of jurisdiction to proceed with respect to the matters on appeal, and vests that jurisdiction with the appellate court. The trial court is divested of jurisdiction to hear not only those matters directly on appeal, but also those matters the resolution of which would affect or impair the superior court's appellate jurisdiction. The Divestiture Rule is unquestionably applicable in bankruptcy proceedings.

3. Following lengthy confirmation proceedings, this Court issued its September 13, 2011 opinion denying confirmation of the then-current version of the Debtors' Plan (the "September Opinion"). In the September Opinion, the Court also indicated its belief that, notwithstanding the pending appeal of the Court's ruling in the TPS Litigation, the Court would retain jurisdiction to consider a yet-to-be-filed, further revised version of the Plan containing provisions intended to render the TPS Litigation appeal equitably moot. The Court further

suggested that, absent this Court's voluntary stay of its own hand (or a stay issued by the District Court to prevent this Court from proceeding), it would continue with such confirmation proceedings. Such positions are supportable only if the Court were to adopt an incorrect (or at least incomplete) articulation of the Divestiture Rule, as discussed herein.

4. Respectfully, the TPS Consortium believes this Court would commit error if it were to confirm the revised Plan and enter related Orders not only deciding matters directly on appeal, but also specifically designed to impair the District Court's ability to consider the TPS Litigation appeal in toto. The TPS Consortium respectfully submits that under the Divestiture Rule, the pendency of the appeal of the Court's ruling in the TPS Litigation automatically and mandatorily divested this Court of jurisdiction to take any action that would affect the matters now on appeal or that would otherwise affect the District Court's ability to adjudicate that appeal (in particular, those provisions of the Plan clearly intended to render the matters before the District Court moot). If the TPS Consortium is correct, violative Orders would be null and void ab initio (potentially creating significant issues this Court would be forced to resolve when its Orders in violation of the Divestiture Rule are unraveled). See, e.g., Padilla v. Neary (In re Padilla), 222 F.3d 1184, 1189-90 (9th Cir. 2000) (bankruptcy court's discharge order was "null and void" as it was entered after the dismissal of the case had been appealed to the bankruptcy appellate panel); Stewart v. Donges, 915 F.2d 572, 578 n.8 (10th Cir. 1990) ("Once the notice of appeal divests the [trial] court of jurisdiction, any subsequent action by it is null and void.") (citation and internal quotations omitted); Garcia v. Burlington N. R.R., 818 F.2d 713, 720-22 (10th Cir. 1987) (trial court's post-appeal amendment of order awarding damages was vacated because the trial court was divested of jurisdiction when the order was appealed); Bennett v. Gemmill (In re Combined Metals Reduction Co.), 557 F.2d 179, 201 (9th Cir. 1977) (noting that,

because the filing of a notice of appeal divested the trial court of its jurisdiction over the matter on appeal, the trial court's "subsequent order [was] a nullity, and the appealed order must stand as it was when the notice of appeal was filed").

5. The Plan proponents are asking for far more than mere enforcement of an Order. The judicial actions requested in connection with Plan confirmation seek to destroy the TPS Consortium's appellate rights and clearly are among the types of actions that impermissibly affect matters on appeal and are therefore forbidden under the Divestiture Rule. As such, the TPS Consortium submits that it is beyond this Court's power to exercise any discretion in determining whether confirmation proceedings may continue prior to resolution of the pending appeal. Stated simply, such proceedings before this Court may not go forward, no matter how inconvenient the attendant delay might be to the Debtors, JPMorgan and others championing the purported settlement built upon this Court's appealed ruling as to current ownership of the Trust Preferred Securities.

6. The TPS Consortium recognizes that the Court ruled that the Divestiture Rule was not applicable to the Sixth Amended Plan. But, the TPS Consortium respectfully submits that the Court's articulation of the rule was unduly narrow. And, the TPS Consortium requests in this Motion that the Court revisit its ruling in light of this submission and in connection with the Seventh Amended Plan. In the alternative, the TPS Consortium requests that the Court stay further confirmation proceedings under Bankruptcy Rule 8005.

7. The TPS Consortium is clearly entitled to such a stay: (a) the TPS Consortium has raised a substantial case on the merits involving a serious legal question; (b) unless confirmation proceedings are halted or the Plan modified to preserve the TPS Consortium's appellate rights, the TPS Consortium faces the irreparable harm of the certain assertions of equitable mootness by

the Plan supporters and this Court taking actions beyond its remaining jurisdiction; (c) to hold confirmation proceedings in abeyance pending resolution of the TPS Consortium's appeal will simply maintain the status quo in this liquidation (the very purpose of a stay); and (d) the interests of the public are either not implicated or would be furthered by this Court declining to trample the property and appellate rights of the TPS Consortium through continued confirmation proceedings.

BACKGROUND

A. The TPS Litigation And The Court's Ruling Therein.

8. As the Court is aware, members of the TPS Consortium are also party to the TPS Litigation. Through that litigation, the plaintiffs commenced an adversary proceeding seeking various declaratory judgments related to ownership of certain trust preferred securities ("Trust Preferred Securities" or "TPS") issued by non-Debtors and claimed to have been exchanged for interests in preferred stock of Debtor Washington Mutual, Inc. ("WMI").

9. By Counts One and Two of that litigation, the TPS Consortium sought a ruling that they continued to own the Trust Preferred Securities after the filing of the Chapter 11 Cases, because WMI and other parties failed to take the steps required by the parties' contractual documents and/or applicable law to effectuate a purported exchange, including, inter alia: (a) the failure to issue the WMI preferred stock, interests in which were to have been given to TPS investors in the exchange; (b) the failure to deliver such WMI preferred shares to a depositary to facilitate the creation of depositary shares to be delivered to TPS investors; (c) the failure to record the purported transfers of the Trust Preferred Securities from third-party investors to WMI in connection with the purported exchange (as required under Article 8 of the Uniform Commercial Code to effectuate the transfer of uncertificated securities); and (d) the failure to

deliver the underlying global certificates for the Trust Preferred Securities to WMI in connection with the purported exchange (as required under Article 8 of the Uniform Commercial Code to effectuate the transfer of certificated securities) (together, the "Completion Steps").

10. Based on the failure of the Completion Steps, the plaintiffs sought a declaratory judgment from this Court, including, inter alia, that:

- The purported conditional exchange of the Trust Preferred Securities for interests in WMI preferred stock did not occur prior to the petition date.
- The purported conditional exchange of the Trust Preferred Securities for interests in WMI preferred stock could not occur after the petition date.
- WMI had no right, title or interest in the Trust Preferred Securities.
- JPMorgan had no right, title or interest in the Trust Preferred Securities.
- As a result, the Trust Preferred Securities and any claim thereto did not constitute property of WMI's estate.
- As a result of the failure of the purported exchange, all right, title and interest in the Trust Preferred Securities remained with investors who held the securities immediately prior to the purported exchange or their transferees (other than in connection with the claimed exchange transaction).

See Complaint, pp. 76-77 and 78-79.[2]

11. Count VI of the TPS Litigation focused on whether, as a result of JPMorgan's knowledge of material non-disclosures associated with the creation, issuance and attempted exchange of the Trust Preferred Securities, JPMorgan could obtain title to the Trust Preferred Securities that would be free from attack by parties harmed by those non-disclosures. Based on JPMorgan's knowledge of those material non-disclosures, Count VI sought declarations that: (a) as a result of its knowledge of the fraud in the issuance of the Trust Preferred Securities, JPMC could not be a bona fide purchaser of the Trust Preferred Securities; and (b) as a result of its knowledge of the fraud in the issuance and sale of the Trust Preferred Securities, JPMorgan's

[2] Excerpts of the applicable pages of the Complaint are attached hereto at Ex. A.

claim, if any, to the Trust Preferred Securities would be subject to the fraud claims of investors in the Trust Preferred Securities. See id., p. 87.

12. The parties to the TPS Litigation filed cross-motions for summary judgment, and the hearing on those requests for summary judgment was held on December 1, 2010, the day prior to commencement of the Court's consideration of the then-current version of the Plan. The Plan was, and as modified remains, based on implementation of a settlement (the "Settlement") that, inter alia, depends on WMI's ability to trade the Trust Preferred Securities to JPMorgan in exchange for $4 billion in WMI deposits seized by JPMorgan and a share of billions of dollars in tax refunds WMI previously claimed belonged solely to it.

13. On January 7, 2011, the same day on which the Court delivered its opinion denying confirmation of the Plan (but indicating it would approve the terms of the Settlement), the Court rendered its decision in the TPS Litigation. In that decision, the Court granted the summary judgment requests of WMI and JPMorgan. More specifically, the Court ruled that, notwithstanding the failure of the Completion Steps, the exchange of the Trust Preferred Securities occurred prior to WMI's chapter 11 filing and those securities belonged to WMI. See TPS Litigation Opinion, at 7-13 (pertaining to Count I) and 13-15 (pertaining to Count II).[3] The Court also ruled in favor of the Defendants on Count VI, denying the Plaintiffs' challenges to JPMorgan's ability to take title to the Trust Preferred Securities free of Plaintiffs' claims and as a bona fide purchaser.

B. The Appeal Relating To The TPS Litigation.

14. By notice of appeal dated January 13, 2011, the plaintiffs in the TPS Litigation appealed the Court's ruling on the TPS Litigation. As set forth in the Appellants' statement of

[3] The Court's TPS Litigation Opinion is attached hereto at Ex. B.

issues on appeal, the District Court is currently reviewing whether this Court erred in ruling on Count I of the Complaint (pertaining to whether a prepetition exchange of the Trust Preferred Securities for interests in preferred stock of WMI was effected under the terms of the operative agreements), where, inter alia:

a. In connection with the purported exchange, the operative agreements imposed on WMI an "immediate and unconditional" obligation to issue WMI Preferred stock (interests in which were to be exchanged for Trust Preferred Securities) and the undisputed facts establish the WMI preferred stock was never issued;

b. This Court held that the occurrence of an "Exchange Event" and the Office of Thrift Supervision's directive to execute an exchange were the only conditions precedent to such an exchange, notwithstanding the terms of the operative agreements imposing, inter alia, an "immediate and unconditional" obligation to issue WMI preferred stock in connection with an exchange;

c. In connection with the purported exchange, the operative agreements contemplate the creation of depositary shares (representing interests in WMI preferred stock) to be exchanged for the Trust Preferred Securities, and the undisputed facts establish the depositary shares never came into existence;

d. In interpreting the operative agreements, this Court failed to distinguish between the concepts of "issuance" of WMI preferred stock and "delivery" of depositary shares;

e. In ruling on Count I, this Court concluded that certificates representing Trust Preferred Securities were deemed to represent non-existent depositary shares representing un-issued WMI preferred stock;

f. Statements, actions and/or judicial admissions of WMI during the bankruptcy proceedings demonstrated that the exchange of Trust Preferred Securities for interests in WMI preferred stock was not accomplished prepetition; and

g. As a result of WMI's September 26, 2008 petition for relief under Title 11 of the United States Code, Bankruptcy Code Section 365(c)(2) now prohibits WMI's assumption of the operative agreements pursuant to which the WMI preferred stock was to have been issued.[4]

15. As set forth in the Appellants' statement of issues on appeal, the District Court is currently reviewing whether this Court erred in ruling on Count II of the Complaint (pertaining to whether a prepetition exchange of Trust Preferred Securities for interests in preferred stock of

[4] See Designation of Record and Statement of Issues on Appeal [App. Docket No. 2], at 10.

WMI was effected in accordance with applicable law), where, inter alia:

a. The undisputed facts demonstrate the purported exchange of the Trust Preferred Securities did not comply with the delivery requirements set forth in applicable versions of UCC § 8-301(a) or 8-301(b) (including, inter alia, the requirements that the applicable securities registers reflect the transfer and/or the global certificates representing the Trust Preferred Securities have been delivered to WMI); and

b. This Court concluded that the operative agreements varied the terms of UCC Article 8 regarding delivery of Trust Preferred Securities when, in fact, the applicable terms of the operative agreements substantially tracked the delivery requirements of UCC 8-301.[5]

16. As set forth in the Appellants' statement of issues on appeal, the District Court is currently reviewing whether this Court erred in ruling on Count VI (pertaining to whether, as a result of its participation (through a direct subsidiary) in the issuance of certain of the Trust Preferred Securities and its direct knowledge of the misrepresentations underlying the issuance of the Trust Preferred Securities, JPMorgan could be a bona fide purchaser of the Trust Preferred Securities), where, inter alia:

a. JPMorgan had at least constructive knowledge of the fraud perpetrated by WMI and its subsidiaries in connection with the issuances of the Trust Preferred Securities;

b. JPMorgan also gained direct knowledge of WMI's undisclosed intent to immediately transfer the Trust Preferred Securities to a subsidiary of WMI and the secret nature of that intent; and

c. This Court's ruling on Count VI was premised on a lack of any need for equitable relief to effectuate the exchange (based on this Court's conclusion that the exchange occurred prior to WMI's bankruptcy proceedings), but fails to address the impact of JPMorgan's knowledge of fraud on its ability to be a "bona fide" purchaser (as would result upon confirmation of the Plan).[6]

17. Briefing on the TPS Litigation appeal was completed on May 18, 2011. The parties await only oral argument and/or the Chief District Court Judge Sleet's ruling on

[5] See id. at 11.

