Docket #9594 Date Filed: 2/7/2012

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	)	Chapter 11
In re:	)	
	)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., *et al.*,	)	Jointly Administered
	)	**Objection Deadline: February 7, 2012**
Debtors	)	**Hearing Date: February 16, 2012**
	)	Related to D.I. 9178, 9400, 9414, 9488 & 9489

OBJECTION OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS TO CONFIRMATION OF DEBTORS' PLAN OF LIQUIDATION

The consortium of holders of interests (the "TPS Consortium")[1] denominated by the above-captioned Debtors as the "REIT Series"[2] and subject to treatment under Class 19 of the seventh amended joint plan of liquidation (the "Plan") [D.I. 9178], by and through undersigned counsel, hereby files this objection (the "Objection") to confirmation of the Plan.[3] In support of this Objection, 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 Fifth Amended Statement of Brown Rudnick LLP and Campbell & Levine LLC [D.I. 9384], as such may be amended) proposed by the Debtors to be treated under Class 19 of the Plan [D.I. 9178]. 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."

[2] Capitalized terms not otherwise defined herein shall bear the meanings ascribed thereto in the Plan.

[3] This Objection supplements the TPS Consortium's: (a) initial objection to confirmation (the "Initial Objection") [D.I. 6020] **(Exhibit A hereto)**; (b) supplemental objection to confirmation (the "First Supplemental Objection") [D.I. 7480] **(Exhibit B hereto)**; (c) second supplemental objection to confirmation (the "Second Supplemental Objection") [D.I. 8100] **(Exhibit C hereto)**; and (d) post-trial brief in further opposition to confirmation (the "Post-Trial Brief") [D.I. 8438] **(Exhibit D hereto)**, each of which is incorporated herein by reference.

0812229120207000000000025

PRELIMINARY STATEMENT

1. While the cast of players opposing the Plan may have decreased in number since the last confirmation hearing, the relevant inquiry with respect to the legal issues addressed herein is not how many parties support or oppose confirmation. Rather, the only relevant inquiry is whether the Plan meets the requirements of Bankruptcy Code Section 1129. Whether a deficiency is raised by one party, multiple parties, or sua sponte by the Court, if the Plan does not meet the requirements of Bankruptcy Code Section 1129, it cannot be confirmed.

2. The Plan does not satisfy Bankruptcy Code Section 1129, inter alia as follows:

- The "Death Trap" and non-consensual third-party release provisions of the Plan violate Bankruptcy Code Sections 524(e) (limiting discharge to debtors) and 1123(a)(4) (requiring the same treatment for members of the same class).
- To the extent Class 19 rejects the Plan and Classes 21 and 22 receive value, the Plan will violate the Bankruptcy Code Section 1129(b)(2)(C)'s "cram down" requirements.
- The compensation of only some members of Class 19 for releases related to the Trust Preferred Securities, coupled with the Plan's other provisions attempting to effect a release of such claims by other members of Class 19 without compensation, would violate Bankruptcy Code Section 1123(a)(4)'s requirement of the same treatment for members of the same class.
- The governance of the Debtors, post-emergence, by nominees of the Creditors' Committee, AAOC and the Equity Committee would violate Bankruptcy Code Sections 1123(a)(7) and 1129(a)(5), as management should have been selected by holders of preferred equity (i.e., those who have an actual economic interest in the Debtors post-bankruptcy).
- The Debtors' assumption of, and performance under, contracts to issue securities in connection with effectuation of the Conditional Exchange transaction would violate Bankruptcy Code Section 365(c)(2).
- The Divestiture Rule prohibits confirmation of the Plan so long as it contains provisions intended to affect or impair the District Court's jurisdiction over the TPS Litigation appeal.

- Consistent with the Supreme Court's decision in Stern v. Marshall, this Court has the Constitutional authority to enter only proposed findings of fact and conclusions of law in connection with the approval of the Global Settlement Agreement.

- The Plan's payment of post-petition interest should be modified to be calculated at the Federal Judgment Rate in effect on the date of confirmation, rather than the rate in effect on the petition date.

- The Debtors have failed to provide evidence sufficient to support approval of the Global Settlement Agreement.

3. For the reasons set forth herein, confirmation of the Plan should be denied.

RELEVANT BACKGROUND

I. General Background.

4. Thus far, the Court has denied confirmation of two prior versions of the Plan, by opinions dated January 7, 2011 [D.I. 6528] (the "January Confirmation Ruling") and September 13, 2011 [D.I. 8612] (the "September Confirmation Ruling"). The version of the Plan currently up for consideration by the Court resulted from the mediation Ordered by the Court in the September Confirmation Ruling, in which mediation the TPS Consortium was not allowed to participate meaningfully. Unlike the prior versions, this Plan provides for a distribution of property to preferred equity holders[4] (at least a percentage of the "reorganized" Debtors' stock and, potentially, residual interests in the proceeds of the Liquidating Trust).

5. On December 23, 2011, arguing that this Court had been divested of jurisdiction to approve the transfer of the Trust Preferred Securities pending resolution of the TPS Litigation appeal, the TPS Consortium moved to stay these confirmation proceedings. That motion was denied by Order dated January 11, 2012. [D.I. 9397]. On January 15, 2012, the TPS Consortium filed a renewed motion for a stay with the District Court and also filed a petition for a writ of

mandamus seeking an Order halting these confirmation proceedings pending resolution of the TPS Litigation appeal. [Dist. Ct. D.I.s 44 & 46]. Those requests were denied by the District Court by Order dated January 19, 2012. [Dist. Ct. D.I. 52]. As of the filing of this Objection, the TPS Consortium has appealed the District Court's denial of a stay and mandamus relief, and has filed a petition for a writ of mandamus from the Third Circuit to stay these confirmation proceedings pending resolution of the TPS Litigation appeal.

II. The Unique Rights Of The "REIT Series" And The Plan's Treatment Thereof.

6. As the Court is aware, the members of the TPS Consortium are of the firm belief that they, rather than the Debtors or JPMorgan, own the Trust Preferred Securities. The importance of that disagreement is obvious; the Trust Preferred Securities (with a $4 billion face amount, of which the members of the TPS Consortium own approximately $1.5 billion) are likely par securities. On the other hand, the amount to be paid under the Plan on account of REIT Series shares remains unknown, but is expected to be a fraction of the value of the Trust Preferred Securities (to the extent any amount is payable on account of the REIT Series if some senior class rejects the Plan and the absolute priority rule comes into play). Moreover, under the Plan, even that fractional recovery to holders of the REIT Series is conditioned on granting of releases against non-Debtors and the compromise of unique rights and claims possessed only by holders of the REIT Series.

7. The unique rights and claims possessed by only holders of REIT Series (and not by holders of Series K or Series R) are demonstrated by, inter alia:

- ***Only holders of the "REIT Series"*** have the ability and standing to challenge the occurrence of the purported conditional exchange transaction. Indeed, members

[4] The current version of the Plan classifies together in Class 19 the holders of REIT Series, Series K and Series R.

of the TPS Consortium are currently pursuing such unique rights against the Debtors and JPMorgan through their adversary proceeding captioned Black Horse Capital, LP, et al. v. JPMorgan Chase Bank, N.A., et al., Adv. Pro. No. 10-51387 (currently on appeal before Chief Judge Sleet).

- ***Only holders of the REIT Series*** will receive a special payment: "in consideration for the releases by the holders of REIT Series of any and all claims against the Debtors and JPMC arising out of, related to, or resulting from, among other things, the issuance or assignment of the Trust Preferred Securities or any commitment, disclosure, or non-disclosure with respect thereto, the declaration of any Exchange Event, the assignment of the Trust Preferred Securities subsequent thereto, and any and all claims in any way related to the Trust Preferred Securities or the REIT Series . . . ." See, e.g., Disclosure Statement, dated March 26, 2010 [D.I. 2623], at p. 12; Revised Supplemental Disclosure Statement for the Modified Sixth Amended Plan, dated March 16, 2011 [D.I. 6966] (same).[5]

- ***Only holders of the REIT Series*** have had their unique claim to ownership of the Trust Preferred Securities targeted for extinguishment by the sale of such securities to JPMorgan "free and clear" of such claims and with the protections of Bankruptcy Code Section 363(m).

- The Plan defines a "Preferred Equity Interest" subject to treatment under Class 19, as "[a]n Equity Interest represented by an issued and outstanding share of preferred stock of WMI prior to or on the Petition Date . . . ." See Plan, § 1.170 (emphasis added). It is undisputed that the REIT Series shares were not issued prior to the petition date and have not been issued since. That fact, which validates the assertion that the conditional exchange transaction did not occur, supports the claims of ***only the REIT Series holders*** to ownership of the Trust Preferred Securities.

[5] Based on prior rulings of this Court, that separate payment to "REIT Series" holders for their release of claims against the Debtors (and JPMorgan) related to the Trust Preferred Securities is now limited to only those "REIT Series" holders who voted in favor of the original Sixth Amended Plan (i.e., those who voted for the Plan two versions ago, back in October 2010). The Court specifically reserved judgment on whether payment of that release-related consideration to less than all members of the class constituted prohibited intra-class discrimination. See Hearing Trans. (March 21, 2011), at 171:17-18. That issue is addressed, infra, in Section II.C

ARGUMENTS AGAINST PLAN CONFIRMATION

I. Applicable Standard And Burden Of Proof.

8. As Plan proponents, it is the Debtors' burden to prove and persuade this Court, by a preponderance of the evidence, that the Plan satisfies every applicable confirmation requirement under Bankruptcy Code Sections 1129(a) and (b). See, e.g., In re Armstrong World Indus., Inc., 348 B.R. 111, 120 n.15 (D. Del. 2006) (plan proponent must establish by preponderance of the evidence the satisfaction of the requirements of Bankruptcy Code Sections 1129(a) and 1129(b)); 7 Collier on Bankruptcy ¶ 1129.05[1][d] (16th ed. 2011) ("At [the confirmation] hearing, the proponent bears the burdens of both introduction of evidence and persuasion that each subsection of section 1129(a) has been satisfied. . . . If nonconsensual confirmation is sought, the proponent of such a plan will have to satisfy the court that the requirements of section 1129(b) are also met. In either situation, the plan proponent bears the burden of proof by a preponderance of the evidence."). This burden is a heavy one, and requires careful consideration of the relevant inquiries. See In re Sacred Heart Hosp. of Norristown, 182 B.R. 413, 423 (Bankr. E.D. Pa. 1995) (a confirmation hearing warrants a meticulous analysis of whether the Plan meets each of the technical requirements of the Code). This is especially so when the Plan proponent is the debtor-in-possession. See, e.g., Everett v. Perez (In re Perez), 30 F.3d 1209, 1214 n.5 (9th Cir. 1994) ("The burden of proposing a plan that satisfies the requirements of the Code always falls on the party proposing it, but it falls particularly heavily on the debtor-in-possession or trustee since they stand in a fiduciary relationship to the estate's creditors.").

II. The Debtors Cannot Carry Their Burdens Of Proof And/Or Persuasion, And Confirmation Should Be Denied.

A. The Plan Should Not Be Confirmed Because It (1) Forces Class 19 Into An Impermissible Non-Consensual Release, And (2) Forces The TPS Consortium To Give Up Unequal Consideration In Relation To Others In Class 19.

9. For the first time in these proceedings, the Debtors have combined the REIT Series with Series K and Series R preferred shares in a single class – Class 19. Additionally, this is the first Plan put forth by the Debtors that clearly provides an immediate distribution to Class 19 of a portion of the common stock in the "reorganized" Debtors. See Plan, § 23.1. By combining previously separate classes and linking this distribution of estate value to mandatory releases of non-Debtor third-parties, the Debtors have created a Plan that is not confirmable because: (a) it impermissibly seeks to extract releases of non-Debtors for no separate consideration from those non-Debtors; and (b) the Plan impermissibly discriminates among members of the same class.

1. The Non-Debtor Releases Are Impermissible Because They Are Non-Consensual And Not Supported By Independent Consideration For The Releasees.