[6] See id. at 12.

pleadings.[7]

C. The Proposed Plan's Implication Of The Issues On Appeal.

18. The Plan and Settlement unabashedly implicate the very same issues now on appeal before Chief Judge Sleet:

Issue On Appeal	How Implicated By Plan[8]
The failure to issue the WMI preferred stock was fatal to consummation of the exchange.	Plan Section 36.1(a)(8) provides, as a condition precedent to confirmation, for the authorization of the taking of all actions to effectuate the transfer of the Trust Preferred Securities. Moreover, Global Settlement Agreement Section 2.3 authorizes JPMorgan to direct the applicable parties to amend their records to reflect the issuance of the preferred stock.
The failure to deposit newly-issued WMI preferred stock with the depositary was fatal to consummation of the exchange.	Plan Section 36.1(a)(8) provides, as a condition precedent to confirmation, for the authorization of the taking of all actions to effectuate the transfer of the Trust Preferred Securities. Moreover, Global Settlement Agreement Section 2.3 authorizes JPMorgan to direct the depositary to amend its records to reflect the deposit of the preferred stock.
The failure of the depositary to issue depositary shares (representing newly-issued WMI preferred stock) was fatal to consummation of the exchange.	Plan Section 36.1(a)(8) provides, as a condition precedent to confirmation, for the authorization of the taking of all actions to effectuate the transfer of the Trust Preferred Securities. Moreover, Global Settlement Agreement Section 2.3 authorizes JPMorgan to direct the depositary to amend its records to reflect the issuance of those depositary shares.

[7] See Notice of Completion of Briefing and Request for Oral Argument, dated May 18, 2011 [App. Docket No. 42].

[8] Under Plan Section 2.1 prelude, the Global Settlement Agreement is incorporated into and made part of the Plan. Where there is a conflict, the Settlement Agreement controls the Plan.

Issue On Appeal	**How Implicated By Plan**[8]
The failure to record on the applicable securities registers any transfer of the Trust Preferred Securities to WMI was fatal to the exchange.	Plan Section 36.1(a)(8) provides, as a condition precedent to confirmation, for the authorization of the taking of all actions to effectuate the transfer of the Trust Preferred Securities. Moreover, Global Settlement Agreement Section 2.3 authorizes JPMorgan to direct the applicable registrars to amend their records to reflect the transfer of the Trust Preferred Securities, and to otherwise document the title transfer.
The failure to deliver to WMI the global certificates representing the Trust Preferred Securities was fatal to the exchange.	Plan Section 36.1(a)(8) provides, as a condition precedent to confirmation, for the authorization of the taking of all actions to effectuate the transfer of the Trust Preferred Securities. Moreover, Global Settlement Agreement Section 2.3 authorizes JPMorgan to direct the applicable parties to amend their records to reflect the delivery of the Trust Preferred Securities to WMI.
As a result of WMI's bankruptcy filing, WMI is precluded by Bankruptcy Code Section 365(c)(2) from assuming and performing the applicable exchange agreements (calling for the issuance of the securities for which the Trust Preferred Securities were to have been exchanged).	Plan Section 36.1(a)(8) provides, as a condition precedent to confirmation, for the authorization of the taking of all actions to effectuate the transfer of the Trust Preferred Securities. Moreover, Global Settlement Agreement Section 2.3(c) authorizes the transfer of the Trust Preferred Securities from WMI to WMB. Additionally, Plan Section 41.2 provides for a release and discharge of Class 19 claims and interests asserted against the estates, thus releasing and discharging the contention on appeal that the TPS Securities are not assets belonging to the Debtors' estates. Finally, Exhibit D to the Debtors' Plan Supplement provides for the assumption of any and all contracts, as and to the extent necessary or required to transfer to JPMorgan any and all rights, title and interest in the Trust Preferred Securities.

Issue On Appeal	How Implicated By Plan[8]
As a result of its knowledge and/or actions related to the issuance of the Trust Preferred Securities, JPMorgan is precluded from becoming a bona fide purchaser of the securities.	Plan Section 2.1(c) provides that, as part of the Global Settlement, the Debtors shall "sell, transfer, and assign" the TPS Securities to JPMorgan. Moreover, and importantly, Plan Section 36.1(a)(10) provides for an Order directing the transfer of the Trust Preferred Securities "free and clear" to JPMorgan and designating JPMorgan as a "good faith" purchaser of the TPS Securities, pursuant to Bankruptcy Code Section 363(m), thus attempting to immunize JPMorgan from disgorgement if Chief Judge Sleet reverses this Court's decision on appeal.

19. Clearly, the intent of the above Plan provisions is to render the TPS Litigation appeal equitably moot and to put the Trust Preferred Securities into the hands of JPMorgan (and beyond the reach of this or an appellate Court). Were the intent otherwise, the Debtors and JPMorgan presumably would agree to Plan modifications preserving the TPS Consortium's appellate rights (among other infirmities requiring Plan modification) so as to obviate this group's continued opposition to the Plan.

ARGUMENT

I. The Divestiture Rule Clearly Precludes Any Action By This Court That Would Impair or Impede The Conduct Of Appellate Review Of The Court's Decision In The TPS Litigation.

20. In the September Opinion, the Court declined to apply the Divestiture Rule to the version of the Plan then before the Court. As discussed below, the TPS Consortium respectfully submits that the Court's decision in that regard was based on an unduly narrow interpretation and is inconsistent with the well-established purpose of the rule. The TPS Consortium respectfully submits that the Plan does not rest on mere enforcement of an Order on appeal, but, instead, impermissibly seeks to destroy the TPS Consortium's appellate and property rights. This Court

is not permitted to take such action.

A. The Court Should Ignore The Inevitable Cries Of "Law Of The Case" By Plan Supporters Who Would Benefit From An Incorrect Articulation Of The Divestiture Rule.

21. The Debtors and other plan supporters will, undoubtedly, shout "law of the case" in hopes the Court will not reassess its articulation of the Divestiture Rule in the September Opinion denying confirmation. Those shouts should be ignored. The "law of the case" doctrine requires that there be a final Order. For the doctrine to apply, there must be "law" actually issued "in the case" binding the parties. See Gander Mountain Co. v. Cabela's, Inc., 540 F.3d 827 (8th Cir. 2008); Council of Alt. Political Parties v. Hooks, 179 F.3d 64, 69 (3d Cir. 1999); Cable v. Millennium Digital Media Sys., L.L.C. (In re Broadstripe, LLC), 435 B.R. 245 (Bankr. D. Del. 2010) (Sontchi, J.). An Order denying confirmation is not a final Order. See Flor v. BOT Fin. Corp. (In re Flor), 79 F.3d 281, 284 (2d Cir. 1996) (holding that denial of confirmation of a Chapter 11 plan, absent dismissal of the petition or conversion to Chapter 7, is not a final order); Zahn v. Fink (In re Zahn), 526 F.3d 1140, 1143 (8th Cir. 2008) (an order denying confirmation of a plan, which does not dismiss the case, is not a final order); WCI Steel, Inc. v. Wilmington Trust Co., 338 B.R. 1, 9 (N.D. Ohio 2005) (same). As such, there is no "law" binding the parties or the Court. The Court, therefore, is free to address the present assertion of the Divestiture Rule in connection with this latest iteration of the Plan.[9]

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[9] The Court may recall that, in connection with the July confirmation proceedings, the Plan supporters also attempted to invoke the "law of the case" doctrine to prevent the Court from re-addressing the appropriate rate of postpetition interest (as the Plan supporters asserted the Court had ruled on that issue in the January Opinion denying confirmation). In the September Opinion, the Court correctly noted that it was not precluded by "law of the case" from revisiting the issue in connection with the revised Plan (as the Court should do with respect to the Divestiture Rule in connection with its consideration of the further revised Plan that is now presented for confirmation). See September Opinion, at 77. And, in any event, in ruling that the federal judgment rate applied, the Court

B. The Court Incorrectly Articulated The Divestiture Rule In The September Opinion.

22. In the September Opinion, the Court narrowly articulated the Divestiture Rule as follows: "The correct statement of the Divestiture Rule is that so long as the lower court is not altering the appealed order, the lower court retains jurisdiction to enforce it." See September Confirmation Opinion, at 20 (citing In re Dardashti, No. 07-1311, 2008 WL 8444787, at *6 (B.A.P. 9th Cir. Feb. 12, 2008) and In re Hagel, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995)). Respectfully, that articulation of the Divestiture Rule is unduly narrow and fails to focus on the critical issues presented herein – the integrity of the appellate process.

23. As the Supreme Court has held, and numerous courts have echoed, "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the [appellate court] and divests the [trial court] of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982); see also Venen v. Sweet, 758 F.2d 117, 120 (3d Cir. 1985) ("[T]he timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a[n appellate court] and divesting a [trial court] of its control over those aspects of the case involved in the appeal."). The Divestiture Rule serves an important role in promoting judicial economy by "avoid[ing] the confusion of placing the same matter before two courts at the same time and ***preserv[ing] the integrity of the appeal process***." Whispering Pines Estates v. Flash Island, Inc. (In re Whispering Pines Estates), 369 B.R. 752, 757 (B.A.P. 1st Cir. 2007) (emphasis added); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, No. 02-20, 2002 WL

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correctly departed from its prior ruling in In re Coram Healthcare to the extent it was inconsistent with the Court's subsequent ruling in the September Opinion. See September Opinion, at 78 n.35. So, too, the Court should use this opportunity to correct its September 2011 articulation of the Divestiture Rule.

1401693, at *1 (D. Del. June 27, 2002) (GMS) (citing Venen, 758 F.2d at 120-21 ("'Divest' means what it says – the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere.")).

24. Chief Judge Sleet has similarly recognized "the general principle that a lower court is divested of jurisdiction once an appeal is filed." Iron Mountain Corp. v. AWC Liquidation Corp. (In re AWC Liquidation Corp.), 292 B.R. 239, 242 (D. Del. 2003) (GMS). Noting the "numerous [] contexts" in which "the lower court is divested of jurisdiction once an appeal is filed," Chief Judge Sleet recognized the "fundamental tenet of federal civil procedure that – subject to certain exceptions – the filing of a notice of appeal from the final judgment of a trial court divests the trial court of jurisdiction and confers jurisdiction upon the appellate court. This rule applies with equal force to bankruptcy cases." Id. (citing Texas Comptroller of Pub. Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.), 303 F.3d 571, 578-79 (5th Cir. 2002)). Chief Judge Sleet also noted the "well established [principle] that the filing of a notice of appeal divests the district court of jurisdiction to rule on the merits of the ***issues underlying the appeal***." Karaha Bodas, 2002 WL 1401693, at *1 (emphasis added). Additionally, the Divestiture Rule's application in the present context has been correctly recognized elsewhere on the Delaware Bankruptcy Bench (by Judge Carey):

> In light of the – what I consider to be a ***black letter rule that the filing of the Notice of Appeal divests the lower court of jurisdiction over those aspects of the case, those issues on appeal.*** How am I restricted from considering, if at all, in determining the issues raised in the Motions for Reconsideration?

In re Tribune Co., Case No. 08-13141 (KJC), Tr. Trans. Nov. 22, 2011, pp. 41:4 – 41:10 (emphasis added).

25. Once an appeal is taken, a trial court faced with a subsequent request to act must first determine whether the requested post-appeal action falls within "one of the limited

circumstances in which the court retain[s] power to act." Venen, 758 F.2d at 122 (emphasis added). Those limited circumstances include:

- Where the requested action is to preserve the status quo as of the time of the appeal. See In re Neuman, 67 B.R. 99, 101 (S.D.N.Y. 1986) ("[C]ourts have recognized an exception to this rule where action by the lower court is necessary to preserve the status quo as of the time of the appeal . . . .") (citations omitted); Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623, 625 (2d Cir. 1962); McClatchey Newspapers v. Cent. Valley Typographical Union, 686 F.2d 731, 734-35 (9th Cir. 1982), cert. denied, 459 U.S. 1071 (1982).
- Where the appeal is from a non-appealable order or judgment. See Venen, 758 F.2d at 121 ("An appeal from a non-appealable judgment or order is sometimes characterized as a nullity."); Sea Star Line, LLC v. Emerald Equip. Leasing, Inc., No. 05-245, 2009 WL 3805569, at *3 (D. Del. Nov. 12, 2009).
- Where the appeal is procedurally premature. See Mondrow v. Fountain House, 867 F.2d 798, 800 (3d Cir. 1989); Sea Star Line, 2009 WL 3805569, at *3 ("[A] premature appeal does not divest the district court of jurisdiction.").
- Where the post-appeal relief is not so closely related to the matters on appeal that retention of jurisdiction by the lower court on the matter would impermissibly interfere with the appellant's rights. See Liscinski v. Cambridge Mgmt. Gp. (In re Trimble), No. 07-2115, 2008 WL 782581, at *2 n.12 (Bankr. D.N.J. March 18, 2008) (Lyons, B.J.); Whispering Pines, 369 B.R. at 759; In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd., 258 B.R. 580, 583 (Bankr. S.D.N.Y. 2001) (trial court divested of jurisdiction by appeal unless it is asked "to determine issues and proceedings different from and collateral to those involved in the appeal").
- Where the post-appeal relief is "uniquely separable" from the matters on appeal such that its resolution would not affect the appeal. See Pensiero v. Lingle, 847 F.2d 90, 98 (3d Cir. 1988) (allowing motion for Rule 11 sanctions to proceed in trial court while anti-trust action remained on appeal).

In cases where there is any question as to whether the trial court has been divested of jurisdiction, doubt should be resolved in favor of awaiting disposition of the appeal by the appellate court. See Sea Star Line, 2009 WL 3805569, at *3 (considering the exception to the Divestiture Rule associated with premature appeals, and stating "[i]n cases in which the answer is less clear, however, doubts as to the legitimacy of the appeal should be resolved in favor of awaiting disposition of the appeal by the court of appeals") (internal quotations omitted).

26. The last two exceptions to the Divestiture Rule (which are the only potentially

applicable exceptions in this situation) focus on the impact of the proposed action on the appellant's rights and the appellate process, not just on whether the Court is "enforcing" an Order. Obviously, the broader nature of bankruptcy proceedings may result in a relatively narrower application of the Divestiture Rule as compared to other types of federal litigation not involving the oversight of an ongoing business or complex restructuring issues. Stated differently, in bankruptcy proceedings where the Bankruptcy Court is faced with myriad issues (some related to the appeal, and some not), the Divestiture Rule does not prohibit the Bankruptcy Court from proceeding with respect to every matter that might arise in the case – while in typical, single-issue litigation, an appeal will result, for all intents and purposes, in the divestiture of the trial court's ability to act with respect to substantially all of the issues before it. See Whispering Pines, 369 B.R. at 758 ("As courts have noted, however, a bankruptcy case typically raises a myriad of issues, many totally unrelated and unconnected with the issues involved in any given appeal. The application of a broad rule that a Bankruptcy Court may not consider any request filed while an appeal is pending has the potential to severely hamper a Bankruptcy Court's ability to administer its cases in a timely manner.") (citation omitted).

27. But, it is clear that, the Divestiture Rule applies in bankruptcy proceedings to prevent the Bankruptcy Court from proceeding on those matters in the bankruptcy case (among the myriad matters that exist) that would affect or impair the appellate court's ability to adjudicate the appeal. See In re Kendrick Equip. Corp., 60 B.R. 356, 358 (Bankr. W.D. Va. 1986) ("In order to assure the integrity of the appeal process, it is imperative that the lower court take no action which might in any way interfere with the jurisdiction of the appeal court. . . . ***This Court should not entertain any request which touches directly or indirectly on the issues presented in the appeal or which might otherwise interfere with the integrity of the appeal***

process.") (emphasis added); In re Urban Dev., Ltd., 42 B.R. 741, 743-44 (Bankr. M.D. Fla. 1984) (granting post-appeal relief in a bankruptcy proceeding regarding issues "***totally unrelated and unconnected with the issues involved in [the] appeal*** . . . .") (emphasis added); Petrol Stops Nw. v. Cont'l Oil Co., 647 F.2d 1005, 1010 (9th Cir. 1981) (filing of a notice of appeal "transfer[s] jurisdiction over ***any matters involved in the appeal*** from the [trial] court to [the appellate] court") (emphasis added); In re Hardy, 30 B.R. 109, 111 (Bankr. S.D. Ohio 1983) (noting that the Divestiture Rule precluded the trial court from taking actions affecting the question presented to the appellate court or that would impinge upon that question, and stating that "***[i]t would not be just for us to grant the alternative relief sought . . . for this would effectively deprive the [appellant] of the right to an appeal***") (emphasis added); In re Strawberry Square Assocs., 152 B.R. 699, 701 (Bankr. E.D.N.Y. 1993) (stating that "***the bankruptcy court [may not] exercise jurisdiction over those issues which, although not themselves on appeal, nevertheless so impact those on appeal as to effectively circumvent the appeal process***") (emphasis added).

28. Here, the Plan proponents are asking the Court to do far more than simply enforce an Order or preserve the status quo pending appeal. They are requesting that the Court exercise its judicial power to approve a Settlement and a Plan that fully and finally disposes of the Trust Preferred Securities, seeks to remedy the Debtors' failure to comply with the parties' contracts and applicable law, and otherwise seeks to destroy the TPS Consortium's appellate and property rights.

29. In the September Opinion, the Court suggested that granting the requested supplemental confirmation-related relief (e.g., compelling performance of the Completion Steps, Ordering the transfer of the Trust Preferred Securities from WMI to JPMorgan "free and clear"

of issues now on appeal, and/or granting JPMorgan protection under Bankruptcy Code Section 363(m)) would simply be enforcing the TPS Litigation ruling. Respectfully, when the post-appeal relief goes so far beyond and outside of the appealed Order, and would serve to vitiate intentionally the appellate process, it cannot be termed "enforcement" of the original Order. See Cibro Petroleum Prods., Inc. v. Albany (In re Winimo Realty Corp.), 270 B.R. 99, 105-106 (S.D.N.Y. 2001) ("Accordingly, courts have recognized a distinction between actions that 'enforce' or 'implement' an order, which are permissible, and acts that 'expand' or 'alter' that order, which are prohibited . . . . ***Any actions that interfere with the appeal process or decide an issue identical to the one appealed are beyond mere 'enforcement' and are therefore impermissible.***") (emphasis added); Bd. of Dir. of Hopewell, 258 B.R. at 583 (same); In re Allen-Main Assoc., LP, 243 B.R. 606, 608 (Bankr. D. Conn. 1998) (same).

30. The cases cited by the Court in the September Opinion are not to the contrary. In In re Dardashti,[10] at issue was the Bankruptcy Court's enforcement of an Order directing the debtor to turn over assets deemed to be property of the estate (the "Turnover Order"). 2008 WL 8444787, at *1. The debtor did not seek reconsideration or a stay of the Turnover Order, nor did he appeal it. See id. Approximately ten months later, the debtor initiated an adversary proceeding seeking a declaratory judgment that the property implicated in the Turnover Order was not property of the estate. See id. at *2. The Bankruptcy Court entered an Order dismissing that adversary proceeding (the "Dismissal Order"), holding that, because it had previously determined the property at issue to be property of the estate in connection with the Turnover

[10] The TPS Consortium also notes that the Dardashti decision was determined by its authors as "not appropriate for publication" and to be of no precedential value. See Dardashti v. Golden (In re Dardashti), No. 07-1311, 2008 WL 8444787, at *1 n.1 (B.A.P. 9th Cir. Feb. 12, 2008) ("This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have . . ., it has no precedential value.") (internal citations omitted).

Order (which had not been appealed), the debtor was precluded from further litigating the issue. See id. The debtor then appealed the Dismissal Order. See id. Later, the trustee, seeking to enforce the Turnover Order, filed a motion for an Order to show cause why the debtor should not be held in contempt for failing to abide by the Turnover Order (which, again, had not been appealed), which motion the debtor opposed on the basis, inter alia, that the Dismissal Order had been appealed and the Bankruptcy Court was divested of jurisdiction to act as a result of that appeal. See id. at *3. In connection with an appeal of the resulting Order to show cause, the Bankruptcy Appellate Panel determined that the Bankruptcy Court had not been divested of jurisdiction to enforce the Turnover Order as a result of the debtor's appeal of the Dismissal Order. See id. at *6.

31. The Dardashti decision is distinguishable from the case at bar. First, the Dardashti decision is procedurally distinguishable. The debtor never appealed the actual substantive decision determining the estate to be the owner of the disputed property – the Turnover Order. Rather, the Debtor appealed the dismissal of a collateral attack on that final, un-appealed Order. Here, the Court's determination of ownership of the Trust Preferred Securities is the exact issue/matter on appeal before Chief Judge Sleet. Second, the Dardashti court did not authorize a sale of the disputed property to a third party "free and clear" of the debtor's interest therein (effectively putting the disputed property out of the reach of the appellant should he prevail on appeal) – such as this Court is being requested to do with respect to the Trust Preferred Securities under the Plan. Rather, the Dardashti Court's post-appeal Order would simply have facilitated bringing the property into the estate and under the Trustee's control consistent with the un-appealed Turnover Order (i.e., the post-appeal relief would actually be enforcing the Turnover Order, rather than granting substantively different relief such

as authorizing the sale of the disputed property in a manner that would moot the appeal). Such relief would not have any effect on the debtor's appeal rights (unlike the Plan provisions cited above).

32. Finally, and critically, the Dardashti Court noted that the post-appeal relief did not "impair [the appellant's] ability to seek review of the Dismissal Order on appeal," and would not have "had any appreciable effect on the [appellate court's] consideration of the Dismissal Order." Dardashti, 2008 WL 8444787, at *6. In contrast, here, the post-appeal action sought is approval of a Plan that is obviously, and unabashedly, intended to divert the Trust Preferred Securities beyond the reach of this Court and/or the District Court and set up the Plan supporters' arguments that the appeal of the TPS Litigation decision has been rendered equitably moot by this Court's post-appeal actions.

33. In re Hagel is similarly distinguishable. In Hagel, the Bankruptcy Court denied confirmation of two chapter 13 debtors' proposed joint plan for failure to include certain income in their schedules, and ordered the debtors to amend their schedules accordingly by a date certain. See Hagel, 184 B.R. at 795. The denial of confirmation and the determination that social security income had to be included in the calculation of the debtors' disposable income were appealed to the Bankruptcy Appellate Panel. The standing trustee subsequently moved for dismissal of the bankruptcy case when the debtors failed to amend their schedules as ordered by the Bankruptcy Court in the original decision. The Court granted the motion and dismissed the case. The debtors challenged the Bankruptcy Court's jurisdiction to Order dismissal given the pendency of the appeal of the denial of confirmation.

34. The Hagel court correctly noted that, once an appeal is filed, the trial court "***may not interfere with the appeal process or the jurisdiction of the appellate court***." Id. at 798

(emphasis added). And, importantly, the post-appeal relief granted by the Bankruptcy Court (dismissal of the debtors' chapter 13 case) did not, in fact, interfere with the appeal process or the Bankruptcy Appellate Panel's jurisdiction – as demonstrated by the Bankruptcy Appellate Panel's continuing ability to deliver its decision on the merits of the debtors' underlying appeal. See id. at 799. Here again, a primary purpose of the Plan provisions dealing with the Trust Preferred Securities is to render equitably moot the TPS Consortium's appeal of this Court's ruling as to ownership. Moreover, Hagel teaches that the decision of the lower court must be left intact so as not to disrupt the appellate process. See id. at 798. As discussed above, contrary to the positions taken by the Appellees in the TPS Litigation and adopted by this Court in its ruling thereon – e.g., that the failure of the Completion steps was of no moment – the Plan proponents seek an Order of this Court compelling, inter alia, completion of substantially all of the Completion Steps in connection with the transfer of the Trust Preferred Securities first to WMI and then to JPMorgan "free and clear" of claims and appellate rights. As such, rather than leaving intact this Court's ruling in the TPS Litigation, the relief granted in connection with Plan approval would eviscerate that ruling by correcting, by subsequent Order of this Court, the very errors that are the subject of the Movants' pending appeal. Finally, to the extent the Hagel Court did intend its articulation of the Divestiture Rule to be as limited as cited in the September Opinion, such a limited reading of the Divestiture Rule would be contrary to binding precedent in this District adopting a more appropriately expansive application of the rule. See AWC Liquidation, 292 B.R. at 242 (noting the "general principle that a lower court is divested of jurisdiction once an appeal is filed . . ." and explaining the "fundamental tenet of federal civil procedure that – subject to certain exceptions – the filing of a notice of appeal from the final judgment of a trial court divests the trial court of jurisdiction and confers jurisdiction upon the

appellate court. This rule applies with equal force to bankruptcy cases.") (citing Transtexas Gas, 303 F.3d at 578-79); Karaha Bodas, 2002 WL 1401693, at *1 (noting the "well established [principle] that the filing of a notice of appeal divests the district court of jurisdiction to rule ***on the merits of the issues underlying the appeal***") (emphasis added).