10. As this Court correctly held in Coram, Bankruptcy Courts do not have jurisdiction or power to compel the release of claims of non-Debtors against other non-Debtors. See In re Coram Healthcare, 315 B.R. 321, 335-37 (Bankr. D. Del. 2004). Any settlement or plan purporting to require such releases cannot be approved.[6] Indeed, any settlement requiring such

[6] See Coram Healthcare, 315 B.R. at 335-37; In re Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999) (plan could not be confirmed where it required non-consensual release of third party claims); In re Digital Impact, Inc., 223 B.R. 1, 10 (Bankr. N.D. Okla. 1998) (plan may not be confirmed if any party who would be bound by the release did not vote in favor of the plan); In re Arrowmill Dev. Corp., 211 B.R. 497, 506 (Bankr. D.N.J. 1997) ("Keeping in mind the Third Circuit's analysis that [Bankruptcy Code Section] 524(e) specifically limits the scope of the discharge, and that the Bankruptcy Code does

releases would be contrary to applicable law, and, as a result, incapable of approval.[7] As such, as long as the Global Settlement Agreement and Plan attempt to require the release of direct third-party claims against JPMorgan, the Trust Preferred Securities-related releasees, and other non-Debtor parties, both remain incapable of approval.

11. This Court's Coram and Zenith decisions are completely consistent with the Third Circuit's decisions dealing with third-party releases. See In re PWS Holding Corp., 228 F.3d 224, 247 (3d Cir. 2000) (allowing exculpations only to the extent required under Bankruptcy Code Section 1103(c)); Gillman v. Cont'l Airlines (In re Cont'l Airlines), 203 F.3d 203, 212-13 (3d Cir. 2000) (criticizing lower court for not examining its jurisdiction to grant the releases at issue); see also Genesis Health, 266 B.R. 591, 607-08 (Bankr. D. Del. 2001) (a Chapter 11 Plan providing for a non-consensual third-party release to secured lenders was not permissible where "the entire reorganization of a massive and complex Chapter 11 case 'hinged' on the approval of certain releases"); see also In re Exide Techs., 303 B.R. 48, 74-75 (Bankr. D. Del. 2003) (following Genesis Health and declining to approve non-consensual third party releases). Indeed, these decisions reflect the general proposition, observed by both this Circuit and others, that non-

---

not contemplate a discharge of nondebtors, this court holds that plans of reorganization may not contain provisions which discharge nondebtors."); In re West Coast Video Enters., Inc., 174 B.R. 906, 911 (Bankr. E.D. Pa. 1994) ("each creditor bound by the terms of the release must individually affirm same. . ."); In re Elsinore Shore Assocs., 91 B.R. 238, 252 (Bankr. D.N.J. 1988) (plan provisions deeming non-debtor proponents and their principals to be discharged and released from any and all claims prohibited by the Bankruptcy Code and relevant case law); In re Monroe Well Serv., Inc., 80 B.R. 324, 334 (Bankr. E.D. Pa. 1987) (debtors could not obtain confirmation of a plan which would attempt, over their objection, to discharge the obligations of non-debtors).

consensual third-party releases are reserved for extraordinary and unusual circumstances, typically those involving mass tort litigation. See Cont'l Airlines, 203 F.3d at 212 (noting that even where "[o]ther circuits have adopted a more flexible approach" to third-party releases, they have done so "in the context of extraordinary cases," such as those where the releases "were necessary to reorganization and were accompanied by consideration for mass tort claimants") (citations omitted); In re Washington Mut., Inc., 442 B.R. 314, 351 (Bankr. D. Del. 2011) (noting that, in the Third Circuit, "third party releases . . . are the exception, not the rule") (citation omitted); see also In re Metromedia Fiber Network, Inc., 416 F.3d 136, 141 (2d Cir. 2005) ("[I]t is clear that such a release is proper only in rare cases.") (citation omitted); Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1401-02 n.6 (9th Cir. 1995) (third-party releases prohibited under the Bankruptcy Code, except with respect to bankruptcies involving mass tort asbestos litigation); Landsing Diversified Props. -II v. First Nat'l Bank & Trust Co. of Tulsa (In re W. Real Estate Fund, Inc.), 922 F.2d 592, 600-02 (10th Cir. 1990) (same).

12. The Debtors purport to give the members of Class 19 a "choice" that is no choice at all: (a) grant a release of their individual claims against non-Debtors (which indisputably belong to them already) and receive a share of the distribution payable to Class 19 under the Plan (which, as a result of their position in the Debtors' capital structure is owed to them already under the Plan); or (b) elect to keep their individual claims (subject to other Plan provisions intended to

[7] See Yockey v. Horn, 880 F.2d 945, 950 (7th Cir. 1989); Jackson Purchase Rural Electric Coop. Ass'n v. Local Union 816, 646 F.2d 264, 267 (6th Cir. 1981); Murtagh v. Univ. Computing Co., 490 F.2d 810, 816 (5th Cir. 1974); Atlantic Co. v. Broughton, 146 F.2d 480, 482 (5th Cir. 1944) ("Though settlements in accord and satisfaction are favored in law, they may not be sanctioned and enforced when they contravene and tend to nullify the letter and spirit of an Act of Congress.").

disable such claims), but be denied the Plan recovery they are entitled to receive.[8] The offer to "give" or the threat to take away from the members of the TPS Consortium that which is already owned (their individual claims against non-Debtors) or that to which they are already entitled under the Bankruptcy Code (the same distribution allowed to similarly-situated interest holders in Class 19 of this Plan), is not a proper choice that could in any sense of the word be described as voluntary. See Cont'l Airlines, 203 F.3d at 212-15 n.13 (receipt of what a party is already entitled to receive on account of its status as a creditor or equity holder is not consideration sufficient to support third-party release). Rather, it is just a different form of coercion that renders the demanded releases non-consensual. See In re Monroe Well Serv., Inc., 80 B.R. 324, 335 (Bankr. E.D. Pa. 1987) ("[E]quality of treatment of members of a class is not provided simply by permitting each creditor of that class to opt to provide a release and receive the same pro rata distribution on its claim.").

[8] Where a settlement is to be implemented pursuant to a plan, the analytical sequence should be: first, whether the settlement is capable of approval; and then, second, whether the Plan's distribution of the estate's proceeds from that settlement comports with the Bankruptcy Code's distribution scheme. See In re Best Prods. Co., 168 B.R. 35, 72 (Bankr. S.D.N.Y. 1994) (where a settlement accompanies a plan, the court should first consider the settlement, and, if the settlement is approved, then distribute the settlement proceeds payable to the estate pursuant to Bankruptcy Code Section 1129); see also January Confirmation Ruling, p. 60 (in considering the Global Settlement Agreement in connection with a prior version of the Plan that did not provide for recoveries to equity, holding that "[t]he fact that the recovery may not reach shareholders is not enough to find [the Global Settlement Agreement] unreasonable, ***so long as the recoveries are distributed in accordance with the priorities of the Code***.") (emphasis added); M. Bienenstock, Bankruptcy Reorganization at 617 (1987) (settlements are subject to approval by the court, and once incorporated into a chapter 11 plan, it is the plan that must be considered for confirmation purposes, and not the settlement). Thus the resolution of claims in a settlement is a separate analysis from any accompanying plan. And, resolution of disputed claims pursuant to such settlement is not separate consideration sufficient to support compelled non-Debtor releases by creditors in that accompanying plan.

13. As a result, each of the non-Debtor releasees must satisfy the hallmarks of permissible non-consensual releases suggested in Continental: "fairness, necessity to the reorganization, and specific factual findings to support these conclusions." 203 F.3d at 214. Fairness depends on "whether non-consenting creditors were given reasonable consideration in exchange for the release." Genesis Health, 266 B.R. at 608. Here, the proposed third party release language "is impermissible as it is not necessary to the reorganization and has not been given in exchange for fair consideration." In re Nichols Midway Pier, LLC, 2010 Bankr. LEXIS 1642, at * 38 (Bankr. D.N.J. May 21, 2010); see also In re Medford Crossings North LLC, 2011 Bankr. LEXIS 185, *72-73 (Bankr. D.N.J. Jan. 20, 2011) (where inadequate consideration was given by the parties to be released, "the necessity of the releases and injunctions for the Debtors' reorganization [did] not overcome the impermissible nature of the releases").

14. First, JPMorgan and the Debtors cannot show that the success of the Debtors' "reorganization" bears a "relationship to the release of the non-consensual parties." Nichols Midway Pier, 2010 Bankr. LEXIS 1642, at * 38. The Plan creates a liquidating trust, "which can be accomplished whether or not" the non-debtor releasees are "released from third parties' claims." Id. Additionally, third-party releases cannot be said to be "necessary" to a liquidation where the prospective releasees indicate an intent to proceed even if they receive less than all of the demanded releases. See Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 659 (6th Cir. 2002) ("[T]he bankruptcy court subsequently interpreted the release and injunction provisions to apply only to consenting creditors, implying that enjoining non-consenting creditors is not essential to reorganization."). The Global Settlement Agreement is not at risk of unwinding if members of Class 19 do not grant releases to non-Debtors. That reality is established by the Plan itself, which allows Class 19 members to

decline to grant a release and retain their claims against JPMorgan (and other non-debtors) – albeit by suffering the illegal deprivation of their entitlement to estate value as a result. Clearly, the "death trap" imposed on those who decline to grant releases to non-Debtors is merely punitive rather than "necessary" to confirmation.

15. Second, no actual consideration is being given to the members of Class 19 in exchange for the demanded releases. The Global Settlement Agreement resolves a number of disputed claims – claims held by the Debtors, claims held by JPMorgan and claims held by the FDIC. Each party to the GSA has agreed to relinquish certain of its claims in exchange for relinquishment of other parties' claims against it. Such give-and-take is not a contribution of new value to the estate, but rather, a decision to resolve disputed claims amongst the parties to the Global Settlement Agreement. Those disputes among those parties, and the compromise of those disputes, are independent of any rights or claims that other creditors (like the REIT Series holders) possess in their individual capacities. Resolution of the claims amongst the settling parties is not tied in any way, nor does it provide any independent benefit, to the third parties as is required to approve non-Debtor releases under the Plan simply to receive the Plan distribution to which their priority already entitles them. See In re Best Prods. Co., 168 B.R. 35, 72 (Bankr. S.D.N.Y. 1994) (where a settlement accompanies a plan, the court should first consider the settlement, and, if the settlement is approved, then distribute the settlement proceeds payable to the estate pursuant to Bankruptcy Code Section 1129).

16. Even if the non-Debtor released parties expended significant time and resources negotiating various aspects of the Global Settlement Agreement and Plan, such efforts are made in

every Chapter 11 case and are insufficient to warrant a release of claims against them.[9] Further, the fact that certain parties-in-interest may have made concessions to other parties to the Global Settlement Agreement is of no consequence as every settlement in a Chapter 11 case is the result of give and take.[10] As such, there is nothing significant about the "consideration" provided by the non-Debtor released parties. Therefore, there is no permissible basis or justification for requiring members of Class 19 to grant third-party releases in order to receive a distribution to which they would otherwise be entitled as a result of their position in the Debtors' capital structure. See Nichols Midway, 2010 Bankr. LEXIS 1642, at *38 (finding third-party releases were impermissible where no consideration was going to the releasing parties who had objected thereto and the releases were not necessary to the debtor's reorganization because it was liquidating).

2. The Plan Also Cannot Be Confirmed Because It Requires Unequal Forfeiture From Different Members *Within* Class 19 In Exchange For Equal Payment.

17. Bankruptcy Code Section 1123(a)(4) (made applicable to confirmation proceedings via Bankruptcy Code Section 1129(a)(1)) requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or

[9] See In re Adelphia Commc'ns Corp., 368 B.R. 140, 268-69 (Bankr. S.D.N.Y. 2007) ("I don't doubt that in this case the Settling Parties engaged, as the Plan proponents argue, in 'tireless efforts' to come together to work out a global compromise aimed at resolving these cases. But that's not unique. It's something creditors have to do in every chapter 11 case, at the risk of destroying themselves (or their recoveries in the case) with their own quests for incremental recoveries . . . It would set the law on its head if parties could get around it by making a third party release a *sine qua non* of their deal, to establish a foundation for an argument that the injunction is essential to the reorganization, or even 'an important part' of the reorganization.").

[10] See In re Adelphia Commc'ns Corp., 368 B.R. at 268-69 (stating that "the 'give ups' that parties made were of rights to recover that were subject to fair debate. In the case of creditors, even those that are Settling Parties, they were merely striking the kinds of deals with respect to their shares of the pie that chapter 11 contemplates").

interest agrees to less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4).

> [T]he most conspicuous inequality that [Bankruptcy Code Section] 1123(a)(4) prohibits is payment of different percentage settlements to co-class members. The other side of the coin of unequal payment, however, has to be ***unequal consideration tendered for equal payment***. It is disparate treatment when members of a common class are required to tender more valuable consideration – be it their claim against specific property of the debtor or some other cognizable chose in action – in exchange for the same percentage of recovery.