35. Undoubtedly, the Debtors' Plan has been constructed to attempt to deprive Appellants of appellate review of this Court's decision in the TPS Litigation. Specifically, the Plan seeks an Order from the Bankruptcy Court providing for, inter alia: a) an affirmative injunction requiring completion of the steps necessary to effect the "conditional exchange" of the Trust Preferred Securities (steps, conveniently, WMI and JPMC argued to this Court, and this Court so held, were unnecessary and/or irrelevant during summary judgment proceedings on the TPS Litigation); b) assumption of the agreements necessary to complete the "conditional exchange" transaction (in contravention of Bankruptcy Code Section 365(c)(2) – another issue on appeal before Chief Judge Sleet); c) transfer of the Trust Preferred Securities to JPMorgan "free and clear" of claims, accompanied by the bona fide purchaser protections of Bankruptcy Code Section 363(m); and d) affirmative injunctive relief requiring third parties to take steps necessary to effect the transfer of the Trust Preferred Securities to JPMorgan under applicable law (e.g., recordation on the applicable trust registers, transfer of global certificates, etc.). Clearly, these, among other aspects of the requested confirmation-related relief are affirmatively designed to attempt to affect the matters now on appeal before Chief Judge Sleet. As such, this Court's actions to approve (or, indeed, Order) the foregoing would be in clear violation of the Divestiture Rule.

36. And, the actions contemplated by the Plan (none of which were Ordered in this Court's January 2011 ruling on the TPS Litigation), go far beyond enforcement of the TPS

Litigation ruling. Nowhere in the Court's ruling in the TPS Litigation can it even be argued that this Court Ordered: a) parties (including parties not before this Court) to undertake the Completion Steps; b) that the Trust Preferred Securities be transferred to JPMorgan, free and clear of claims and interests; or c) that the TPS Consortium's claims against JPMC (or any of its affiliates) related to the Trust Preferred Securities be released. Such post-appeal relief cannot be said to be merely enforcing the Court's TPS Litigation ruling. Rather, it clearly would be a significant modification and/or expansion of the ruling now on appeal. As such, the relief requested is prohibited by the Divestiture Rule.

C. The Divestiture Rule Is Mandatory And Automatic.

37. In the September Opinion, the Court appears to suggest that the Divestiture Rule is subject to the same type of discretion afforded under Bankruptcy Rule 8005. The TPS Consortium respectfully submits that Divestiture Rule provides no discretion. Where it applies, the trial Court is forbidden from proceeding – even if the trial Court were otherwise inclined to do so. See In re Emergency Beacon Corp., 58 B.R. 399, 402 (Bankr. S.D.N.Y. 1986) (finding that a Bankruptcy Court, once divested of jurisdiction by the filing of a notice of appeal, "should [not] be able to vacate or modify an order under appeal, not even a Bankruptcy Court attempting to eliminate the need for a particular appeal") (citations omitted). Bankruptcy Rule 8005, on the other hand, explicitly allows the Court discretion to stay other aspects of the bankruptcy case that are not otherwise mandatorily stayed through proper application of the Divestiture Rule. See Fed. R. Bankr. P. 8005 ("[T]he bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.").

38. No case identified by the TPS Consortium (or, the Plan supporters, for that matter) stands for the proposition that the promulgation of Rule 8005 and its voluntary stay provisions somehow overturned binding caselaw standing for the proposition that the Divestiture Rule automatically and mandatorily forces the trial court to stay its hand pending appeal. Clearly, where the Divestiture Rule is implicated to preserve matters on appeal, the discretion or desires of the trial Court are irrelevant. Stated simply, Rule 8005 has no place in the discussion of the Divestiture Rule. That the Court, in the September Opinion, suggested that the Divestiture Rule left the Court with the same discretion afforded it under Rule 8005 was error and another reason the Court should adopt a corrected articulation of the Rule in connection with the further revised version of the Plan.[11]

D. Application Of The Divestiture Rule Would Not Improperly Impede The Debtors' Cases From Continuing.

39. The Plan proponents argue that application of the Divestiture Rule in this case would somehow result in the end of bankruptcy as it is known. They suggest that if this Court declines to disturb aspects of the TPS Litigation now on appeal before Chief Judge Sleet, such a decision would somehow force a freeze of all activity in the Debtors' case pending final determination of those appellate matters. That is a straw-man argument this Court should

[11] See September Opinion, at 18-19 (discussing the discretionary standard allowed under Rule 8005 in considering whether the Divestiture Rule applied); see also id. at 22 (declining to exercise discretion under Rule 8005 to halt confirmation proceedings under the Divestiture Rule – notably, the TPS Consortium had not even sought relief under Rule 8005). Additionally, the TPS Consortium respectfully submits that the Court's citation to the DeMarco Court's decision does not support the proposition that the discretionary standard of Rule 8005 should govern in the instant situation. See id. The DeMarco Court correctly applied the Divestiture Rule, and nowhere in the opinion cited Rule 8005 or discretion. See DeMarco, 285 B.R. at 36.

decline to adopt.[12]

40. Knowing that the ownership of the Trust Preferred Securities is still subject to dispute, and that this issue is to be decided by Chief Judge Sleet, the Debtors and JPMorgan nonetheless persist in proposing a Plan that requires the delivery of these Securities to JPMorgan "free and clear" of all claims (including the TPS Consortium's claims). The TPS Consortium owns approximately $1.5 billion of these Securities. To compromise the TPS Consortium's rights in the interests of expediency raises serious constitutional property and due process issues.

41. Admittedly, because of the case agenda JPMorgan and the Debtors have foisted upon this Court (basically, it is their "deal" or no deal), proper application of the Divestiture Rule in this case to prevent an unfettered transfer of the Trust Preferred Securities to JPMorgan would likely preclude near-term consummation of the current version of the Settlement (based on JPMorgan's threats to walk away if this Court does not Order the transfer of the Trust Preferred Securities free and clear of claims and the TPS Consortium's appeal rights). But, there is no exception to the Divestiture Rule to facilitate settlements that are claimed by their proponents to be "too big to fail." Nor is it appropriate for the Court to contravene the Divestiture Rule out of a desire to limit the scope of matters on appeal (as the Plan supporters hope this Court will do). See Bennett v. Gemmill (In re Combined Metals Reduction Co.), 557 F.2d 179, 201 (9th Cir.

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[12] Indeed, in the normal course of a bankruptcy case, most Orders are interlocutory and not subject to immediate appeal absent permission. The present situation, in which the Plaintiffs were required to seek relief via a separate adversary proceeding, and the Court entered a final, appealable Order determining state law property rights in connection therewith, is unusual. As such, the Plan supporters' "doomsday" scenarios should be rejected. Instead, this Court should embrace this rare opportunity to facilitate review by an Article III court of this Court's ruling on important property and due process issues. Accord Stern v. Marshall, 131 S.Ct. 2594 (2011) (stressing the importance of Article III review); Butner v. United States, 440 U.S. 48, 54 (1979) (absent actual conflict with Federal law, property rights to be determined in accordance with state law).

1977) (Divesture Rule precludes even actions by the trial court that would "eliminate the need for a particular appeal").

42. And while frustration of the Debtors' efforts to force approval of the Settlement (as currently constituted) might be inconvenient to some parties,[13] there are still numerous aspects of the Debtors' case that could continue notwithstanding this Court's application of the Divestiture Rule to preserve those matters now on appeal before Chief Judge Sleet. For example, proper application of the Divestiture Rule would not prevent: (a) the Court's consideration and approval of a plan or liquidation scheme not dependent on delivering the Trust Preferred Securities to JPMorgan free and clear of the TPS Litigation appellants' rights; (b) the Court's consideration and approval of a revised Plan and Settlement that preserved the TPS Consortium's appellate rights (rather than affirmatively trampling such rights) – such as by requiring the Trust Preferred Securities be placed in a disputed claims reserve pending resolution of the TPS Litigation appeal; (c) appointment of a chapter 11 trustee to help bring the Debtors' cases to a fair and reasonable conclusion; (d) conversion of the Debtors' cases to chapter 7; (e) continuation of litigation over other sources of potentially-significant estate value (e.g., disputed deposits, tax refunds, etc.); or (f) pursuit of estate claims against third parties bearing potential

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[13] Numerous Court's have aptly noted that avoidance of inconvenience is not sufficient to overcome the jurisdictional mandates of the Divestiture Rule. See Venen, 758 F.2d at 123 ("This litigation has been unduly prolonged, unnecessarily burdening this court in this appeal, as it will burden the district court in the proceedings which will undoubtedly follow. ***Nevertheless, jurisdictional requirements may not be disregarded for convenience sake***.") (emphasis added); AWC Liquidation, 292 B.R. at 242-43 (while mindful of the inconvenience caused by application of the Divestiture Rule, inconvenience is not sufficient to overcome the jurisdictional bar); Transtexas Gas, 303 F.3d at 580 ("[P]rinciples of flexibility do not permit a bankruptcy court to enter an order addressing a post-judgment motion when the bankruptcy court lacks jurisdiction over the case . . . simply because prompt disposition of the motion might be desirable from an efficiency standpoint. Such pragmatic concerns cannot 'outweigh' a jurisdictional defect.").

responsibility for WMI's collapse (e.g., JPMorgan, investment bankers, ratings agencies, officers and directors, etc.). Such matters clearly can go forward under a proper application of the Divestiture Rule. The aspects of the Plan designed to undermine the TPS Litigation appeal clearly cannot go forward.

II. Even If the Court Declines To Recognize Proper Application Of The Divestiture Rule, Confirmation Proceedings Should Be Stayed Pending Appeal.

43. As noted above, given the automatic and mandatory nature of the Divestiture Rule, the TPS Consortium respectfully submits that a discretionary stay provided by Rule 8005 is not necessary. In any event, Rule 8005's requirements are satisfied easily in this case. Rule 8005 contemplates a discretionary stay pending an appeal of a Bankruptcy Court's Order. See Fed. R. Bankr. P. 8005. Under Rule 8005, a stay pending appeal is appropriate to "maintain the status quo." See KOS Pharm., Inc. v. Andrix Corp., 369 F.3d 700, 708 (3d Cir. 2004). In bankruptcy cases, myriad circumstances can occur "that would necessitate the grant of a stay pending appeal in order to preserve a party's position." In re Highway Truck Drivers & Helpers Local Union # 107, 888 F.2d 293, 298 (3d Cir. 1989).

44. In evaluating whether a party is entitled to a stay pending appeal, courts consider (a) the likelihood that the moving party will succeed on the merits; (b) the possibility that the moving party will suffer irreparable harm absent relief; (c) whether the stay will inflict substantial harm on the nonmoving parties; and (d) whether the stay will harm the public interest. See Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d Cir. 1991) (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

45. None of these factors is, on its own, outcome determinative. Rather, the Court "must balance all of the factors in order to decide whether or not to grant a stay." Haskell v. Goldman, Sachs & Co. (In re Genesis Health Ventures, Inc.), 367 B.R. 516, 519 (Bankr. D. Del.

2007) (finding all four factors weighed in favor of granting motion to stay proceedings pending appeal) (citation omitted); Meisel v. Armenia Coffee Corp. (In re Hudson's Coffee, Inc.), No. 06-1458, 2008 Bankr. LEXIS 2994, at * 4 (Bankr. D.N.J. Oct. 31, 2008) ("[N]o single factor is outcome determinative. Rather, [a court] must balance all of the elements in order to reach an appropriate determination."); see also In re Countrywide Home Loans, Inc., 387 B.R. 467, 479 (W.D. Pa. 2008) (noting that "a balancing approach is more appropriate than a somewhat mechanical test"). Particularly, the Court should find that the more likely it is that the movant will succeed on appeal, the less strong showing of irreparable harm needs to be, and vice versa. See BEPCO, L.P. v. 15375 Mem'l Corp. (In re 15357 Mem'l Corp.), No. 06-10859-KG, 2009 WL 393948 (D. Del. Feb. 18, 2009); see also Hickey v. City of New York (In re World Trade Ctr. Disaster Site Litig.), 503 F.3d 167, 170 (2d Cir. 2007) ("[T]he degree to which a factor must be present varies with the strength of the other factors, meaning that more of one [factor] excuses less of the other.") (citations and internal quotations omitted).

46. Here, balancing the four factors weighs strongly in favor of granting a stay of further confirmation proceedings pending the resolution of the TPS Litigation appeal. Movants have raised substantial, serious and difficult legal issues in their appeal before the District Court, and further raise serious legal issues in this motion, among them the potential deprivation of the TPS Consortium's constitutional due process and Fifth Amendment property rights, as well as the application of the Divestiture Rule to prohibit this Court from granting relief affirmatively designed to deprive Chief Judge Sleet of jurisdiction over the TPS Litigation appeal. These are important and difficult issues warranting maintenance of the status quo pending their resolution).

47. Because the Plan seeks to resolve the ownership of the Trust Preferred Securities and post-appeal consummation of the steps to the Conditional Exchange, which are central issues

on appeal before the District Court in the TPS Litigation appeal, and the Debtors and other parties will undoubtedly seek to strip the Plaintiffs of any appellate review by claiming, inter alia, that such an appeal would be equitably moot, this is such a case warranting a stay. Absent a stay, Movants will be irreparably harmed through the potential destruction of their property interests in the Trust Preferred Securities, as well as the attempted elimination of any forum for seeking relief from such deprivation.[14] Additionally, the stay, if granted, would not injure – let alone substantially injure – any of the non-moving parties, since the stay of confirmation proceedings would simply maintain the status quo (which is the very purpose of a stay). Finally, the public interest would be furthered through the granting of a stay in that the stay would forestall the Plan proponents' efforts to cause this Court to violate the Divestiture Rule and trample on Movants' property, appellate and Due Process rights.

A. The Movants Are Likely To Succeed On The Merits Of Their Appeals.

48. To prove likely success on the merits, the "movant must demonstrate that it has a substantial issue to raise on appeal." BEPCO, 2009 WL 393948, at *1 (citation and internal quotations omitted). For this prong of a court's analysis, it is often sufficient that a movant show that it "seeks to raise issues on appeal that are substantial, serious, and doubtful so as to make them fair ground for litigation." Countrywide, 387 B.R. at 471-72 (citation omitted); see also

[14] As noted above, the obvious intent of the Plan provisions pertaining to the Trust Preferred Securities is to give the Plan proponents a basis to claim the TPS Litigation appeal has been rendered equitably moot. In anticipation of that inevitability should the Plan be confirmed, Movants dispute that the facts and circumstances of these cases support application of the equitable mootness doctrine. Moreover, any Order found to have been entered in contravention of the Divestiture Rule will be void ab initio. See, e.g., Padilla v. Neary (In re Padilla), 222 F3d 1184, 1189-90 (9th Cir. 2000) (bankruptcy court's discharge order was "null and void" as it was entered after the dismissal of the case had been appealed to the bankruptcy appellate panel); Garcia v. Burlington N. R.R., 818 F.2d 713, 720-22 (10th Cir. 1987) (trial court's post-appeal amendment of order awarding damages was vacated because the trial court was divested of jurisdiction when the order was appealed).

Arnold v. Garlock, Inc., 278 F.3d 426, 439 (5th Cir. 2001) (finding that the movant "need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the equities weigh in favor of granting the stay") (citation omitted). Furthermore, the movant need not convince the bankruptcy court it was incorrect in order to warrant a stay to preserve issues for appellate review. In other words, it is not necessary for a court to "confess error" to grant a request for a stay pending appeal. See Evans v. Buchanan, 435 F. Supp 832, 843 (D. Del. 1977). Rather, a court may stay its own Order or proceedings where there are difficult legal questions and the equities of the case suggest that the status quo should be maintained. See Goldstein v. Miller, 488 F. Supp 156, 172-73 (D. Md. 1980). As Bankruptcy Judge Walsh has explained in granting a stay:

> Although the cases that Defendants put forward do not sway this Court, that does not mean that Defendants' motion should fail. For the purposes of this motion, it does not matter whether this Court believes that Defendants should succeed on appeal. In considering the likelihood of success on the merits, "[i]t seems illogical . . . to require that the court in effect conclude that its original decision in the matter was wrong before a stay can be issued."

Genesis Health Ventures, 367 B.R. at 521(quoting Evans, 435 F. Supp at 844).

49. Apropos to the current situation, in Adelphia, the plan opponents applied for the court to stay the enforcement of a confirmation Order while their appeal on issues implicated by that Order was pending. See ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.), 361 B.R. 337 (S.D.N.Y. 2007). In analyzing the issues on appeal, the district court found substantial merit in the arguments set forth for appeal and reasoned, in deciding to grant the stay requested, that to do otherwise and "[p]ermit[] the Plan to go effective as confirmed – thereby distributing the finite estate to the creditors and taking away forever the rights of Movants . . . could be a fundamental violation of Movants' constitutional due process

rights." Id. at 358.

50. Movants respectfully submit that they have a high likelihood of prevailing on their arguments that this Court, as a result of the pendency of the TPS Litigation appeal, has been divested of jurisdiction to approve Plan provisions and related relief designed to impair or impede the District Court's appellate jurisdiction. Moreover, Movants also believe they are highly likely to prevail in obtaining a reversal of the Court's TPS Litigation rulings on appeal. At a minimum, however, Movants have raised serious, significant issues (e.g., pertaining to this Court's jurisdiction and the Court-sanctioned trampling of Movants' property rights in the Trust Preferred Securities). As such, the first factor for obtaining a stay under Rule 8005 is clearly satisfied and strongly supports this Court's granting of a stay of further confirmation proceedings on the Plan, as currently constituted.

B. The Movants Will Be Irreparably Harmed If The Confirmation Proceedings Are Not Stayed.

51. In considering this Motion, the Court should bear in mind "the official role a stay pending appeal plays, not only in maintaining the status quo, but also in preserving the right to a review on the merits." In re Charles & Lillian Brown's Hotel, Inc., 93 B.R. 49, 53 (Bankr. S.D.N.Y. 1988). The Third Circuit has recognized that a party may suffer irreparable harm justifying a stay pending appeal if it faces the possibility that its appeal would be rendered moot if the adverse party relies upon the lower court Order by taking action that cannot be undone. See Highway Truck Drivers, 888 F.2d at 297-98 (discussing "the necessity of a stay under Rule 8005" by stating that "the consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the [lower] court as final [notwithstanding that an appeal is pending.] . . . Thus, in the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree. As a result, the court of appeals

may become powerless to grant the relief requested by the appellant.") (internal citations omitted); see also Trone v. Roberts Farms, Inc., 652 F.2d 793, 798 (9th Cir. 1981) ("If an appellant fails to obtain a stay after exhausting all appropriate remedies, that well may be the end of his appeal . . . For this reason there is a concomitant obligation on the courts to consider such stay application thoroughly and with full appreciation of the consequences of a denial."); Adelphia, 361 B.R. at 351-52, 352 n.9 (noting that loss of appellate rights is dispositive for the irreparable harm to appellants factor of the stay inquiry). Here, a stay pending appeal is necessary to prevent irreparable harm to the Movants and their substantial appeal rights, which may be stripped absent a stay.[15]

52. Absent a stay, the Debtors and creditors certainly will argue that the Movants' appeals, in connection with the TPS Litigation and any subsequently-entered confirmation opinion, will be moot. While this Court has previously stated that "an appeal being rendered moot does not *itself* constitute irreparable harm," In re Trans World Airlines, Inc., No. 01-0056, 2001 WL 1820325, at *10 (Bankr. D. Del. March 27, 2001) (emphasis added), the irreparable harm the Movants would suffer extends beyond just concern over equitable mootness. As discussed, the Movants face an imminent danger of being stripped of their property interests in the Trust Preferred Securities without an opportunity to obtain an Article III court's review of the underlying decision.[16] Coupled with the threat that the TPS Litigation appeal might be impaired

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[15] In the event a stay is not granted, Movants do not concede that substantial consummation of the Plan will moot their appellate rights, and expressly reserve all of their rights in this regard.

[16] The Supreme Court of the United States has found that the "power" of the Bankruptcy Code cannot be used "to defeat traditional property interests [because] [t]he bankruptcy power is subject to the Fifth Amendment's prohibitions against taking private property without compensation." United States v. Sec. Indus. Bank, 459 U.S. 70, 75 (1982); see In re Introgen Therapeutics, Inc., 429 B.R. 570 (Bankr. W.D. Tex. 2010) (recognizing a property interest in an equity holder's right to receive an estate distribution after all

and that this Court would exceed its jurisdiction in contravention of the Divestiture Rule, the Movants will be irreparably harmed if confirmation proceedings are allowed to continue. Acknowledging such a threat, the Third Circuit, in discussing "the necessity of a stay under Rule 8005," has recognized that "in the absence of a stay . . . the court of appeals may become powerless to grant the relief requested by the appellant." Highway Truck Drivers, 888 F.2d at 297-98 (citations omitted); see BEPCO, 2009 WL 393948, at *1 (granting motion to stay proceedings since "dismissal . . . has a finality that may well be difficult to un-do").

53. Accordingly, allowing confirmation proceedings to continue and/or entering a confirmation Order in contravention of the Divestiture Rule would irreparably harm the Movants by stripping them of their property interests in the Trust Preferred Securities without due process of law, potentially rendering moot their appeal before District Court, and by this Court exceeding its jurisdiction at the expense of the Movants' appellate rights.

C. No Party-In-Interest Will Be Substantially Harmed If The Bankruptcy Proceedings Are Stayed.

54. Granting a stay of further confirmation proceedings on the Plan will not harm – let alone substantially harm – any of the nonmoving parties. The very purpose of a stay pending appeal is to "maintain the status quo." KOS Pharm., 369 F.3d at 708. By granting the stay, the Court will maintain the status quo while the Movants are afforded an opportunity to pursue their

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allowed claims and post-petition interest have been paid in full); Adelphia, 361 B.R. at 358 (to "[p]ermit[] the Plan to go effective as confirmed – thereby distributing the finite estate to the creditors and taking away forever the rights of Movants . . . could be a fundamental violation of Movants' constitutional due process rights"). Additionally, the Supreme Court has recognized as paramount "[t]he right of a citizen to defend his property against attack in a court . . . ." Degen v. United States, 517 U.S. 820, 828 (1996). Here, the Plan provides for the "total destruction" of the Movants' property interests in the Trust Preferred Securities, and does so without providing *any* compensation or forum for the Movants to litigate the merits of their claim to the Trust Preferred Securities.

rights in the TPS Litigation appeal. The nonmoving parties will remain unaffected, since all eligible parties holding Allowed Claims will continue to accrue post-petition interest on their claims. To the extent, as a result of the Court's September Opinion, junior creditors are required to payover a portion of their recoveries to senior creditors, those junior creditors will simply be subject to the terms of the contractual subordination provisions to which they voluntarily bound themselves and this Court's ruling on post-petition interest and enforceability of subordination agreements. See, e.g., Shelly's, Inc. v. Food Concepts of Wisconsin, Inc. (In re Shelly's, Inc.), 87 B.R. 931, 935-36 (Bankr. S.D. Ohio 1988) (finding that potential contractual damages do not constitute irreparable harm for purposes of injunctive relief); Eastman Kodak Co. v. Collins Ink Corp., No. 11-6513, 2011 WL 5304059, at *9 (W.D.N.Y. Nov. 4, 2011) ("All that this injunction does is require [the non-movant] to continue to perform under the contract . . . . That hardly constitutes a cognizable 'harm' to [the non-movant]."); Atlantic City Coin & Slot Serv. Co. v. IGT, 14 F. Supp. 2d 644, 670 (D.N.J. 1998) (noting that the "injuries [a party] may suffer by paying higher prices as a result of [its] contractual obligation [are] irrelevant to the balance of the hardship between the litigating parties").

55. There is no evidence to suggest that a delay in implementing the Plan would cause any non-moving party any harm other than a delayed distribution on their claims. There is no emerging business that would be delayed or harmed if further confirmation proceedings are stayed. The reorganized Debtor is, admittedly, merely a reinsurance runoff "business" that has been operating in the same manner (i.e., in runoff mode) since the petition date. See Transcript of July 14, 2011 Hearing (Testimony of Steven Zelin), at 251:5-9 ("Wimrick (sic) is a captive reinsurance company within WMI. It is currently in a runoff today and has been in runoff frankly since around the time of bankruptcy. It's a business that even prior to bankruptcy was

not an independent reinsurance company . . . ."). There is no plan to enter into any new lines of business, nor will any new policies be written. See id. at 277:25 - 278:7 ("And today, as reorganized WMI itself is not an ongoing, you know, reinsurance operator that is writing new policies, it would have to go out and make acquisitions . . . . [I]t doesn't have a management team that can execute on those transactions, it does not have a business plan, it does not have the infrastructure in place to employ capital for purposes of making those kinds of acquisitions."). That run-off business can continue to operate the same way that it has been operating for more than three years. Thus, the only harm that the non-moving parties might suffer would be a delay in distribution on their claims and/or continued fulfillment of their contractual subordination rights. Neither is sufficient to outweigh the irreparable harm sought to be inflicted on the Plaintiffs through the Plan. As such, the status quo will not be compromised by a temporary stay of confirmation pending resolution of the TPS Litigation appeal insofar as eligible holders of Allowed Claims will be compensated for the brief delay.[17] See In re Coram Healthcare Corp., 315 B.R. 321, 346 (Bankr. D. Del. 2004) (explaining "the purpose of post-petition interest is to compensate creditors for the delay between the petition date and the time of payment") (citations omitted); see also In re St. Johnsbury Trucking Co., 185 B.R. 687, 690 (S.D.N.Y. 1995) (finding that, after a two-year confirmation process, a brief delay in the distributions of estate property that would result from a stay of the Confirmation Order did not impose an undue burden on creditors where the stay pending appeal did "not mean a lengthy delay"); In re Gen. Motors Corp., 409 B.R. 24, 32-33 (Bankr. S.D.N.Y. 2009) (recognizing the line of "[c]ases expressing a

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[17] The parties have completed briefing in the TPS Litigation Appeal and are currently awaiting the scheduling of oral arguments and/or the Court's ruling. See Notice of Completion of Briefing and Request for Oral Argument, dated May 18, 2011 [App. Docket No. 42]. The TPS Consortium is not aware of any reason Chief Judge Sleet would be unable to timely adjudicate the TPS Litigation Appeal. As such, any delay accorded by the requested stay could be quite short.

willingness to grant a brief stay pending expedited appeal" as establishing a sound reason for granting such stay, where the stay does nothing more than "delay[] distributions to creditors for a little longer").