In re AOV Indus., Inc., 792 F.2d 1140, 1152 (D.C. Cir. 1986) (emphasis added); see also Finova Grp., Inc. v. BNP Paribas (In re Finova Grp., Inc.), 304 B.R. 630, 636 (D. Del. 2004) (holding that Bankruptcy Code Section 1123(a)(4) required all members of the same class to receive the same treatment); In re Modern Steel Treating Co., 130 B.R. 60, 64 (Bankr. N.D. Ill. 1991) (holding that plan providing for unequal treatment to shareholders in the same class violated Bankruptcy Code Section 1123(a)(4)). Cementing this requirement, approximately one week ago, the District Court for the District of Delaware "interpreted equal treatment to mean that: (1) all class members must be subject to the *same process for claim satisfaction*; (2) all class members' claims must be of 'equal value' through the application of the *same pro rata distribution or payment percentage procedures* to all claims; and (3) all class members must give up the *same degree of consideration for their distribution* under the plan." In re W.R. Grace & Co., No. 11-199, 2012 WL 310815, at *47 (D. Del. Jan. 30, 2012) (internal citations and quotations omitted) (emphasis added).

18. The treatment of the members of TPS Consortium under the Plan is identical to the impermissible treatment in AOV Industries. Like the AOV creditor who held a unique, direct claim against a third party (for breach of a guarantee), the members of the TPS Consortium hold unique (to holders of the REIT Series) direct claims against the Debtors and JPMorgan related to

the Trust Preferred Securities and the purported exchange thereof, which they would be forced to surrender in exchange for the same percentage of recovery as other Class 19 members who do not hold such a claim (i.e., the holders of the Series K and Series R).[11] That is impermissible treatment under Bankruptcy Code Section 1123(a)(4) and AOV Industries. See id. at 1152 ("It is disparate treatment when members of a common class are required to tender more valuable consideration – be it their claim against specific property of the debtor or some other cognizable chose in action *in exchange for the same percentage of recovery*").

19. As in AOV, the perceived strength of the TPS Consortium members' direct claims on appeal is irrelevant for purposes of finding that the Plan violates Bankruptcy Code Section 1123(a)(4). Id. at 1152 (the court was not "prepared to make a finding that [the creditor] in fact had a guarantee from [the non-Debtor]; indeed, the litigation in the New York district court leads to a contrary conclusion. However, to the extent that the creditor was called upon to release a unique, direct claim in order to participate in the $3 million Fund, we conclude that [the creditor] was being subjected to unequal treatment in violation of 11 U.S.C. 1123(a)(4)."). Also, that the inter-class discrimination is tied to a Plan-imposed election to grant or not grant releases to non-Debtors does not make the discrimination any less offensive. See In re MCorp Fin., Inc., 137 B.R. 219, 236 (Bankr. S.D. Tex. 1992) (finding "death trap" based on Plan voting to be impermissible and noting "[t]here is no authority in the Bankruptcy Code for discriminating against classes who vote against a plan of reorganization"), appeal dismissed, 139 B.R. 820 (S.D. Tex. 1992); In re Allegheny Int'l, Inc., 118 B.R. 282, 304 n.15 (Bankr. W.D. Pa. 1990) (same).

---

[11] Those unique rights also make classification of the REIT Series with the Series K and Series R (who do not possess any rights related to the Trust Preferred Securities) inappropriate. See generally, TPS Consortium's Objection to Classification [D.I. 9257]. To the extent Class 19 is determined to have accepted the Plan, the TPS Consortium incorporates by reference and reserves its objections to classification.

What is critical is the fact that, like in AOV, the members of the TPS Consortium are being forced to give "unequal consideration" for the same pro rata distribution under the Plan that non-REIT Series members of Class 19 would receive; that requirement is impermissible. See AOV Indus., 792 F.2d at 1152; see also Coram Healthcare, 315 B.R. at 335 (noting that a bankruptcy court is without power to release a non-debtor from claims held by third party without third party's consent); In re Arrowmill Dev. Corp., 211 B.R. 497, 506 (Bankr. D.N.J. 1997) (finding that plans of reorganization containing releases of third party claims against non-debtors are not confirmable unless the third party consents); In re Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999) (plan could not be confirmed where it required non-consensual release of third-party claims).

20. This Court's decision in In re Zenith Elecs. Corp. is not to the contrary. In the first instance, Zenith addressed a challenge by the equity committee to a plan provision that offered a senior bondholder *class* a distribution based on a favorable vote. There, the plan provided for the same treatment for the *entire class* depending on the vote of that *class*. See 241 B.R. 92, 105 n.21 (Bankr. D. Del. 1999) (noting that all members of the class at issue would be treated the same). Zenith does not support differentiation in treatment amongst members within the same class based on their individual votes. Id. at 105 n. 21 (distinguishing AOV on basis that AOV dealt with unequal treatment within the same class). The current Plan forces certain holders (including the members of the TPS Consortium) in a single class to forfeit rights/claims that are not held by others in the same class, and/or be deprived of any recovery from the estate to which they are otherwise entitled if they decline to grant releases of those rights/claims. Both

such instances of intra-class discrimination are forbidden under Bankruptcy Code Section 1123(a)(4).

21. Respectfully, the Court should reconsider the conclusion in the September Confirmation Ruling that AOV and Conseco are distinguishable because "the release provision in this case is voluntary and is applicable equally to all creditors and shareholders, rather than applicable only to a creditor or shareholder that has a unique direct claim against the released parties." See September Confirmation Ruling, at 100. The question is not whether all members of the class are afforded the same opportunity to opt in or opt out; rather, the question is whether all members in the same class possess a sufficiently similar bundle of rights such that the provision actually treats them equally. As outlined supra, the members of the TPS Consortium have unique direct claims against the released parties. Moreover, because the members of Class 19 are entitled (based on their position in the Debtors' capital structure) to the value that is slated to flow to Class 19 under the Plan, the non-Debtor releasees' exchange of releases of claims against the estate for releases of estate claims against them under the Global Settlement Agreement cannot also serve as the "consideration" necessary to compel releases of claims by non-Debtors. This is exactly the cases of AOV and Conseco. The Court's acceptance of the Debtors' "condition requiring a release in order to receive a distribution," see September Confirmation Ruling p. 99, was, respectfully, unsupported under the relevant case law and should not stand. See also In re Monroe Well, 80 B.R. at 335 ("equality of treatment of members of a class is not provided simply by permitting each creditor of that class to opt to provide a release and receive the same pro rata distribution on its claim"). Thus, because the Plan's treatment of Class 19 constitutes impermissible intra-class discrimination prohibited by Bankruptcy Code Section 1123(a)(4), the Plan is incapable of confirmation.

22. Additionally, the Court's previous reliance on dicta in In re Dana Corp. for the proposition that Bankruptcy Code Section 1123(a)(4) does not require actual equal treatment among members of a class, but merely the opportunity for equal treatment, is misplaced. See January Confirmation Ruling, at 85-86. In Dana Corp., a portion (7,500) of the approximately 133,000 members of the Ad Hoc Committee of Asbestos Personal Injury Claimants (the "Ad Hoc Committee") entered into a series of settlement agreements with the Debtor wherein the settling members of the Ad Hoc Committee were to receive under the Debtor's plan approximately $267 per member in satisfaction of each member's personal injury claim against the Debtor. See Ad Hoc Comm. of Pers. Injury Asbestos Claimants v. Dana Corp. (In re Dana Corp.), 412 B.R. 53, 57 (S.D.N.Y. 2008). Because all personal injury claimants were grouped together into one class, those members who chose not to settle would receive nothing through the Plan, but their claims would "pass through the bankruptcy and [be] reinstated" against the Debtor post-bankruptcy. Id. In the first place, the district court was hearing an appeal from an order approving a Settlement Agreement and held that the proper time to challenge equal treatment was at confirmation. In re Dana Corp. at 62. In dicta, the Court went on to say that equal treatment existed where parties who settled and those who did not were afforded the same or "equal" treatment because:

> [I]f they all were permitted to present their claims to a jury and were paid whatever amounts the jury awarded, until funds were no longer available they had the same opportunity as the settling parties: settle or litigate.

Id. at 62.

23. Here, dissenting members of Class 19 have no such equal opportunity. Unlike the asbestos victims in Dana Corp., the members of Class 19 are not a homogenous group of tort claimants who differ only in the amount of dollars that their particular disease may suggest to a

jury. Instead, holders of the Trust Preferred Securities have unique and distinct claims against the Debtors and JPMorgan (and other non-Debtors) that no other member of Class 19 possesses. These unique rights and claims are to be discharged and released "regardless of whether any property will have been distributed or retained pursuant to the Plan on account of such Claims . . ." regardless of whether the members of the TPS Consortium grant a release and/or receive an compensation therefore. Plan, § 41.2 Moreover, regardless of any release, the very assets to which the TPS Consortium has asserted rights/claims (the Trust Preferred Securities) are to be transferred "free and clear" with JPMorgan to be afforded the protections of Bankruptcy Code Section 363(m). See Plan, §§ 41.2, 36.1(a)(10). Thus, far from the "equal opportunity" afforded claimants in Dana Corp., the dissenting REIT Series members of Class 19 are unfairly discriminated against by the Plan not only because they do not receive their equal distribution of residual estate value under the Plan, but also because they purportedly lose their rights to litigate their claims against JPMorgan and others post-bankruptcy whether or not they receive a distribution and/or grant a release. See also infra, Section II.C.

24. The "death trap" provisions of the Plan would deprive dissenting REIT Series holders in Class 19 of their due entitlement (based on their position in the Debtors' capital structure) to share in, inter alia: (a) the proceeds of claims and causes of action vested in the Liquidating Trust; and (b) value associated with the "reorganized" Debtors. Such "death trap" treatment (and the resulting different treatment of interest holders within the same class) renders the Plan incapable of confirmation.

B. To The Extent Class 19 Rejects The Plan, And Classes 21 Or 22 Receive A Recovery, The Plan Violates Bankruptcy Code Section 1129(b)(2)(C) And Should Not Be Confirmed.

25. Bankruptcy Code Section 1129(b)(1) provides that, if all of the requirements of Bankruptcy Code Section 1129(a)[12] are satisfied other than (a)(8) (all classes have accepted the plan or are not impaired under the plan), the Court can still confirm a plan if it: (a) does not discriminate unfairly; and (b) is fair and equitable with respect to each impaired, dissenting class. See 11 U.S.C. § 1129(b)(1). With respect to a class of preferred stock, the "fair and equitable" requirement includes the alternative mandates that:

> (i) the plan provides that each holder of an interest in such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or
>
> (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

See 11 U.S.C. § 1129(b)(2)(C) (emphasis added). See also In re Armstrong World Indus., 432 F.3d 507, 514 (3d Cir. 2005) (denying attempt to gift value from class of unsecured creditors to equity holders in contravention of the absolute priority rule, holding that "[a]llowing this type of transfer would encourage parties to impermissibly sidestep the carefully crafted strictures of the Bankruptcy Code . . . .").

26. The Plan, as currently constituted, provides for a distribution of property to Classes 21 and 22 comprised of: (a) 30% of the "reorganized" common stock available for distribution to equity classes; and (b) 30% of Liquidating Trust Interests that may be passed down

[12] The TPS Consortium expects there will be at least one impaired accepting class under the Plan. If not, however, Bankruptcy Code Section 1129(a)(10) would independently mandate denial of confirmation.

to equity classes upon satisfaction of senior claims or interests. If Class 19 rejects the Plan, such distributions to Classes 21 and 22 would violate Bankruptcy Code Section 1129(b)(2)(C)(ii), rendering the plan incapable of confirmation unless the alternative requirement of Bankruptcy Code Section 1129(b)(2)(i) is met.[13]

27. Under the Plan, each member of Class 19 will not receive or retain property of a value equal to its fixed liquidation preferences (in aggregate, the members of Class 19 hold securities with a liquidation preference totaling $7.5 billion). Moreover, Bankruptcy Code Section 1129(b)(2)(C)(i) looks to the treatment of each holder of an interest in Class 19, requiring that each holder receive or retain property of a value equal to, at least, the liquidation preference of the securities it holds. As discussed supra, because of the "death trap" imbedded in the Plan, holders of Class 19 interests who decline to release their individual claims against non-Debtors will not receive any property under the Plan. Rather, they will receive nothing on account of their Class 19 interests. Both the presence of the "death trap" and the fact that Class 19 will not otherwise receive property with a value of at least $7.5 billion under Plan would violate Bankruptcy Code Section 1129(b)(2)(C)(i).

28. If Class 19 rejects the Plan, the Plan (as currently constituted) would fail to meet the requirements of Bankruptcy Code Section 1129(b)(2)(C) and would be incapable of confirmation.