D. Staying Confirmation Proceedings Would Serve The Public Interest.

56. This Court should grant the Movants' requested stay because it promotes the public interest by ensuring the Movants are provided a judicial forum in which to seek appellate review of this Court's ruling in the TPS Litigation. See Charles & Lillian Brown's Hotel, 93 B.R. at 53 (recognizing the vital role stays pending appeal play in preserving parties' rights, including the "right to a review on the merits"); see also AT&T v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1427 n.8 (3d Cir. 1994) ("As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff."). Although public policy favors the "expedient administration of the bankruptcy estate," parties "objecting to [a] settlement and [] distribution scheme have a right to appellate review . . . [and] [d]istribution of the challenged settlement award before its validity has been tested would deprive those parties of that right." Adelphia, 361 B.R. at 349-50 (citations omitted).

57. By granting the Motion, the Court would preserve the Movants' right to review of this Court's TPS Litigation ruling and would, simultaneously, be respecting the "constitutional limitations [imposed] upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) (quoting Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958)). Furthermore, the most critical public policy consideration is the correct application of the law. See Americans United for Separation of

Church & State v. City of Grand Rapids, 922 F.2d 303, 306 (6th Cir. 1990) (noting that "[t]he public interest lies in the correct application [of the law]"). Thus, given the significant issues on which the Movants are likely to prevail on appeal, and the need to ensure that the Movants are not stripped of their property and appellate rights in contravention of the Due Process Clause of the Fifth Amendment and the Divestiture Rule, a stay is clearly in the public interest in this case.

III. A Bond Should Not Be Required.

58. A bond is unnecessary in the present case because a stay pending appeal will not cause any harm. The Court has "wide discretion in the matter of requiring security and if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary." Cont'l Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782 (9th Cir. 1964); see also In re United Merchs. & Mfrs., Inc., 138 B.R. 426, 427 (D. Del. 1992) (a bond for a stay is discretionary and unnecessary when the debtor will not be harmed by the stay). Courts requiring bonds when a stay of confirmation Order is granted typically do so because the stay is "likely to cause harm by diminishing the value of an estate or endanger [the non-moving parties'] interest in the ultimate recovery." See Adelphia, 361 B.R. at 368 (quotations omitted); see also In re Innovative Commc'ns, 390 B.R. 184, 189-90, 190-91 (Bankr. D.V.I. 2008) (finding a bond necessary where the stay "would cause substantial harm to the creditors"); In re Gleasman, 111 B.R. 595, 603 (Bankr. W.D. Tex. 1990) (bond was required to protect appellee against diminution in the value of its collateral pending appeal).

59. Such cases have no application here, as there can be no showing of a likely harm to be avoided. As set forth above, the only issue would be a delayed distribution. That "harm" is solved by continued accrual of post-petition interest, and no further compensation is required. Courts will not require appellants to post security for a stay where, as here, little or no injury or

prejudice to appellees will occur. See In re Sphere Holding Corp., 162 B.R. 639, 644-45 (E.D.N.Y. 1994) (holding that bond was not required as a condition to an injunction restraining creditors from collection pending appeal when there was no evidence that the creditor's collateral was diminishing in value and little damage would occur); United Merchs., 138 B.R. at 427 (stay of further distributions pursuant to confirmed chapter 11 plan would not be conditioned upon filing of a bond because the debtor would not suffer any loss as a result of the stay pending appeal); In re Columbia Gas Sys., Nos. 91-803, 91-804, 1992 U.S. Dist. LEXIS 3253, at *3, 5-6 (D. Del. Mar. 10, 1992) (no bond required where the debtors and estate could be accommodated under the stay and not be substantially harmed). Accordingly, the Court should not require the Movants to post a bond in connection with this Court's stay of further confirmation proceedings (at least as to the current iteration of the Plan) pending resolution of the TPS Litigation.

CONCLUSION

Wherefore, the TPS Consortium respectfully requests (i) that the Court grant the Motion for Stay of Confirmation Proceedings Pending Resolution of Its Adversary Appeal and (ii) any other relief that the Court deems just and proper.

Dated: Wilmington, Delaware
December 23, 2011

Respectfully submitted,
CAMPBELL & LEVINE LLC

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EXHIBIT A

preferred equity. WMI was further obligated to mail to each holder of record of the Trust Preferred Securities a notice regarding the occurrence of a purported Conditional Exchange. The WMI preferred equity was never issued, nor was the required notice of the purported Conditional Exchange transmitted. As such, these conditions precedent to consummation of the purported Conditional Exchange have not been satisfied, the purported Conditional Exchange therefore failed, and ownership of the Trust Preferred Securities remains with the Plaintiffs and similarly-situated investors.

207. Because the purported Conditional Exchange never occurred, WMI never acquired ownership or title to the Trust Preferred Securities and thus could not have transferred ownership or title to the Trust Preferred Securities to WMB. Because WMI could not lawfully transfer ownership or title to the Trust Preferred Securities to WMB, neither WMB nor the FDIC could transfer ownership or title to the Trust Preferred Securities to JPMC.

208. Lastly, although the Trust Preferred Securities were purportedly transferred to JPMC, there is no indication that such a transfer was in fact consummated. As previously alleged by WMI, the issuers of the Trust Preferred Securities made no transfer notations registering the Trust Preferred Securities to WMB (or any other party) to reflect any purported assignment.

209. Under every circumstance, JPMC has no right to the Trust Preferred Securities. In addition, JPMC cannot assert any claim for the Trust Preferred Securities because it expressly excluded from its purchase of WMB's assets "any interest, right, action, claim, or judgment against" WMI.

210. As such, Plaintiffs request a declaratory judgment determining that:

- The purported Conditional Exchange was never consummated.

- The purported Conditional Exchange cannot now be consummated.
- WMI has no right, title or interest in the Trust Preferred Securities.
- JPMC has no right, title or interest in the Trust Preferred Securities.
- As a result, the Trust Preferred Securities and any claim thereto, do not constitute property of the estate under 11 U.S.C. § 541.
- As a result, inter alia, of the failure of the purported Conditional Exchange, all right, title and interest in the Trust Preferred Securities remains with investors who held such securities immediately prior to 8:00 a.m. (Eastern) on September 26, 2008, or to any party to whom such parties subsequently transferred such Trust Preferred Securities, other than in connection with the purported Conditional Exchange.

COUNT II
DECLARATORY JUDGMENT
(Against WMI, JPMC)

211. Plaintiffs repeat and reallege the allegations contained in paragraphs 1, 2, 8-59, 71-72, 74-77, 79-83, and 84-89, which are incorporated by reference as if set forth fully herein.

212. There is an actual controversy between the Trust Preferred Holders, WMI and JPMC regarding ownership of the Trust Preferred Securities, which is of sufficient immediacy to warrant judicial relief under 28 U.S.C. § 2201.

213. Both WMI and JPMC have asserted a claim of ownership to the Trust Preferred Securities. However, applicable law imposes certain requirements to effectuation of any transfer of the Trust Preferred Securities. These requirements were not met. As such, the purported Conditional Exchange through which WMI has claimed ownership of the Trust Preferred Securities was never consummated. As WMI never obtained any rights to the Trust Preferred Securities, it had no rights to the Trust Preferred Securities to transfer to WMB and/or JPMC.

214. Because the Trust Preferred Securities were issued in certificated form, UCC § 8-301(a) governs delivery upon a transfer, in this case requiring: (a) WMI to acquire possession of

the applicable security certificate(s); or (b) for another person, other than a securities intermediary, to take possession of the security certificate(s) on behalf of WMI, or, having previously acquired possession of the certificate, acknowledge that it holds on behalf of WMI. WMI never acquired possession of the applicable certificates for the Trust Preferred Securities, and no other person in possession of such securities has recognized WMI as the transferee of the Trust Preferred Securities. As such, the legal requirements for delivery of the Trust Preferred Securities, a condition precedent to consummation of any exchange or transfer, have not been fulfilled, the purported Conditional Exchange failed, and ownership of the Trust Preferred Securities remains with the Plaintiffs and similarly-situated investors.

215. Because the purported Conditional Exchange never occurred, WMI could not have transferred the Trust Preferred Securities to WMB and JPMC could not have acquired the Trust Preferred Securities.

216. Lastly, although the Trust Preferred Securities were purportedly transferred to JPMC, there is no indication that such a transfer was in fact consummated. As previously alleged by WMI, the issuers of the Trust Preferred Securities made no transfer notations registering the Trust Preferred Securities to WMB to reflect any purported assignment.

217. Under every circumstance, JPMC has no right to the Trust Preferred Securities. Indeed, JPMC cannot assert any claim for the Trust Preferred Securities because it expressly excluded from its purchase of WMB's assets "any interest, right, action, claim, or judgment against" WMI.

218. As such, Plaintiffs request a declaratory judgment determining that:

- The purported Conditional Exchange was never consummated.
- The purported Conditional Exchange cannot now be consummated.

- WMI has no right, title or interest in the Trust Preferred Securities.
- JPMC has no right, title or interest in the Trust Preferred Securities.
- As a result, the Trust Preferred Securities and any claim thereto, do not constitute property of the estate under 11 U.S.C. § 541.
- As a result, inter alia, of the failure of the purported Conditional Exchange, all right, title and interest in the Trust Preferred Securities remains with investors who held such securities immediately prior to 8:00 a.m. (Eastern) on September 26, 2008, or to any party to whom such parties subsequently transferred such Trust Preferred Securities, other than in connection with the purported Conditional Exchange.

COUNT III
DECLARATORY JUDGMENT
(Against WMI, JPMC)

219. Plaintiffs repeat and reallege the allegations contained in paragraphs 1, 2, 8-59, 71-72, 74-77, 79-83, and 84-89, which are incorporated by reference as if set forth fully herein.

220. There is an actual controversy between the Trust Preferred Holders, WMI and JPMC regarding ownership of the Trust Preferred Securities, which is of sufficient immediacy to warrant judicial relief under 28 U.S.C. § 2201.

221. Both WMI and JPMC have asserted a claim of ownership to the Trust Preferred Securities. However, the Trust Preferred Securities and related controlling agreements impose restrictions on transferees of the Trust Preferred Securities. Those restrictions prohibited any transfer of the Trust Preferred Securities to WMI. As such, the purported Conditional Exchange through which WMI has claimed ownership of the Trust Preferred Securities was never consummated. As WMI never obtained any rights to the Trust Preferred Securities, it had no rights to the Trust Preferred Securities to transfer to WMB and/or JPMC.

222. The terms of the Trust Preferred Securities themselves and the applicable governing documents (each of which were drafted by or under the direction of WMI), require all

soundness of WMB were likely to give rise to circumstances potentially triggering a purported Conditional Exchange.

256. JPMC was aware of these material omissions and misrepresentations to investors in the Trust Preferred Securities at the time it allegedly purchased the assets of WMB, from which transaction JPMC has claimed an interest in the Trust Preferred Securities.

257. As a result of its knowledge of and/or direct or indirect participation in the fraud involved in the formulation and sale of the Trust Preferred Securities, JPMC knew that any acquisition of the Trust Preferred Securities through the purported Conditional Exchange was tainted by fraud. Because of that knowledge, JPMC cannot be a bona fide good faith purchaser of the Trust Preferred Securities.

258. Therefore, Plaintiffs request that this Court enter a judgment declaring that:

- As a result of its knowledge of the fraud in the issuance and sale of the Trust Preferred Securities, JPMC cannot be a bona fide purchaser of the Trust Preferred Securities.

- As a result of its knowledge of the fraud in the issuance and sale of the Trust Preferred Securities, JPMC's claim to the Trust Preferred Securities, if any, is subject to the fraud claims of investors in the Trust Preferred Securities.

COUNT VII
FRAUD
(Against WMPF, SPEs)

259. Plaintiffs repeat and reallege the allegations contained in the preceding paragraphs, which are incorporated by reference as if set forth fully herein.

260. The offerings of the Trust Preferred Securities were conducted by and consummated through the SPEs (Washington Mutual Delaware I-IV and WaMu Cayman) and WMPF (collectively, the "Offering Defendants").

EXHIBIT B

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
	)	
BLACK HORSE CAPITAL LP et al.,	)	
	)	
Plaintiffs,	)	
	)	Adv. No. 10-51387 (MFW)
v.	)	
	)	
JPMORGAN CHASE BANK, N.A. et al.	)	
	)	
Defendants.	)	

OPINION[1]

Before the Court are cross motions for partial summary judgment filed by the parties in the above-captioned adversary. For the reasons stated below, the Court will grant the motions of the Defendants and deny the motion of the Plaintiffs for summary judgment.