[13] Presumably, realizing the inevitability of the absolute priority rule's assertion, the Debtors included in Plan Sections 23.1, 24.1 and 25.1 a reservation allowing the Court to modify distribution percentages to Classes 19, 21 and 22.

C. The Payment Of Special Release Consideration To Less Than All Members Of Class 19 Violates Bankruptcy Code Section 1123(a)(4), Rendering The Plan Incapable Of Confirmation.

29. Under the revised Plan, a subset of holders of the REIT Series is to receive a special payment in exchange for a release of such holders' claims against the Debtors and JPMorgan related to the Trust Preferred Securities (the "TPS Release Consideration").[14] See Plan, § 23.1 (limiting TPS Release Consideration to "Releasing REIT Trust Holders"). That subset consists only of those holders of the REIT Series who, in connection with the October 2010 voting on a prior version of the Plan (described as the "Sixth Amended Plan"), elected to grant releases associated with the Trust Preferred Securities. See Plan, § 1.186. All other holders of the REIT Series (and all holders of the Series K and Series R) are denied the TPS Release Consideration.[15]

---

[14] Payment of the special release consideration is being made pursuant to, and is required by, the Plan, and is part of, and contingent on, a broader exchange of value between and amongst JPMorgan, the Debtors and the FDIC under the Global Settlement Agreement that will be implemented through the Plan. As such, any argument that the payment is being made by JPMorgan outside of the Plan and therefore is not subject to the requirements of Bankruptcy Code Section 1123(a)(4) would be incorrect. Accord Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.), 634 F.3d 79, 97-98 (2d Cir. 2011) (in considering a "gifting" plan under Bankruptcy Code Section 1129(b), noting that the court focuses on who receives the distribution under the plan, without regard to what would be received in a liquidation or whether the payment at issue could have been made outside of the plan).

[15] To the extent the Debtors argue that "equal opportunity" to elect to receive Class treatment is all that is necessary to satisfy Bankruptcy Code Section 1123(a)(4), the TPS Consortium would note that the Series K and Series R (both now included in Class 19) were never offered the opportunity to receive the TPS Release Consideration. According to the Debtors, holders of the REIT Series do not possess any unique claims related to the Trust Preferred Securities, and so would not be entitled to different treatment than the holders of the Series K and Series R. See Debtors' Objection to Classification Challenge Motion [D.I. 9318], p. 12 (stating "it is apparent that holders of REIT Series have an interest in only the REIT Series and do not possess interests in the Trust Preferred Securities.").

30. While holders of REIT Series were previously given the option to voluntarily release their specific claims against the Debtors and JPMorgan (and other non-Debtors) in exchange for the TPS Release Consideration, the Plan continues to seek to impose an involuntary release of those same claims from all REIT Series Holders – regardless of whether they receive the TPS Release Consideration.[16] See, e.g., Plan, § 2.1 (approving the Global Settlement Agreement, which transfers the Trust Preferred Securities to JPMorgan); Plan, § 36.1(a)(8) (providing for the completion of all steps necessary to effect the conditional exchange transaction); Plan, § 36.1(a)(10) (providing for a sale of the Trust Preferred Securities to JPMorgan "free and clear" of claims and subject to the protections of Bankruptcy Code Section 363(m)). The TPS Consortium maintains that a non-consensual release of such claims would be impermissible (as discussed supra). However, to the extent the Plan provisions and applicable law are determined to allow a non-consensual release of claims related to the disputed ownership of the Trust Preferred Securities (in effect, depriving those REIT Series holders of the claims for which the Releasing REIT Trust Holders received payment under the Plan), the Plan will have effected prohibited intra-class discrimination prohibited by Bankruptcy Code Section 1123(a)(4), and will be rendered incapable of confirmation.[17]

---

[16] At the March 21, 2011 hearing at which the Debtors sought authority to solicit acceptances of the last version of the Plan (described as the "Modified Sixth Amended Plan"), the TPS Consortium objected on the basis that the TPS Release Consideration was proposed to be paid only to those REIT Series holders who granted non-Debtor releases in connection with the prior version of the Plan (i.e., the Sixth Amended Plan). The Court allowed solicitation to proceed, but specifically reserved the issue of whether payment of the TPS Release Consideration to less than all members of Class 19 (then comprised only of REIT Series holders) would render the Plan incapable of confirmation. See Hearing Trans. (March 21, 2011), p. 171:17-18.

[17] In the alternative to denying confirmation, the Court could Order the parties to escrow the amount necessary to provide all REIT Series holders an equal share of the TPS Release

D. The Proposed Post-Petition Governance Violates Bankruptcy Code Sections1123(a)(7) And 1129(a)(5)(A)(ii), Rendering The Plan Incapable Of Confirmation.

31. In considering the propriety of the then-proposed composition of the Trust Advisory Board, in the September Confirmation Ruling the Court held that "the composition of the Trust Advisory Board must reflect the constituents who hold Liquidating Trust Interests." See September Confirmation Ruling, p. 25. The Court's ruling in that regard was consistent with Bankruptcy Code Sections 1129(a)(7) and 1129(a)(5)(A)(ii).

32. Bankruptcy Code Section 1129(a)(5)(A)(ii) requires that the appointment or continuation of a director, officer, or voting trustee must be consistent with the interests of creditors and equity security holders and with public policy. See 11 U.S.C. § 1129(a)(5)(A)(ii). Bankruptcy Code Section 1129(a)(5)(A)(ii) is often read in conjunction with Bankruptcy Code Section 1123(a)(7), which allows a plan to contain only "provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7); see In re Mesa Air Grp., Inc., No. 10-10018, 2011 WL 320466, at *9 n.3 (Bankr. S.D.N.Y. Jan. 20, 2011) ("On its face, section 1123(a)(7) applies to both pre-confirmation and post-confirmation selection of officers, directors or trustees."); see also Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1361 (9th Cir. 1986) ("Sections 1123(a)(6) and 1123(a)(7) must be read together. These provisions require that

---

Consideration should the combined terms of the Plan ultimately be determined to have effected an involuntary release of those claims for which the Releasing REIT Trust Holders will have already been compensated (thereby ensuring that all similarly-situated parties do, in fact, receive the "same" treatment required under Bankruptcy Code Section 1123(a)(4)).

the court scrutinize *any* plan which alters voting rights or establishes management in connection with a plan of reorganization, whether or not the plan provides for the issuance of new securities.") (citations omitted) (emphasis in original); see also In re Machne Menachem, Inc., 304 B.R. 140 (Bankr. M.D. Pa. 2003) (denying confirmation after focusing on the plan's non-compliance with applicable state law – involving corporate governance – to determine whether the plan's provisions selecting directors violated Bankruptcy Code Section 1123(a)(7)). The legislative history suggests that the purpose of the statute was to provide adequate representation to those parties represented by the new officers and directors. See id. at 142 ("The Senate Report accompanying the [statutory predecessor to Bankruptcy Code Section 1123(a)(7)] stated . . . that such provision *directs the scrutiny of the court to the methods* by which the management of the reorganized corporations is to be chosen, so as to ensure, for example, adequate representation of those whose investments are involved in the reorganization.") (citation omitted) (emphasis added).

33. Currently, the board of the "reorganized" Debtors will include four nominees appointed by the Equity Committee and one appointed by AAOC. The Trust Advisory Board will include three nominees by the Creditors' Committee, three nominees by the Equity Committee, and one nominee of the Creditors' Committee approved by the Equity Committee. The Litigation Subcommittee will include two members appointed by the Equity Committee and one member appointed by the Creditors' Committee.

34. Clearly, neither the Creditors' Committee nor AAOC represent the interests of preferred equity holders in these cases (in fact, they have been adverse to preferred equity at nearly every step of these cases). Moreover, the Equity Committee, chaired by a member who owns only common stock (and who has already obtained an appointment for himself to the

Debtors' board and to the Trust Advisory Board), does not represent the interests of preferred equity holders (as demonstrated by the Equity Committee's negotiation of, or at least acquiescence to, a Plan based on distributions to common equity before preferred equity is paid in full). As such, the selections by the Equity Committee are not a substitute or proxy for the ability of preferred equity to select board members.

35. To the extent the absolute priority rule applies to preclude distribution of stock or other value to Classes 21 and 22 (as the TPS Consortium believes will be the case), holders of preferred equity should be allowed to choose those who would serve on the "reorganized" Debtors' board, the Trust Advisory Board and the Litigation Subcommittee. To do so would be consistent with the requirement that post-emergence governance reflect the interests of those who have an economic stake in the enterprise.

E. The Debtors' Assumption Of, And Performance Under, The Exchange Agreements Would Violate Bankruptcy Code Sections 365(c)(2) And 1129(a)(1), Rendering The Plan Incapable Of Confirmation.

36. As set forth on Exhibit D of the Plan Supplement [D.I. 9488], the Debtors seek Court authority to assume and assign to JPMorgan:

> [a]ny and all contracts, as and to the extent necessary or required to transfer to JPMC or its designee any and all right, title and interest the WMI Entities may have or may ever have had in the Trust Preferred Securities free and clear of all claims, liens, interests and encumbrances, as contemplated in Section 2.3 of the Global Settlement Agreement, as and to the extent such contracts are or may be executory contracts, including, without limitation, (a) offering circulars, (b) trust agreements, (c) ***exchange agreements***, (d) side letters, and/or (e) any additional ancillary and subsidiary documents; provided however, that the forgoing is without prejudice to the rights of the Debtors and JPMC with respect to the Trust Preferred Securities and all related contracts in the event the Global Settlement Agreement is not approved and/or terminates.

See Plan Supplement in Support of Seventh Amended Plan, dated January 25, 2012, Exhibit D [D.I. 9488], at 7 (emphasis added).

37. Included among the agreements to be assumed are the agreements pursuant to which the securities that were supposedly exchanged for the Trust Preferred Securities would finally be issued and exchanged. Indeed, under penalty of perjury, the Debtors have stated as follows regarding the status of the "purported" conditional exchange and the Debtors' intent to complete the transaction through the Plan (including through the issuance of the shares that were to have been "exchanged" in the transaction): "Pursuant to the terms of the Settlement Agreement, upon consummation of the Plan, WMI and relevant third parties will complete the Conditional Exchange." See Monthly Operating Report for the Period July 1, 2010 through July 31, 2010 [D.I. 5372], Note 2 (emphasis added).

38. Bankruptcy Code Section 365(c)(2) prohibits a trustee or debtor in possession from assuming or assigning an executory contract to "make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, *or to issue a security of the debtor*." See 11 U.S.C. § 365(c)(2) (emphasis added). Where a contract is incapable of assumption because of Bankruptcy Code Section 365(c)(2)'s proscriptions, that contract must be deemed rejected. Accord In re UAL Corp., 293 B.R. 183, 186-87 (Bankr. N.D. Ill. 2003) (had the contract in question been subject to Bankruptcy Code Section 365(c)(2), the result would have been automatic rejection); In re Ardent, Inc., 275 B.R. 122, 126 (Bankr. D.D.C. 2001) (ordering contract to issue securities to be, and to be deemed, rejected after concluding Bankruptcy Code Section 365(c)(2) applied to prohibit assumption). The rejection of an executory contract by a debtor constitutes a breach of that agreement as of immediately prior to the commencement of the chapter 11 case. See 11 U.S.C. § 365(g). That breach relieves the non-debtor party to the rejected contract of any further performance obligations to the debtor. See Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 186 (2d. Cir. 2007) ("[A]

party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach.") (citing Hadden v. Consol. Edison Co. of N.Y., 34 N.Y.2d 88, 96, 312 N.E.2d 445 (N.Y. 1974).

39. Debtor WMI's prospective performance under the Exchange Agreements to effectuate the Conditional Exchange would thus clearly violate Bankruptcy Code Sections 365(c)(2) and 1129(a)(1), rendering the Plan incapable of confirmation.

III. Continuing Objections To Confirmation.

40. It is the TPS Consortium's understanding that interim rulings by the Court in the January and September Confirmation Rulings are to be carried forward and embodied in any final Order confirming the Plan. As set forth in the TPS Consortium's request that the confirmation Order (if entered) be certified to the Third Circuit, the TPS Consortium respectfully disagrees with certain of those interim rulings and intends to seek appellate review once such rulings are set forth, or incorporated, in a final Order.

41. More specifically, the TPS Consortium continues and reasserts the following objection points:

- The Plan, as currently constituted, is incapable of confirmation because the Divestiture Rule prohibits this Court from issuing any Order or taking any action that would impair or impede the District Court's appellate jurisdiction over the TPS Litigation appeal. See First Supplemental Objection, at 8-14.
- Consistent with the Supreme Court's decision in Stern v. Marshall, this Court has the Constitutional authority to issue only proposed findings of fact and conclusions of law with respect to the Global Settlement Agreement to the extent it resolves claims and causes of action that would otherwise require adjudication by an Article III Court. See Second Supplemental Objection, at 16-19.
- The Plan's provision of post-petition interest, payable at the Federal Judgment Rate in effect on the Petition Date renders the plan incapable of confirmation. Instead, the Plan should be modified to pay post-petition interest at the Federal

Judgment Rate in effect on the date of confirmation. See Post-Trial Brief, at 26-29.

- The Debtors have failed to create the evidentiary record necessary for this Court to determine whether the Global Settlement Agreement is fair and reasonable and otherwise satisfies the requirements of Bankruptcy Code Section 1129. See Post-Trial Brief, at 52-54.

RESERVATION OF RIGHTS

42. The TPS Consortium expressly reserves all of its rights to object to the Plan on any grounds whatsoever, including by joining in the objections of other parties, regardless of whether those grounds are addressed herein.

REQUEST FOR CERTIFICATION

43. By request dated February 2, 2011 [D.I. 9559], the TPS Consortium requested that, to the extent the Court grants Plan confirmation, the TPS Consortium's appeal of the resulting Order be certified directly to the Third Circuit for review. That request is incorporated by reference herein.

WHEREFORE, the TPS Consortium respectfully requests that the Court (a) deny the Motion, as set forth herein, and (b) grant such other and further relief as it deems just and proper.

Dated: Wilmington, Delaware
February 7, 2012

Respectfully submitted,

CAMPBELL & LEVINE LLC

*<u>/s/ Mark T. Hurtford</u>*______________
Marla Rosoff Eskin, Esq. (DE 2989)
Bernard G. Conaway, Esq. (DE 2856)
Mark T. Hurtford, Esq. (DE 3299)
Kathleen Campbell Davis, Esq. (DE 4229)
800 North King Street, Suite 300
Wilmington, DE 19809
(302) 426-1900
(302) 426-9947 (fax)

– and –

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Seven Times Square
New York, NY 10036
(212) 209-4800
(212) 209-4801 (fax)

– and –

James Stoll, Esq.
Jeremy B. Coffey, Esq.
Daniel J. Brown, Esq.
One Financial Center
Boston, MA 02111
(617) 856-8200
(617) 856-8201 (fax)

Counsel for the TPS Consortium

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

OBJECTION OF THE TPS CONSORTIUM TO CONFIRMATION OF THE SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

The Consortium of Trust Preferred Security Holders (the "TPS Consortium"),[1] respectfully submits this Objection to confirmation of the Sixth Amended Joint Plan of Washington Mutual Inc., ("WMI") and WMI Investment Corp. ("WMI Investment," and together with WMI, the "Debtors"), dated October 6, 2010, (the "Plan").[2] In support of its Objection, the TPS Consortium respectfully represents as follows:

---

1 As set forth in the *Verified Third Amended Statement of Brown Rudnick LLP and Campbell & Levine LLC Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure*, dated October 29, 2010 [Docket No. 5712], the TPS Consortium is comprised of parties: (a) who have been classified for treatment under Class 19 of the Plan; and (b) who each hold interests in securities described by the Debtors as constituting the REIT Series under the Plan. To be clear, the members of the TPS Consortium hold Trust Preferred Securities and, not the REIT Series. But, because the Debtors seek to impose Plan treatment on holders of Trust Preferred Securities, the TPS Consortium is compelled to file this Objection to the Plan.

2 See Docket No. 5548.

PRELIMINARY STATEMENT[3]

1. The Plan suffers from numerous fatal flaws that, as a matter of law, render it incapable of confirmation. These defects include, inter alia:

(a) the proposed Settlement underpinning the Plan violates equitable principles, the Bankruptcy Code and applicable case law;

(b) the Plan's purported release of claims (both those held by the estates and those held by non-Debtors) against non-Debtor third-parties in violation of the Bankruptcy Code and applicable case law;

(c) as detailed in a concurrently-pending adversary proceeding filed by members of the TPS Consortium (the "TPS Action"),[4] the Debtors failed to implement a "Conditional Exchange" of WMI preferred equity for the Trust Preferred Securities prior to the Petition Date, are precluded from doing so under Bankruptcy Code Section 365(c)(2), and the efforts to effect that transaction in contravention of Bankruptcy Code Section 365(c)(2) violate Bankruptcy Code Section 1129(a)(1);

(d) given the Plan's dependence on the diversion of the Trust Preferred Securities to JPMC, and the impossibility of completing the Conditional Exchange as a result of Bankruptcy Code Section 365(c)(2), the Plan is not feasible as is required under Bankruptcy Code Section 1129(a)(11);

(e) the Plan's proposed payment of "Allowed Postpetition Interest Claims," calculated at the contract rates set forth in any agreement related to such Allowed Claims, violates the Bankruptcy Code and applicable case law (as discussed infra, allowed claims for

---

[3] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Plan.

[4] Black Horse Capital, LP, et al. v. JPMorgan Chase Bank, N.A., et al. Adv. No. 10-51387 (Bankr. D. Del. July 7, 2010).

postpetition interest should be paid at the Federal Judgment Rate (the "FJR") in accordance with Bankruptcy Code Sections 726(a)(5) and 1129(a)(7)); and

(f) the Debtors' inability to meet the "good faith" requirement of Bankruptcy Code Section 1129(a)(3), because –

(i) the Global Settlement Agreement (the "Settlement") was negotiated, on the estate's behalf, by counsel operating under disabling conflicts of interest with respect to the other parties to the Settlement (notably, JPMC), and others proposed to receive significant value and/or broad releases under the Plan; and

(ii) the "settlement" with Class 19 was the result of a collusive arrangement amongst the parties thereto, indicative of the pervasive manipulation of the Plan process to lock in substantial benefits for select insiders (to the detriment of other estate constituents, including members of the TPS Consortium), under the Settlement.

2. As Plan proponents, it is the Debtors' burden to prove and persuade this Court, by a preponderance of the evidence, that the Plan satisfies every applicable confirmation requirement under Bankruptcy Code Sections 1129(a) and (b).[5] As discussed herein, the Debtors cannot carry these burdens and confirmation must be denied.[6]

---

[5] See, e.g., In re Armstrong World Indus., Inc., 348 B.R. 111, 120 n.15 (D. Del. 2006) (plan proponent must establish by preponderance of the evidence the satisfaction of requirements of Bankruptcy Code Sections 1129(a) and 1129(b)); 7 Collier on Bankruptcy ¶ 1129.02[4] (15th ed. rev. 2007) ("At the [confirmation] hearing, the proponent bears the burdens of both introduction of evidence and persuasion that each subsection of section 1129(a) has been satisfied. If nonconsensual confirmation is sought, the proponent of such a plan will have to satisfy the court that the requirements of section 1129(b) are also met. In either situation, the plan proponent bears the burden of proof by a preponderance of the evidence.").

[6] See In re Sacred Heart Hosp. of Norristown, 182 B.R. 413, 423 (Bankr. E.D. Pa. 1995) (a confirmation hearing warrants a meticulous analysis of whether the Plan meets each of the technical requirements of the Code).

BACKGROUND

I. The Trust Preferred Securities.

3. Prior to the Petition Date, WMI raised approximately $4 billion through the issuance of the Trust Preferred Securities. As discussed in greater detail in the TPS Action, those securities could, in certain circumstances and after the satisfaction of specified requirements, be subject to a Conditional Exchange whereby WMI, pursuant to a series of exchange agreements (each an "Exchange Agreement"), was to have issued preferred stock (the "WMI Preferred Stock") to be represented by depositary shares (the "Depositary Shares") and exchanged for the Trust Preferred Securities. The Exchange Agreements also required that any transfer of the Trust Preferred Securities to WMI in a Conditional Exchange be reflected on the applicable registers whereby ownership of the securities is tracked and determined.

II. The Botched Conditional Exchange And WMI's Voluntary Bankruptcy.

4. On September 25, 2008, WMB was seized and the Office of Thrift Supervision (the "OTS") closed the bank. On that same day, the Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver of WMB and the FDIC agreed to sell WMB's assets to JPMC for $1.88 billion. Also on September 25, the Debtors purportedly triggered a "Conditional Exchange" transaction whereby the $4 billion in Trust Preferred Securities were to be pulled into WMI in exchange for five new series of WMI Preferred Stock, effective as of 8:00 a.m. the following day.

5. But, as will be demonstrated at trial in the TPS Action (scheduled to commence on December 1st in advance of confirmation proceedings), WMI neither: (a) issued the WMI

Preferred Stock;[7] nor (b) was recorded as the owner of the Trust Preferred Securities in the applicable trust registers.[8] It is for these reasons, inter alia, the plaintiffs in the TPS Action are seeking a declaration that the Conditional Exchange did not occur and that they are the holders of Trust Preferred Securities, rather than a phantom security never issued by WMI and, therefore, incapable of having been tendered in "exchange" for the Trust Preferred Securities.

6. On September 26, 2008, each of the Debtors filed with this Court a voluntary petition for Chapter 11 relief only hours after the purported occurrence of the Conditional Exchange, but, critically, before the required steps to effect the Conditional Exchange had been taken.

III. The Actions And Adversary Proceedings.

7. In the wake of events described above, multiple litigations arose, primarily with respect to competing claims to assets of the Debtors' estates and the Trust Preferred Securities (which, the TPS Consortium maintains, never became part of WMI's estate as a result of the failure of the Conditional Exchange). While myriad issues and assets were in dispute, material components of the various litigations included: (a) ownership of approximately $4 billion in WMI's demand deposits (the "Deposits"); (b) ownership of the Trust Preferred Securities, assuming, arguendo, the Conditional Exchange occurred and such securities ever became part of

---

7 See WMI Answer in the TPS Action [Docket No. 60] (the "WMI Answer"), ¶ 206; *Affidavit of Jeremy B. Coffey in Support of the Objection of the TPS Consortium to Confirmation of the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, filed contemporaneously herewith ("Coffey Aff."), Ex. A, (

8 See Coffey Aff., Ex. A,

WMI's estate; (c) ownership of approximately $5.5 - $5.8 billion in tax refunds, including $2.7 - $3.0 billion that arose a year into the Debtors' Chapter 11 cases as a result of changes to the tax laws (collectively, the "Tax Refunds"); and (d) numerous potential estate claims against third parties, including business tort claims against JPMC based on its actions in advance of the seizure of WMB (the "Business Tort Claims") and available avoidance actions to recover, among other property, the purportedly-transferred Trust Preferred Securities (the "Avoidance Actions," and, together with the Business Tort Claims and other potential estate claims, the "Estate Claims").

8. In connection with these actions, the Debtors initially represented to the Court and stakeholders that they were vigorously pursuing estate rights and claims against third parties – all under the auspices of returning to the estates significant value for the benefit of stakeholders.

IV. The Global Settlement Agreement And Plan.

9. In March 2010, the Debtors suddenly announced a prospective global settlement of various claims and causes of actions, including those referenced above. The Debtors, JPMC, FDIC Corporate, FDIC Receiver, the Creditors' Committee, and a small number of hedge funds holding positions at various levels of the capital structures of WMI and WMB[9] (collectively, the

---

[9] The hedge fund parties to the Amended Settlement include: (a) Appaloosa Management L.P. ("Appaloosa"), on behalf of Appaloosa Investment L.P. I, Palomino Fund Ltd., Thoroughbred Fund, L.P., and Thoroughbred Master Ltd.; (b) Centerbridge Partners, L.P. ("Centerbridge"), on behalf of Centerbridge Credit Advisors, LLC and Centerbridge Special Credit Advisors, LLC; (c) Owl Creek Asset Management, L.P. ("Owl Creek"), on behalf of Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Overseas Fund, Ltd., Owl Creek Socially Responsible Investment Fund, Ltd., Owl Creek Asia I, L.P., Owl Creek Asia II, L.P., and Owl Creek Asia Master Fund, Ltd.; and (d) Aurelius Capital Management, LP ("Aurelius"), on behalf of Aurelius Capital Master, Ltd., Aurelius Convergence Master, Ltd., ACP Master, Ltd. and other managed fund entities.

"Settlement Parties") were parties to that original settlement, which, as subsequently modified, came to form the basis of the current Plan and Settlement.