I. BACKGROUND

Washington Mutual, Inc. ("WMI") was a savings and loan holding company, which held inter alia, all of the stock of Washington Mutual Bank ("WMB"). In February 2006, a subsidiary of WMB, University Street, Inc. ("University") created a new

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

subsidiary called Washington Mutual Preferred Funding LLC ("WMPF"). University and WMB then transferred to WMPF portfolios of home equity and other mortgage loans in exchange for all the WMPF common stock and WMPF preferred securities, respectively. WMPF then transferred the loan assets to statutory trusts in exchange for certificates entitling it to payments of principal and interest on the loans. The WMPF preferred securities paid dividends based on distributions from the trusts. In five similarly-structured issuances between March 2006 and October 2007, the trusts issued approximately $4 billion in Trust Preferred Securities (the "TPS") which were sold to qualified institutional buyers pursuant to private placements. Each series of TPS was evidenced by a global certificate registered in the name of and held by a custodian of the Depository Trust Company.

Each series of TPS had a feature that provided that if the Office of Thrift Supervision (the "OTS") determined that WMB had become undercapitalized or would become undercapitalized in the near term or that WMB had been placed in a receivership or conservatorship (defined as an "Exchange Event"), then the OTS could direct that the TPS be transferred to WMI in exchange for new Depositary Shares (the "Conditional Exchange"). (McIntosh Decl. at Exs. 3A & 4A.) The Depositary Shares were to be issued to WMI in exchange for WMI Preferred Shares. (Id.) In order to obtain the agreement of the OTS to the issuance of the TPS and

their treatment as core capital for WMB, WMI agreed that if it acquired the TPS as a result of a Conditional Exchange, then WMI would contribute the TPS to WMB. (Id. at Exs. 5C, 5E, 5G, 5H.)

On September 7, 2008, as its financial condition worsened, WMB entered into a memorandum of understanding with the OTS (the "MOU") pursuant to which the OTS explicitly limited WMB's ability to declare a dividend. (Id. at 7A, §2(B).) On September 25, 2008, the OTS concluded that based on the MOU's limitations on WMB's ability to pay dividends, an Exchange Event had occurred and directed the Conditional Exchange of the TPS. (Id. at Ex. 6A.) WMI responded to that directive on September 25, 2008, advising that it would issue a press release on September 26, 2008, announcing that the Conditional Exchange would occur as of 8:00 a.m. Eastern time on that date. (Id. at Ex. 6B.) WMI also executed an assignment to WMB of all of WMI's entitlements to the TPS. (Id. at Ex. 7B.)

On that same day, September 25, 2008, the OTS seized WMB and appointed the Federal Deposit Insurance Corporation (the "FDIC") as receiver. Immediately after its appointment as receiver, the FDIC sold substantially all of the assets of WMB to JPMorgan Chase Bank, N.A. ("JPMC") for approximately $1.9 billion and assumption of certain of WMB's liabilities. (Id. at Exs. 7C & 7D.)

At 7:45 a.m. Eastern time on September 26, 2008, WMI issued

a press release announcing, inter alia, that an Exchange Event had occurred and that consequently the Conditional Exchange would occur at 8:00 a.m. Eastern time on that date resulting in the automatic exchange of the TPS for Depositary Shares tied to WMI Preferred Shares. (Id. at Ex. 6C.)

Later that same day, September 26, 2008, WMI filed a petition for relief under chapter 11 of the Bankruptcy Code. During the course of the bankruptcy case, disputes arose between WMI and JPMC regarding the ownership of certain assets, including the TPS. Ultimately a Global Settlement was reached between them (and the FDIC and other parties) which has been incorporated into the Debtors' Sixth Amended Joint Plan of Reorganization (the "Plan").

After the announcement of the Global Settlement, the Plaintiffs[2] filed a complaint against WMI and JPMC seeking, inter alia, a declaration that the TPS were still owned by the investors and did not belong to WMI or JPMC. On September 7, 2010, the Court stayed litigation of certain of the counts of the Complaint and permitted the parties to conduct discovery and file dispositive motions with respect to Counts I through VI.[3] The

[2] The Plaintiffs are approximately 30 institutional investors who acquired the TPS. Most of the acquisitions were made after September 26, 2008.

[3] The Plaintiffs have subsequently withdrawn Count III of the Complaint.

parties agreed that those counts had to be determined (by dispositive motions or trial) before the Debtors could proceed with confirmation of the Plan. The parties filed cross motions for summary judgment which were fully briefed by November 24, 2010. The matter is ripe for decision.

II. JURISDICTION

This Court has jurisdiction over the adversary, which is a core proceeding pursuant to 28 U.S.C. §§ 1334 & 157(b)(2)(A), (B), (K), (M) & (O).

III. DISCUSSION

A. Standards for Summary Judgment

Rule 7056 of the Federal Rules of Bankruptcy Procedure incorporates Rule 56 of the Federal Rules of Civil Procedure in adversary proceedings.

In considering a motion for summary judgment under Rule 56, the court must view the inferences from the record in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Hollinger v. Wagner Mining Equip. Co., 667 F.2d 402, 405 (3d Cir. 1981). If there does not appear to be a genuine issue as to any material fact and on such facts the movant is entitled to judgment as a matter of law, then the court shall enter judgment in the movant's favor. See, e.g.,

Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); Carlson v. Arnot-Ogden Mem'l Hosp., 918 F.2d 411, 413 (3d Cir. 1990).

The movant bears the burden of establishing that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986); Integrated Water Res., Inc. v. Shaw Envtl., Inc. (In re IT Group, Inc.), 377 B.R. 471, 475 (Bankr. D. Del. 2007). A fact is material when it could "affect the outcome of the suit." Anderson, 477 U.S. at 248.

Once the moving party has established a prima facie case in its favor, the non-moving party must go beyond the pleadings and point to specific facts showing more than a scintilla of evidence that there is a genuine issue of fact for trial. See, e.g., Anderson, 477 U.S. at 252; Matsushita, 475 U.S. at 585-86; Michaels v. New Jersey, 222 F.3d 118, 121 (3d Cir. 2000); Robeson Indus. Corp. v. Hartford Accident & Indem. Co., 178 F.3d 160, 164 (3d Cir. 1999). If the moving party offers only speculation and conclusory allegations in support of its motion, the burden is not met. See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999). Therefore, when the court determines that the non-moving party has presented no genuine issue of fact, summary judgment may be granted. See Matsushita, 475 U.S. at 587.

In this case, all parties agree that summary judgment is

appropriate with respect to Counts I and II of the Complaint because they require only the consideration of contract language and legal principles. See, e.g., Amadeus Global Travel Distrib., S.A. v. Orbitz, LLC, 302 F. Supp. 2d 329, 334 (D. Del. 2004) (concluding that under Delaware law, the interpretation of contracts is "a matter of law for the court to determine."); Quintus Corp. v. Avaya, Inc. (In re Quintus Corp.), 353 B.R. 77, 82 (Bankr. D. Del. 2006) ("Summary judgment is proper where contract language is unambiguous and favors the interpretation advanced by the movant.").

B. Counts I & II: Conditions Precedent

The Plaintiffs contend that the Conditional Exchange never occurred because of the failure of certain conditions precedent, which were required under the applicable agreements or under Delaware law. The Defendants respond that there were no conditions precedent to the occurrence of the Conditional Exchange that had not, in fact, occurred. The parties agree that there are no material issues of fact in dispute and that the determination of this issue depends on an interpretation of the operative agreements and applicable law.

"Conditions precedent 'are not favored in contract interpretation because of their tendency to work a forfeiture.'" AES Puerto Rico, L.P. v. Alstom Power, Inc., 429 F. Supp. 2d 713, 717 (D. Del. 2006) (citing Stoltz v. Realty Co. v. Paul, No. Civ.

S. 94C-02-208, 1995 WL 654152, at *9 (Del. Super. Sept. 20, 1995)). Therefore, conditions precedent must be expressly stated in a contract to be given force. Castle v. Cohen, 840 F.2d 173, 177 (3d Cir. 1988).

1. Terms of the Agreements

The Plaintiffs contend in Count I of the Complaint that, under the express terms of the Exchange Agreements, the Conditional Exchange could not occur until (i) WMI issued new Preferred Shares and deposited them with the Depositary, (ii) the Depositary issued new Depositary Shares and transferred the Depositary Shares to WMI and (iii) WMI then exchanged those Depositary Shares for the TPS. The Defendants contend that those steps were not conditions precedent to the occurrence of the Conditional Exchange but were merely ministerial steps that would a fortiori occur after the Conditional Exchange. Instead, the Defendants argue that the only actual conditions precedent to the occurrence of the Conditional Exchange were (i) the determination by the OTS that an Exchange Event had occurred and (ii) the direction by the OTS that the Conditional Exchange occur.

There is no dispute that an Exchange Event[4] occurred on

[4] An Exchange Event was defined in both the Exchange Agreements and the Trust Agreements to include:

> when . . . WMB becomes undercapitalized under the OTS' "prompt corrective action" regulations . . . , WMB is placed into conservatorship or receivership, or . . . the OTS, in its sole discretion, anticipates WMB becoming undercapitalized in the near term or takes a

September 7, 2008, as a result of the MOU whereby WMB's ability to declare a dividend was restricted. Nor is it disputed that the OTS directed on September 25, 2008, that the Conditional Exchange occur. The Court concludes that under the express terms of the agreements those were the only conditions that needed to occur for the Conditional Exchange to be effective.

The Trust Agreements with respect to each TPS series provided:

> If the OTS so directs upon the occurrence of an Exchange Event, each [TPS] then outstanding shall be exchanged automatically for a Like Amount of newly issued [Depositary Shares tied to WMI Preferred Shares] (the "Conditional Exchange").

(McIntosh Decl., Exs. 3A-3E, §4.08(a) (emphasis added).)

The Trust Agreements expressly state the effect of the Conditional Exchange and make it clear that it automatically divests the TPS holders of any more rights in the TPS and converts them to interests only in Depositary Shares that reflect WMI Preferred Shares:

> As of the time of the Conditional Exchange, . . . all rights of the exchanging Holders of [TPS] as beneficiaries of the Trust shall cease, and such Persons shall be, for all purposes, solely holders of [Depositary Shares tied to WMI Preferred Shares], and WMI shall be the holder of all outstanding TPS.

(Id. at Ex. 3A-3E, §4.08(b).)

> supervisory action that limits the payment of dividends by WMB, and in connection therewith, directs a Conditional Exchange.

(Id. at Exs. 3A-3E, §1.01; Exs. 4A-4E at 3.)

The Plaintiffs argue, however, that the language of the Trust Agreements is not relevant, because they are not the operative agreements. The Plaintiffs argue instead that the Exchange Agreements executed by WMI and the Trusts are the operative agreements. The Plaintiffs cite to section 3 of the Exchange Agreements which they argue provide additional conditions to the occurrence of the Conditional Exchange:

> If at any time after the issuance and sale of the [TPS], the OTS directs in writing that the [TPS] be exchanged into a like amount of [Depositary Shares tied to WMI Preferred Shares] following the occurrence of an Exchange Event, then:
>
> (a) each holder of [TPS] shall be unconditionally obligated to surrender to WMI any certificate representing the [TPS] . . . ;
>
> (b) WMI shall immediately and unconditionally issue [WMI Preferred Shares] and deposit such shares with the Depositary;
>
> (c) effective on the date and time of the Conditional Exchange, [the registrar] shall record, or cause to be recorded, in the Register WMI as the owner of all of the [TPS] . . . ; and
>
> (d) upon receipt of the [WMI Preferred Shares], the Depositary shall issue a like kind of . . . Depositary Shares and, in turn, WMI shall deliver such receipts to the holders of record of the [TPS] upon surrender of the certificates representing the [TPS].

(See id. at Ex. 4A, § 3.)

Specifically, the Plaintiffs contend that the obligations of WMI to issue new Preferred Shares and exchange them for Depositary Shares were conditions precedent to the occurrence of the Conditional Exchange. Because WMI never issued new Preferred Shares or exchanged them for Depositary Shares, the Plaintiffs contend that the Conditional Exchange never occurred.

The Court disagrees. Under 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. Further, the Depositary Shares are defined in the Trust Agreements as "depositary shares issuable upon a Conditional Exchange. . . ." (Id. at Ex. 3A, §1.01 (emphasis added).) This suggests that they would not be issued until after the Conditional Exchange occurred.[5]

In addition, even the Exchange Agreements on which the Plaintiffs rely specifically contemplate that the Conditional Exchange will be effective without the issuance of the WMI Preferred Shares or the Depositary Shares. The Exchange Agreements provide that: "Until receipts evidencing the . . . Depositary Shares are delivered or in the event such replacement receipts are not delivered, any certificates previously representing the [TPS] shall be deemed for all purposes to represent . . . Depositary Shares." (Id. Ex. 4A, § 3 (emphasis added).) This is consistent with the Trust Agreements which provide that:

> Until replacement certificates representative of [Depositary Shares tied to WMI Preferred Shares] are delivered or in the event such replacement certificates

[5] While the WMI Preferred shares were not issued, WMI did designate authorized shares to be issued "if and only if a Conditional Exchange occurs." (McCombs Decl., Exs. 2A-2E, § 1.)

> are not delivered, any certificates previously representing [TPS] shall be deemed for all purposes to represent [Depositary Shares tied to WMI Preferred Shares].