10. The key aspect of the Settlement, as effectuated by the Plan, is its provision to the Settlement Parties of significant value and/or releases (both of estate and third-party claims). Another key component is the proposal for JPMC to pay over to members of Class 19 under the Plan (holders of Trust Preferred Securities) $50 million, purportedly in exchange for a forced release by those parties of claims against, inter alia, JPMC and other parties with potential liability for the manner in which the Trust Preferred Securities were structured, issued and sold, and the compelled delivery of those Trust Preferred Securities to JPMC.[10] In the latest iteration of the Plan and Settlement, the FDIC was even able to negotiate for its constituents – holders of claims against non-Debtor WMB – a payment of $335 million ***in WMI estate value***.

11. Under the Settlement, as effectuated by the Plan, the largest pools of estate value and claims are to be treated as follows:

- JPMC will return the Deposits to WMI, net of 80% of the Tax Refund amounts contained in the Disputed Accounts, and JPMC and the FDIC will release all alleged claims to the Deposits.[11]
- JPMC will be deemed the sole legal owner of the Trust Preferred Securities, and all claims against JPMC pertaining to the Trust Preferred Securities will be released.[12]
- Tax Refund amounts will be distributed amongst JPMC, WMI and the FDIC, with the Homeownership Carryback Refund amounts paid 30.357% to the FDIC (approximately $850 million) and 69.643% to WMI (approximately $1.95 billion, with $335 million of that amount to be paid to creditors of WMB), and all other Tax Refund amounts paid 80% to JPMC (providing a

---

10 See Plan § 2.1(h) at 31.

11 See Settlement § 2.1 at 18.

12 See Settlement § 2.3 at 19.

minimum of $2 billion in Tax Refunds to JPMC) and 20% to WMI (approximately $540 to $600 million).[13]

- All claims against the Settlement Parties will be released (both claims of each other, and, as noted above, claims of non-Debtor third parties) and the adversary actions commenced by the Settlement Parties will be stayed.[14]
- WMI and the FDIC will seek to enjoin the plaintiffs in the Texas litigation, and any other parties with similar claims, from prosecuting claims against JPMC based on the Business Tort Claims alleged to have been committed by JPMC.[15]

V. The Rampant, Debilitating Conflicts Of Interest.

A. The Delivery Of Significant Value To Clients Of Debtors' Counsel.

12. As has become evident since the announcement of the Plan and Settlement, the processes by which they were negotiated were rife with insider dealing and conflicts of interest. For example, it is openly acknowledged that Weil Gotshal & Manges LLP ("WG&M") concurrently represented JPMC while acting as general bankruptcy counsel for the Debtors, and that such representations created a conflict of interest.[16] Notwithstanding this acknowledgement, WG&M acted as the law firm principally responsible for negotiating the terms of the Settlement on behalf of the Debtors, and in some instances, negotiated directly with its other current client,

---

13 See Settlement § 2.4 at 20.

14 See Settlement § 3.1 at 51-58.

15 See Settlement § 2.7 at 33.

16 See *Application of the Debtors Pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code For Authorization to Employ and Retain Weil, Gotshal & Manges LLP as Attorneys for the Debtors, Nunc Pro Tunc to the Commencement Date*, dated October 13, 2008 [Docket No. 64] ("WG&M Retention Application") at Exhibit B (*Affidavit and Disclosure Statement on Behalf of Weil, Gotshal & Manges LLP Pursuant to Sections 327, 328(a), 329 and 504 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2014(a) and 2016(b)* (the "Rosen Affidavit")), ¶ 15 (providing that JPMorgan Chase Bank, National Association is a current client); Coffey Aff., Ex. B ([redacted]).

JPMC, resulting in the arrangement whereby JPMC is slated to receive billions of dollars in estate value and valuable releases.[17] WG&M's lead role (discussed below) in negotiating the Settlement – the lynchpin of the Plan – between two clients (the Debtors and JPMC) was plainly impermissible.[18] Also, as discussed below, WG&M similarly suffers from conflicts of interest with respect to other Settlement Parties and other parties proposed to receive significant value and/or valuable releases under the Settlement and Plan.

13. Recognizing WG&M's conflicts of interest, after WG&M had already negotiated material aspects of the proposed Settlement with JPMC, the Debtors retained special conflicts counsel to represent them in matters adverse to JPMC.[19] But, that counsel, Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel"), does not appear to have played a role in the negotiation of the Settlement. Moreover, even if Quinn Emmanuel had been involved in the negotiations of the Settlement, it too suffered from conflicts of interest with respect to at least the Centerbridge Parties, who are amongst the Settlement Parties slated to receive recovery in full (or more) on their claims against the Debtors.

---

17 See, e.g., Coffey Aff., Ex. C ([REDACTED].

18 See In re Envirodyne Indus., Inc., 150 B.R. 1008, 1019 (Bankr. N.D. Ill. 1993) ("[T]he Debtors' interests and the interests of the creditor body as a whole are not best represented at a negotiation table by a lawyer who faces a substantial client on the other side.").

19 See Coffey Aff., Ex. B, [REDACTED].

14. More specifically, Debtors' counsel had conflicts of interest with respect to Settlement Parties JPMC,[20] the FDIC[21] and/or Centerbridge Parties[22] – each of whom came away from the negotiations with significant value and releases of third party claims against them.[23] WG&M's acknowledged conflict of interest with respect to representing the Debtors in matters

---

20 See Rosen Affidavit, at ¶ 15 (providing that JPMorgan Chase Bank, National Association is a current client); id. at Exhibit B (listing JP Morgan Chase Bank as a current client).

21 See WG&M Retention Application; see also Rosen Affidavit, ¶ 15 (noting past and potential current and future representation of the FDIC).

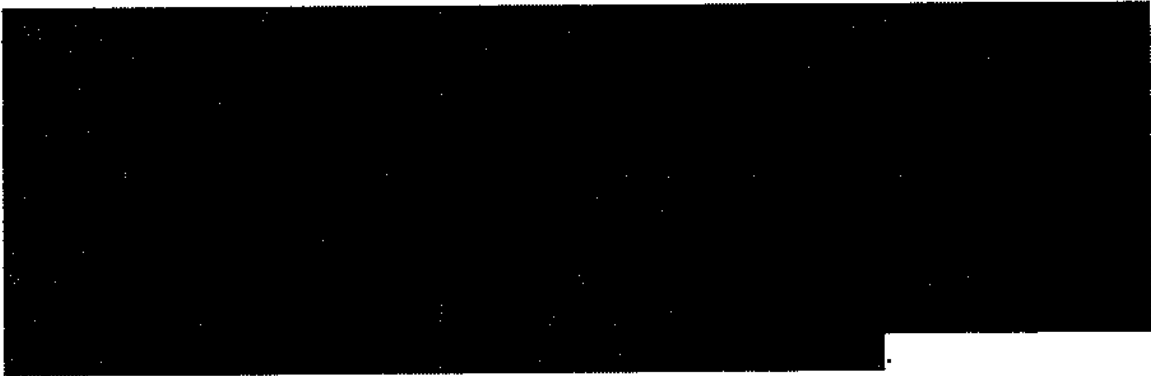
22 See *Supplemental Declaration of Susheel Kirpalani in Further Support of the Application of Debtors Pursuant to Section 327(e) and 328(a) of the Bankruptcy Code and Bankruptcy Rule 2014 For Authorization to Employ and Retain Quinn Emanuel Urquahart Oliver & Hedges, LLP as Special Litigation and Conflicts Counsel to the Debtors, Nunc Pro Tunc to April 3, 2009*, dated April 30, 2009 [Docket No. 969] ("Supplemental Kirpalani Declaration"), page 5 (listing Centerbridge Capital Partners, L.P. as a current client); id. at 98 &101 (same).

23 The Creditors Committee has, on multiple occasions, made much of its purported review and blessing of the Settlement. But, counsel for the Creditors' Committee, Akin Gump Strauss Hauer & Feld LLP ("Akin Gump"), also suffers from significant conflicts of interest with respect to numerous parties (including, importantly, JPMC) slated to receive significant value and/or releases under the Settlement and Plan. Moreover, the Creditors' Committee's duties run to its constituents – creditors of WMI – and not to preferred or common equity holders. As such, one should not be surprised the Creditors' Committee would not be bothered by a tainted negotiation process resulting in creditors receiving nearly a full recovery, with only equity holders being harmed by the diversion of estate value to non-Debtors. Accordingly, the Creditors' Committee's blessing of the Settlement is meaningless.

adverse to JPMC is particularly troubling given that JPMC was a central figure in the Settlement negotiations.[24]

15. Further, the Settlement and Plan purport to grant broad releases of estate and third-party claims to, among others, parties involved in the structuring, issuance and sale of the Trust Preferred Securities (which, as alleged in the complaint initiating the TPS Action, suffered from significant defects and fraudulent non-disclosure of material matters). Substantially all of these third parties, who do not appear to have even been part of the negotiation process, are important clients of WG&M and are proposed to receive releases under the Settlement and Plan. For example, it would appear the plan's extraordinarily broad releases could pertain to numerous clients of WG&M, including, inter alia: (a) Goldman Sachs & Co.;[25] (b) Citigroup;[26] (c) Credit Suisse;[27] (d) Morgan Stanley;[28] and (e) UBS.[29]

---

24 

25 See Rosen Affidavit, Exhibit B (listing Goldman Sachs Execution & Clearing, L.P., Goldman Sachs International, Goldman, Sachs & Co. and Goldman Sachs Group, Inc. as affiliates of a current client).

26 See Rosen Affidavit, Exhibit B (listing Citigroup (Travelers) as a current client and Citicorp and Citigroup Global Markets Inc. and Solomon Brothers as affiliates of a current client).

27 See Rosen Affidavit at Exhibit B (listing Credit Suisse Securities (USA) LLC as an affiliate of a current client).

16. This Court has previously noted particular concerns relating to WG&M's conflict as to JPMC. In its Order approving the WG&M Retention Application entered on November 7, 2008 (the "WG&M Retention Order"), the Court inserted its own handwritten language providing that:

> in the event WG&M becomes aware of any potential claim the estate may have against JP Morgan Chase it shall promptly notify the U.S. Trustee's office and counsel for the Creditor's Committee . . .[30]

17. In apparent recognition of WG&M's disabling conflict with respect to JPMC, the Debtors finally filed an application on April 8, 2009 (the "Quinn Retention Application") to retain Quinn Emanuel as special litigation and conflicts counsel in connection with the so-called "JPMorgan Actions."[31] The JPMorgan Actions, as defined in the Quinn Retention Application, included certain proceedings among the Debtors, JPMC and the FDIC relating to the ownership of disputed assets, including the Trust Preferred Securities, the Tax Refunds, the Deposits and claimed capital contributions. The Debtors acknowledged that WG&M could not represent them in connection with the JPMorgan Actions, because such representation would require WG&M to

---

28 See Rosen Affidavit, Exhibit B (listing Morgan Stanley as a current client and Morgan Stanley & Co. Incorporated, Morgan Stanley-International Limited and Morgan Stanley Asset Management as affiliates of current client); id. at 18 (listing Morgan Stanley DW Inc. as current client).

29 See Rosen Affidavit, Exhibit B (listing UBS AG Stamford Branch, UBS AG London Branch, UBS Securities LLC and UBS Global Asset Management as affiliates of current client).

30 See WG&M Retention Order, dated November 7, 2008 [Docket No. 244], at 3.

31 See *Application of Debtors Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code and Bankruptcy Rule 2014 for Authorization to Employ and Retain Quinn Emanuel Urquhart Oliver and Hedges, LLP as Special Litigation and Conflicts Counsel to the Debtors, Nunc Pro Tunc to April 3, 2009,* dated April 8, 2009 [Docket No. 888, ¶¶ 9-11].

be adverse to JPMC – a charge all agreed WG&M was not capable of fulfilling.[32] In seeking to retain Quinn Emmanuel, the Debtors stated they "believe[d] that retaining Quinn Emanuel [was] reasonable and necessary in order for the Debtors to prosecute the JPMorgan Actions and to discharge their responsibilities to their estates and creditors."[33]

18. However, the retention of Quinn Emanuel did nothing to remedy WG&M's conflicts with respect to JPMC, and did not even purport to address WG&M's numerous conflicts with the other parties referenced herein. First, even prior to Quinn Emanuel's retention, WG&M had already actively negotiated and outlined the terms of the proposed Settlement (including with respect to the Trust Preferred Securities, the Deposits, and Tax Refunds) with JPMC and its counsel.[34] Most of these terms remained unchanged after the retention of Quinn Emmanuel and ultimately became part of the Settlement currently proposed for consideration by

---

32 See id. at ¶ 16 ("After JPMorgan Chase commenced the JPMorgan Adversary and moved to intervene in the FDIC Action, the Debtors determined that it would be necessary to retain special counsel to represent them in connection with the JPMorgan Actions, due to a conflict that prevented Weil Gotshal from representing the Debtors in these actions.").

33 Id. at ¶ 17.

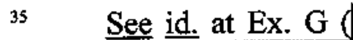
34 See).

the Court. For example, the Debtors offered to transfer the Trust Preferred Securities to JPMC free and clear in early 2009, and *never attempted to negotiate away from this position.*[35]

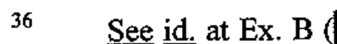
19. Second, despite acknowledging that a conflict precluded WG&M from representing the Debtors in the JPMorgan Actions, it does not appear the Debtors used Quinn Emanuel to negotiate the Settlement, something that should have been done in light of WG&M's conflicts of interest. Rather, even after Quinn Emanuel was retained, WG&M continued to negotiate the terms of the Settlement on behalf of the Debtors, and discovery shows that Quinn Emanuel played no meaningful role in those negotiations.[36] Yet, the Settlement purportedly

---

35 See id. at Ex. G (



36 See id. at Ex. B (



.

resolves the very same issues WG&M was incapable of litigating against JPMC in connection with the JPMorgan Actions. To the extent Quinn Emmanuel claims to have done an analysis of the strengths and weaknesses of the litigations it was handling on behalf of the Debtors, that would not provide a basis for a conflicted WG&M to negotiate the material terms of the Settlement with its other client, JPMC.

20. Third, as noted infra, the retention of Quinn Emanuel as special conflicts counsel for the Debtors with respect to the JPMorgan Actions did nothing to resolve the myriad other conflicts of WG&M with respect to other parties to and non-parties benefiting from the Settlement and Plan. In fact, these additional conflicts do not appear ever to have been addressed.

B. The Collusive "Settlement" With Class 19.

21. The pattern of conflicts of interest infecting the Plan also includes the purported "settlement" with Class 19.[37] The "settlement" appears to have been the result of a collusive arrangement amongst the parties thereto, indicative of the pervasive manipulation of the Plan process by the Debtors and JPMC to favor select insiders (to the exclusion and detriment of members of the TPS Consortium) under the Settlement.

22. The Debtors have provided little evidence of the genesis or the negotiating history of the proposed $50 million payment from JPMC to the members of Class 19 under the Plan (i.e., the holders of the Trust Preferred Securities). However, it now appears that the "settlement" with Class 19 was constructed so as to satisfy, in full (or more), the claims and interests of only those parties who participated in the negotiated the Settlement, and not the REIT Series holders (i.e., Class 19) as a whole. Certain of the hedge fund Settlement Parties also own Trust Preferred

---

[37] See Plan § 2.1(h) at 31.

Securities, and such parties appear to have acted as the exclusive "representatives" of Class 19 in connection with negotiating the treatment of this group under the settlement.[38] Under the Settlement and Plan, consenting holders of the Trust Preferred Securities would receive a 1.25% recovery – in the form of a direct payment from JPMC.[39] This recovery appears to approximate the cost bases of the hedge fund Settlement Parties in their Trust Preferred Securities holdings.[40] Thus, it appears that these non-fiduciary Settlement Parties may have negotiated to settle their Trust Preferred Securities claims (as well as those of all other members of Class 19) at or around the Settlement Parties' cost bases in such claims to enhance their recoveries on their significant holdings at other levels of the capital structure.[41] This apparent payoff to certain, select Settlement Parties – at the expense of the other members of Class 19, who were not given the opportunity to participate in the settlement negotiations – is further indicia of the special insider treatment that is the hallmark of this Plan and Settlement.

---

38 See

39 See Settlement § 2.24 at 48 - 49.

40 See *First Supplemental Verified Statement of Fried, Frank, Harris, Shriver & Jacobson LLP Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure*, dated May 17, 2010 [Docket No. 3761].

41 See

VI. The Plan's Fatal Flaws Cannot By Cured By The Examiner.

23. By Order, dated July 28, 2010, the Bankruptcy Court approved the appointment of Joshua R. Hochberg as examiner (the "Examiner") to investigate among other things, the claims and actions being compromised and settled and the assets being transferred pursuant to the terms and provisions of the Settlement. On November 1, 2010, the *Final Report of the Examiner* was filed (the "Examiner's Report").[42] While the Examiner had the power to subpoena witnesses and take statements under oath, he elected to perform his examination through informal, unsworn interviews. At best, the Examiner's report is a compilation of inadmissible hearsay. The depth and quality of the analysis in the Examiner's Report speaks for itself.

ARGUMENT

I. The Plan Should Not Be Confirmed Because The Proposed Settlement Works Substantial Injustice That Does Not Withstand Scrutiny.

A. The Settlement Violates The Bankruptcy Code.

24. The Debtors bear the burdens of proof and persuasion respecting every applicable provision of Bankruptcy Code Section 1129.[43]

25. Among other things, the Debtors must establish that the Plan complies with Bankruptcy Code Sections: (i) 1129(a)(1) (Plan complies with the Bankruptcy Code); (ii) 1129(a)(3) (Plan has been proposed in good faith and not by means forbidden by law);

---

42 See Docket No. 5735.

43 See In re Armstrong World Indus., 348 B.R. 111, 120 & fn. 15 (D. Del. 2006)(plan proponent must establish by preponderance of evidence the satisfaction of requirements of both Bankruptcy Sections 1129(a) and 1129(b)); 7 Collier on Bankruptcy ¶ 1129.02[4]("At the [confirmation] hearing, the proponent bears the burdens of both introduction of evidence and persuasion that each subsection of section 1129(a) has been satisfied. If nonconsensual confirmation is sought, the proponent of such plan will have to satisfy the court that the requirements of section 1129(b) are also met.).

1129(a)(11) (that the Plan is feasible); and 1129(b)(1) (that the Plan is "fair and equitable" respecting dissenting classes). These burdens the Debtors bear have been described in the case law as "heavy."[44]

26. The Debtors cannot carry these heavy burdens respecting Bankruptcy Code Sections 1129(a)(1), 1129(a)(3), 1129(a)(11), and 1129(b)(1) because the Plan incorporates settlement terms that are entirely inappropriate. As indicated in the TPS Consortium's Summary Judgment Memorandum,[45] the "Conditional Exchange" was not consummated pre-petition and cannot be consummated post-petition. The Plan's stated intent of "completing" the "Conditional Exchange" post-petition is a facial violation of Bankruptcy Code Section 365(c)(2) and, in turn, Bankruptcy Code Sections 1129(a)(1) and 1129(a)(11). Such "completion" also violates the provisions of the underlying Exchange Agreements, and the foundational bankruptcy principle that state law limitations on a debtor's contract rights are recognized in bankruptcy (i.e., bankruptcy does not augment or expand the terms and/or limitations of a debtor's pre-petition contract rights).[46] The Plan's failure to recognize such legal restrictions constitutes a violation of Bankruptcy Code Section 1129(a)(3). As discussed below, the Plan's intent to foist the economic burden of "settlement" on the backs of Trust Preferred Securities holders, in contravention of their agreements and in a manner that works a fraud, also runs afoul of Bankruptcy Code Sections 1129(a)(3) and 1129(b)(1).

27. Accordingly, confirmation of the Plan must denied.

---

44 See e.g., Everett v. Perez (In re Perez), 30 F.3d 1209, 1214 n. 5 (9th Cir. 1994) ("[t]he burden of proposing a plan that satisfies the requirements of the Code always falls on the party proposing it, but it falls particularly heavily on the debtor-in-possession or trustee since they stand in a fiduciary relationship to the estate's creditors.").

45 See Adv. Pro. No. 10-51387 (MFW), [Docket No. 139] (the "Summary Judgment Memorandum").

46 See, e.g., Chicago Bd. Of Trade v. Johnson, 264 U.S. 1 (1924).

B. The Debtors Cannot Carry Their Burdens Of Proof And Persuasion.

28. The Debtors' burdens of proof and persuasion respecting the Settlement are significant; especially when consideration is given to the size and complexity of the matters at issue. Judge Carey recently articulated the applicable standard of review in In re Spansion:[47]

> Approval of a settlement pursuant to Bankruptcy [Code Section 1123] is committed to the discretion of the court. The court must decide whether 'the compromise is fair, reasonable, and in the best interest of the estate.' 'Under the 'fair and equitable' standard, [the court looks] to the fairness of the settlement to the other persons, i.e., the parties who did not settle.'
>
> When considering the best interest of the estate, the Court must 'assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal.' In striking this balance, the court should consider: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of creditors.[48]

29. "In the final analysis, the court does not have to be convinced that that settlement is the best possible compromise. Rather, the court must conclude that the settlement is within the reasonable range of litigation possibilities."[49] The Debtors carry the burden of persuading the court that the compromise falls within the reasonable range of litigation possibilities.[50] "While a court generally gives deference to the Debtors' business judgment in deciding whether to settle a

---

47 2009 Bankr. LEXIS 1283 (Bankr. D. Del. June 2, 2009).

48 See id at *12 - *13 (internal citations omitted).

49 In re World Health Alternatives, Inc., 344 B.R. 291, 296 (Bankr. D. Del. 2006).

50 Key3Media Group, Inc. v. Pulver.com, Inc. (In re Key3Media Group, Inc.), 336 B.R. 87, 93 (Bankr. D. Del. 2005).

matter, the Debtors have the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved."[51]

30. Applying this inquiry to the Settlement at issue here, it is quite clear the Debtors are unable to carry their burdens of proof and persuasion. The record in these Chapter 11 proceedings is littered with discussion about the Debtors and JPMC's pervasive gamesmanship and discovery abuse. Time and time again, the Debtors and JPMC were ordered to deliver information, only to have the Court's orders flouted and ignored. To this day, the Debtors and JPMC have delivered relatively few documents, and document discovery is now essentially over. Certainly, the documents produced are insufficient to prove the propriety of the Settlement at issue here. That is the record of the Debtors' own creation; they now have to live with it.[52]

31. Presumably, the Debtors intend to shield the evidentiary dilemma they created for themselves with citation to the Examiner's Report. But as indicated at the November 9, 2010 omnibus hearing, and as proven by the Consortium's Summary Judgment Memorandum, the Examiner's Report is far from reliable; it is, in fact, flippant and remarkably lacking in

---

51 Id.

52 See Coffey Aff., Ex. K, September 7, 2010 Hearing Transcript at 78:7-9 ("We had a meet and confer which was not mentioned a couple of weeks ago where we indicated that we did not intend to put the advice of counsel at issue at confirmation); 79:7-16 (". . .the fairness of the settlement at confirmation can be established objectively without putting the advice of counsel at issue. And the contents of communications between counsel and the debtors and the private thoughts of counsel are irrelevant and unnecessary for confirmation of the settlement. And settlements are routinely approved without putting the advice of counsel at issue as I am sure your Honor is well aware. As I indicated, Your Honor, the debtors do not plan to put the advice of counsel at issue. . . ."); see also Coffey Aff., Ex. L, September 24, 2010 Hearing Transcript at 30:15-20 ("I've said before to the extent the debtor has said it is not going to rely on advice of counsel in proving its case on confirmation. I'm holding the debtor to that. And it cannot present any evidence to that effect.").

analysis.[53] That said, the TPS Consortium's views in this regard are irrelevant. The Examiner's Report is hearsay, entirely inadmissible at the confirmation hearing and for any other purpose. In this regard, the law could not be more clear.[54]

32. The TPS Consortium holds the Debtors to their burdens of proof and persuasion, and fully objects to the use of the Examiner's Report for any purpose at the confirmation hearing. In light of the limited discovery produced, the Debtors are unable to prove that the settlement is appropriate. Confirmation should be denied.

C. The Settlement Is Structured To Inappropriately Steal Value Belonging To Class 19, Delivering Such Value To JPMC In Exchange For Satisfaction Of Claims.

1. Trust Preferred Securities Holders Did Not "Assume The Risk" That Their Value Would Be The JPMC "Pay-Off" For The Creditor Settlement.