(Id. at Ex. 3A, §4.08(c) (emphasis added).)

This interpretation of the Agreements is consistent with the language of the offering Circulars for the TPS, which expressly disclosed the automatic and unconditional nature of the exchange on the front cover: "If the [OTS] so directs following the occurrence of an Exchange Event as described herein, each [TPS] will be automatically exchanged for [WMI Preferred Shares]." (Id. at Ex. 1A at cover page (emphasis added).) Further, inside the Circulars, it was disclosed that:

> once the OTS directs a Conditional Exchange after the occurrence of an Exchange Event, no action will be required to be taken by holders of [TPS], by WMI, by WMB (other than to inform the OTS), by [WMPF] or by WaMu Delaware in order to effect the automatic exchange as of the time of exchange. After the occurrence of the Conditional Exchange, the [TPS] will be owned by WMI.

(Id. at Ex. 1A at 64 (emphasis added).)

Therefore the Court concludes that there were no conditions precedent to the Conditional Exchange that did not occur. The Court finds that all of the operative documents expressly evidence that the Conditional Exchange would occur automatically once the OTS directed that the Conditional Exchange occur, even without the delivery of new WMI Preferred Shares or Depositary Shares tied to the new WMI Preferred Shares. Neither the Trust

Agreements nor the Exchange Agreements expressly state that the acts identified by the Plaintiffs were conditions precedent to the effectiveness of the Conditional Exchange. In fact, the acts could only occur after the Conditional Exchange became effective. Under the plain language of the Trust Agreements, the Conditional Exchange automatically occurred on September 26, 2008. (Id. at Ex. 3A-3E, § 4.08(b); Ex. 6(C).) Therefore, under the express language of the Trust Agreements and the Exchange Agreements, the Court concludes that the certificates held by the TPS holders are no longer TPS but are deemed to be Depositary Shares tied to WMI Preferred Shares. (Id. at Exs. 3A-3E, § 4.08(b) & (c); Exs. 4A-4E, § 3.)

2. Delaware Law

The Plaintiffs contend in Count II of the Complaint that the physical delivery of new certificates of ownership was nonetheless required to effectuate a transfer of the TPS under Delaware law. 6 Del. C. § 8-301. Because the TPS certificates have never been delivered to WMI, the Plaintiffs contend that WMI does not have title to the TPS.

The Court disagrees. First, Article 8 does not provide the exclusive means by which ownership of securities can arise. 6 Del. C. §8-302 cmt. 2 (2010) ("Article 8 is also not a comprehensive codification of all of the law governing the creation or transfer of interest in securities."); 17 Williston

on Contracts § 51:40 (4th ed.) ("[W]hile the [UCC] provides that 'upon delivery,' the purchaser acquires the transferor's rights, this does not mean that a person can acquire an interest in a security only by delivery. Revised Article 8 is not a comprehensive codification of all of the law governing the creation or transfer of interests in securities."). See also Kallop v. McAllister, 678 A.2d 526, 529 (Del. 1996) (noting that "Article 8 of the UCC . . . did not preclude the validity of a stock transfer accomplished by methods that are not listed" in that article and acknowledging that other methods recognized by law may be used to transfer ownership in securities.).

Further, the UCC expressly allows parties to vary its provisions by contract. 6 Del. C. § 1-302(a) cmt. 1 (2010)("an agreement can change the legal consequences that would otherwise flow from the provisions of the Uniform Commercial Code."). In this case, the Exchange Agreements do exactly that: they provide that the ownership of the TPS will occur automatically, even before delivery of new certificates, upon the direction of the OTS after the occurrence of an Exchange Event. (McIntosh Decl. at Ex. 4A , §§ 2 & 3.) Therefore, the Court concludes that the transfer was effective notwithstanding the lack of physical delivery of new certificates of ownership.

In addition, section 8-301 on which the Plaintiffs rely does not even apply to the transfer at issue because the transfer was

not a sale of a security to a purchaser but instead was an involuntary automatic transfer. 6 Del. C. § 8-302 cmt. 2 (2010) (Article 8 does not apply to transfers by operation of law because they are not voluntary). See also, United States v. Seattle-First Nat. Bank, 321 U.S. 583, 587-88 (1944) (finding that the transfer of securities by operation of law must be evaluated by the "immediate mechanism by which the transfer is effective," not its general background). Therefore, while the initial issuance and purchase of the TPS might have been a voluntary transaction, it does not result in the Conditional Exchange being voluntary.

C. Misrepresentation and Fraud Allegations

The Plaintiffs contend that the Debtors committed a fraud by failing to disclose to the TPS investors that WMI had agreed to transfer the TPS to WMB in the event that they were transferred to WMI as the result of a Conditional Exchange. The Defendants respond that (1) the Plaintiffs suffered no damages as a result of the alleged failure of disclosure, (2) many of the current TPS holders have no standing to assert this claim because they were not original buyers of the TPS (and in fact bought them after the Conditional Exchange had already occurred), and (3) at most the Plaintiffs would have a subordinated claim equivalent to an equity interest pursuant to section 510(b).

The Court agrees with the Defendants that the Plaintiffs can

prove no damages resulting from the alleged misrepresentations. It is significant that nowhere in the agreements or offering circulars was there any restriction on what WMI could do with the TPS once it received them on a Conditional Exchange. Specifically absent is any restriction on WMI contributing the TPS to its subsidiary WMB. In fact, the Defendants argue that it could have been anticipated that if the OTS took the extreme step of directing a Conditional Exchange because WMB was in financial trouble, the OTS would have required that WMI provide financial support to WMB including contribution of the TPS to WMB. Therefore, the Plaintiffs cannot establish that there was any misrepresentation that WMI would retain the TPS if it got them in the Conditional Exchange.

Further, the Defendants presented evidence that 26 of the 30 Plaintiffs bought their TPS after the Conditional Exchange occurred. (McIntosh Decl. at Ex. 13A, 3-16.) Therefore, those Plaintiffs cannot prove that they relied on any alleged representation that the TPS would not be transferred after WMI acquired them or were misled by the failure of WMI to disclose the agreement to contribute the TPS to WMB in the event a Conditional Exchange occurred.

The Court agrees further that, even if the Plaintiffs had a claim for fraud or misrepresentations relating to the issuance of the TPS, such claims would be subordinated to the claims of all

creditors under section 510(b). Section 510(b) provides that

> a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security . . . shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b).

Because the claims asserted by the Plaintiffs relate to the purchase and sale of securities, they must be subordinated to the claims of creditors. While the Plaintiffs contend that the claims relate to the purchase of the TPS, any potential claims that the Plaintiffs have against the Debtors actually relate to the preferred stock that WMI was to issue to them. Therefore, the Court concludes that the claims, even if the Plaintiffs had any, would have to be subordinated to the level of preferred stock.

The Defendants also respond that this count must fail because the Plaintiffs are really asserting that the Conditional Exchange is not valid because the actions of the OTS were unlawful and fraudulent. The Defendants argue that the Plaintiffs lack standing and cannot sue the OTS for any allegedly improper actions.

The Court agrees with the Defendants that the Plaintiffs do not have standing to sue the OTS for any alleged improper actions in declaring an Exchange Event and directing the Conditional

Exchange of the TPS. 12 U.S.C. § 1464(d)(1)(A) (providing that only federal savings associations or their officers and directors can sue the OTS to challenge its regulatory decisions). See, e.g., United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1327 (6th Cir. 1993) (holding that investors in a bank's securities did not have standing to challenge an OTS regulatory decision affecting the bank).

The Plaintiffs cannot avoid this result by suing JPMC and WMI instead. See, e.g., Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (holding that the Constitution "still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."); Duquesne Light Co. v. U.S. EPA, 166 F.3d 609, 612-13 (3d Cir. 1999) (holding that plaintiffs could not sue federal agency to challenge the regulatory decision of a state agency).

Because the Court finds that the Plaintiffs have not proven any claim for misrepresentation or fraud, the Court will grant summary judgment for the Defendants on Count IV of the Complaint.

E. Equitable Relief

In Counts V and VI, the Plaintiffs argue that the Defendants have "unclean hands" and may not now invoke the Court's equitable powers to effectuate the Conditional Exchange. In

addition, the Plaintiffs assert that JPMC was not a bona fide purchaser of the TPS, because it had knowledge of WMI's alleged misrepresentations to the investors. These arguments are based on the premise that the Conditional Exchange did not occur and that the Defendants are asking the Court to provide equitable relief by permitting the Conditional Exchange to occur now.

As stated above, the Court finds that the Conditional Exchange occurred on September 26, 2008. This was a legal determination based on the interpretation of contract language and application of legal principles.[6] The Court is not granting any equitable relief. Therefore, the Plaintiffs' equitable defenses are inapplicable. See, e.g., Gen. Dev. Corp. v. Binstein, 743 F. Supp. 1115, 1133-34 (D.N.J. 1990) (finding that equitable defenses, such as unclean hands, are generally not applicable to bar claims seeking legal remedies). The Court concludes that judgment must be entered in favor of the Defendants on Counts V and VI of the Complaint.

IV. CONCLUSION

For the reasons set forth above, the Court will grant the Defendants' motions for summary judgment and deny the Plaintiffs' motion for summary judgment.

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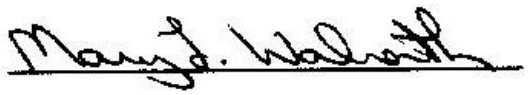
[6] At oral argument, Plaintiffs' counsel admitted that "equity has no place today," and that the issue being determined "is a matter of law, and should be resolved as a matter of law." (Hr'g Tr. 12/01/2010 at 55.)

An appropriate order is attached.

Dated: January 7, 2011

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

EXHIBIT C

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
	)	Related to Docket Nos. 9178, 9179, 9180 & 9181

ORDER GRANTING THE MOTION OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS FOR STAY OF CONFIRMATION PROCEEDINGS PENDING APPEAL

Upon consideration of the Motion, dated December 23, 2011, filed by Trust Preferred Security Holders, for the entry of an order staying further confirmation proceedings concerning the Seventh Amended Joint Plan of liquidation, pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure, pending final resolution of the appeal of this Court's January 7, 2011 ruling in the adversary proceeding captioned Black Horse Capital, LP, et al. v. JPMorgan Chase Bank, N.A., et al., Adv. Pro. No. 10-51387 (the "TPS Litigation"); and it appearing that the Court has jurisdiction to consider and determine the Motion; and it appearing that due and proper notice of the Motion has been given; and it appearing that the relief requested in the Motion is appropriate; and after due deliberation and sufficient cause appearing therefore; it is hereby:

ORDERED that the Motion is GRANTED; and it is further

ORDERED that all further confirmation proceedings concerning the Plan are hereby stayed pending final resolution of the appeal of this Court's January 7, 2011 ruling in the TPS Litigation; and it is further

ORDERED that this Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this order and any further proceedings with respect to the Motion.

Dated: _____, 2012
Wilmington, Delaware

THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., *et al.*,	)	Jointly Administered
Debtors.	)	**Objection Deadline: January 4, 2012 @ 4:00 p.m.**
	)	**Hearing Date: January 11, 2012 @ 2:00 p.m.**
		Related to Docket Nos. 9178, 9179, 9180 & 9181

NOTICE OF MOTION OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS FOR STAY OF CONFIRMATION PROCEEDINGS PENDING APPEAL

TO: All Parties on the Attached List

PLEASE TAKE NOTICE, that on December 23, 2011, the Consortium of Trust Preferred Security Holders filed and served the attached **Motion of the Consortium of Trust Preferred Security Holders for Stay of Confirmation Proceedings Pending Appeal** (the "Motion"), with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801.

PLEASE TAKE FURTHER NOTICE that any responses to the Motion must be in writing and filed with the Bankruptcy Court on or before **January 4, 2012 @ 4:00 p.m.**

PLEASE TAKE FURTHER NOTICE that at the same time, you must also serve a copy of the response upon the undersigned counsel, so that it is received on or before **January 4, 2012 @ 4:00 p.m.**

IN THE EVENT THAT ANY OBJECTION OR RESPONSE IS FILED AND SERVED IN ACCORDANCE WITH THIS NOTICE, A HEARING ON THE MOTION WILL BE HELD ON **JANUARY 11, 2012 @ 2:00 P.M.** BEFORE THE HONORABLE MARY F. WALRATH AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE,

824 MARKET STREET, 5th FLOOR, COURTROOM #4, WILMINGTON, DELAWARE 19801.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF DEMANDED BY THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: Wilmington, Delaware
December 23, 2011

Respectfully submitted,
CAMPBELL & LEVINE LLC

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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
	)	

NOTICE OF SERVICE

I, Mark T. Hurford, of Campbell & Levine, LLC, hereby certify that on December 23, 2011, I caused a copy of the *Motion of the Consortium of Trust Preferred Security Holders for Stay of Confirmation Proceedings Pending Appeal* to be served upon the attached service list via First Class U.S. Mail.

Dated: December 23, 2011

/s/ Mark T. Hurford
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