33. The TPS Consortium's Summary Judgment Memorandum discusses at length the nature of the financing arrangement struck pre-petition by the Debtors and the holders of the Trust Preferred Securities. The pleading is supplemented by affidavits executed by noted Professors Jack Williams and Hal Scott. These affidavits further evidence the fact that Trust Preferred Securities investors did not "assume the risk" that the $4 billion in Trust Preferred Securities value would be "taken" and delivered to JPMC, at an instantaneous closing a moment before bankruptcy, leaving investors with nothing. Their deal was that the Trust Preferred

---

53 See Coffey Aff., Ex. J, November 9, 2010 Hearing Transcript at 24: 9 – 25:4.

54 See In re Monus, Bankruptcy No. 92-41883, 1995 WL 469694, at *9 (Bankr. N.D. Ohio, May 18, 1995) (examiner's report relying on unsworn testimony and unidentified witnesses not admissible); Miller v. Ernst & Young, 892 S.W.2d 387, 388-89 (Mo. App. E.D.1995) ("bankruptcy examiner's report" filed in support of a motion for summary judgment had no probative value because it was not an affidavit, but only "unadulterated hearsay"); State v. Morris, 656 S.E. 2d 359, 369 (S.C. 2008) (bankruptcy examiner's report inadmissible hearsay).

Securities would be exchanged for WMI preferred stock of likely commensurate value, for the purpose of supporting the operations of WMI and/or WMB; and not for the purpose of making a "sweetheart" deal between the FDIC and JPMC even sweeter. Those documents are incorporated herein by reference.

34. The Plan's "Settlement" adds further insult to the injury intended to be inflicted. The Settlement purports to "complete" the Conditional Exchange, asking this Court to bless JPMC's seizure of $4 billion in value. In exchange, the "Settlement" graciously enables the Debtors to keep value they otherwise own (tax refunds, disputed accounts, *etc.*). Ironically, but not surprisingly, the Settlement enables creditors to receive a full pay-off, leaving essentially nothing for equity holders who did not have a voice at the negotiating table.[55] The "Settlement" stinks of backroom dealing: JPMC takes the Trust Preferred Securities and significant additional value, the FDIC takes hundreds of millions of dollars for its constituents (creditors of WMB who do not have legitimate claims to any value from the Debtors' estates) – leaving just enough in the Debtors' estate to buy the acquiescence of WMI's creditors.

35. This is inconsistent with Bankruptcy Code Sections 1129(a)(3) and 1129(b)(1). The Plan should not be confirmed.

---

[55] On November 16, 2010, Tricadia Capital Management, LLC filed an emergency motion seeking the imposition of trading restrictions with respect to certain classes of Claims against WMI. [D.I. 5935]. The basis of that request is a concern that the Debtors, in pursuing their current Plan, are endangering and/or failing to protect significant tax attributes, which, if realized, could result in significantly more value for constituents of WMI's estates (as opposed to JPMC, the FDIC or others of the Settlement Parties already receiving a full recovery on account of their claims). The TPS Consortium believes further consideration should be given to the concerns raised by Tricadia, as well as to the more basic issue of what other pots of significant estate value may be forfeited through the Debtors' efforts to deliver value and releases to insiders and favored parties at any costs.

2. <u>The Settlement Is Built On Fraud.</u>

36. As discussed at length in the Summary Judgment Memorandum, the cornerstone of the Settlement is the attempted consummation of the series of transactions (including the Conditional Exchange and the immediate diversion of the Trust Preferred Securities to JPMC), that would bring to fruition a massive fraud set in motion with the first issuance of the Trust Preferred Securities, while at the same time affirmatively concealing WMI's purported intent to shunt the Trust Preferred Securities immediately away from WMI (in direct contradiction to disclosures made to investors). The Debtors' request for the Court to lend its dignity to such a scheme is inappropriate and should not be granted.

3. The Settlement Facilitates An Outlandish, Unjustified Windfall <u>For JPMC On The Backs Of Class 19.</u>

37. Through the Settlement, JPMC seeks to further increase the windfall it has enjoyed since its predatory acquisition of WMB in September 2008. Having already been forced to "write up" the transaction by billions of dollars (even before receipt of the Trust Preferred Securities), JPMC now seeks to push away from table – but only after grabbing another $4 billion in value in the form of Trust Preferred Securities and billions more in portions of the Tax Refunds to which it had no legitimate entitlement. The primary basis for this additional windfall? – JPMC's relinquishment of its baseless claim against the $4 billion in Disputed Deposits.

D. The Settlement Is The Product Of Collusive <u>Bargaining In Violation Of Applicable Fiduciary Duties.</u>

38. As Plan proponents, the Debtors carry the heavy burdens of proof and persuasion that the Plan was proposed in good faith and does not confound applicable law, in accordance

with Bankruptcy Code Section 1129(a)(3).[56] The evidence presented must enable the Court to make sufficiently detailed findings so that a reviewing court knows the proper factors were considered and an informed judgment made.[57] Bankruptcy Code Section 1129(a)(3)'s "good faith" standard requires that the Plan be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code."[58] In evaluating the totality of the circumstances and the fundamental fairness of the Plan, the Court must consider both bankruptcy law, and non-bankruptcy law (including the Debtors' fiduciary duties).[59] Courts must consider the interests of equity holders in appropriate circumstances, such as where there is a likelihood of recovery for equity.[60]

---

56 See 11 U.S.C. § 1129(a)(3); see also Fin. Sec. Assur. Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'Ship), 116 F.3d 790, 802 (5th Cir. 1997); Everett v. Perez (In re Perez), 30 F.3d 1209, 1214 n. 5 (9th Cir. 1994) ("[t]he burden of proposing a plan that satisfies the requirements of the Code always falls on the party proposing it, but it falls particularly heavily on the debtor-in-possession or trustee since they stand in a fiduciary relationship to the estate's creditors.").

57 See 10 Collier on Bankruptcy ¶ 9019.02 at 9019-5 (15th ed. rev. 2007); Kopp, et al. v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.), 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997).

58 In re Coram Healthcare Corp., 271 B.R. 228, 234 (Bankr. D. Del. 2001).

59 See In re Zenith Electronics Corp., 241 B.R. 92, 108 (Bankr. D. Del. 1999) (in analyzing good faith under section 1129(a)(3), the court concluded that the section was 'broad' and incorporated non-bankruptcy law such as Delaware corporate law, as well as principles of bankruptcy law."); In re Cara Corp., 1992 Bankr. LEXIS 672, at *2 (Bankr. E.D. Pa. Apr. 27, 1992) (pursuit of approval of plan in violation of fiduciary duties mandated denial of confirmation); Coram Healthcare, 271 B.R. at 228 (court denied confirmation of plan due to CEO's connections to senior lender amounting to a violation of fiduciary duties).

60 See Will v. Northwestern Univ. (In re Nutraquest, Inc.), 434 F.3d 639, 644 (3d Cir. 2006); Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996).

39. As the Plan implements,[61] and is expressly conditioned on the approval of, the Settlement,[62] the Plan must also meet the standards for approval under Bankruptcy Code Sections 363, 365, 1123(a)(5) and 1123(b)(3) of the Bankruptcy Code and Rule 9019 of the Bankruptcy Rules.[63] And, a bankruptcy settlement (whether under Bankruptcy Rule 9019 or Bankruptcy Code Section 1123) is subject to heightened scrutiny when it involves benefits to insiders (such as the provision of releases to insiders, officers and directors).[64] Finally, settlements that violate applicable law or public policy cannot be approved.[65]

40. Due to conflicts described herein, the Debtors cannot carry these "good faith" burdens and, therefore, the Plan cannot be confirmed. When counsel for the debtor is operating

---

[61] See Plan, Article XXXIII at 67.

[62] See Plan at 77.

[63] See In re Spansion, No. 09-10690, 2009 WL 1531788 at *4 (Bankr. D. Del. June 2, 2009) ("[t]he Debtors carry the burden of persuading the court that the compromise falls within the reasonable range of litigation possibilities.") (citations omitted); In re Exide Tech., 303 B.R. 48, 67-68 (Bankr. D. Del. 2003).

[64] See, e.g., In re Exaeris, Inc., 380 B.R. 741, 747 (Bankr. D. Del. 2008) ("[A] court can and should consider whether an insider is receiving a release when evaluating the "good faith" criterion" in approving a settlement); see also In re Drexel Burnham Lambert Group, Inc., 134 B.R. 493, 498 (Bankr. S.D.N.Y. 1991) ("We subjected the agreement to closer scrutiny because it was negotiated with an insider, and hold that closer scrutiny of insider agreements should be added to the cook book list of factors that Courts use to determine whether a settlement is fair and reasonable.").

[65] See In re Rosenberg, 2010 Bankr. LEXIS 371, at *11 (Bankr. E.D.N.Y. Feb. 5, 2010) (holding that "[i]t is well established that settlements are void against public policy . . . if they directly contravene a state or federal statute or policy" (internal citations omitted)); In re Big Rivers Elec. Corp., 233 B.R. 726, 736 (Bankr. W.D. Ky. 1998) (concluding that an agreement between a debtor and one of its creditors was void and unenforceable because a "[n]o shop" provision included therein interfered with the debtor's fiduciary obligation to maximize the estate's value and thus violated public policy), aff'd, 233 B.R. 739, 751-53 (W.D. Ky. 1998); see also Atlantic Co. v. Broughton, 146 F.2d 480, 482 (5th Cir. 1944) ("Though settlements in accord and satisfaction are favored in law, they may not be sanctioned and enforced when they contravene and tend to nullify the letter and spirit of an Act of Congress.").

under significant conflicts of interest when negotiating a compromise, the Court must evaluate carefully that conflict in determining whether the resulting settlement is "fair and equitable."[66] Even when such conflict has been disclosed, but not objected to, it may lead a court to reject a settlement negotiated by conflicted counsel.[67]

41. Here, the Settlement would result in delivery of significant value to non-Debtor Settlement Parties and favored insiders in the form of estate property and/or releases of claims (both estate claims and claims of non-Debtor third-parties). As troubling as this manufactured value distribution might be, it is even more troubling given the significant conflicts of interest under which counsel for estate fiduciaries were operating when the Settlement was negotiated.

42. As set forth above, the Settlement negotiations and Plan process were plagued by textbook conflicts of interest, including, but not limited to:

- WG&M (Debtors' counsel) negotiated directly with its current client, JPMC, resulting in the Settlement whereby JPMC would receive billions of dollars of estate value and valuable releases.[68]
- Quinn Emanuel (conflicts' counsel) had no involvement in the negotiation of the Settlement and Plan (thus, doing nothing to remedy WG&M's conflicts), and itself was operating under a conflict with respect to one or more of the Settlement Parties in any event.
- JPMC and WG&M worked together in a non-adversarial manner to leverage other parties-in-interest to agree to the Settlement.
- WG&M's continued failure to defend vigorously against JPMC's claimed ownership of the Trust Preferred Securities (despite the significant value at stake).

---

66 See In re Project Orange Assocs., LLC, 431 B.R. 363, 374 n.4 (Bankr. S.D.N.Y. 2010).

67 Id. (withdrawing approval of settlement because counsel negotiated settlement with existing client).

68 Akin Gump, counsel to the Creditors' Committee, also currently represents JPMC and other parties slated to receive significant value and/or releases under the Settlement and Plan.

- The Settlement and Plan purport to grant broad releases of estate and third party claims to, among others, parties involved in the structuring, issuance and sale of the Trust Preferred Securities (which suffered from significant defects and fraudulent non-disclosure of material matters), who do not appear to have even been part of the negotiation process, but are clients of WG&M.

- The Settlement with Class 19 holders was constructed to solely satisfy, in full (or more), the claims and interests of those who negotiated the Settlement, with all residual value shunted away to non-Debtor parties, including JPMC.

43. Thus, the Settlement was negotiated, on the estate's behalf, by counsel operating under disabling conflicts with respect to the other Settlement Parties (notably, JPMC) and others proposed to receive significant value and/or broad releases of liability under the Settlement and Plan.[69] As a result, the Settlement, and, therefore, the Plan fails to meet the applicable standards for approval.[70]

44. In Project Orange, a highly instructive case, Judge Glenn recently found that proposed debtor's counsel, who concurrently represented the debtor's largest unsecured creditor in unrelated matters, was conflicted from acting as debtor's counsel because the resolution of disputes between the debtor and creditor was central and essential to a successful

69 As discussed herein, the Debtors finally did retain conflicts counsel to address, at least facially, their lead counsel's conflicts of interest with respect to JPMC. But, from document discovery, it is apparent that the primary terms of the Settlement had already been negotiated by that time and conflicts counsel thereafter played a minimal, if any, role in the Settlement and Plan negotiating process.

70 Accord, Project Orange, 431 B.R. at 374 n.4. A conflict of interest issue may be raised at any time. See, e.g., Tenzer Greenblatt, LLP v. Silverman (In re Angelika Films 57th, Inc.), 246 B.R. 176, 180 (Bankr. S.D.N.Y. 2000) ("disinterestedness . . . is so crucial to the proper functioning of the bankruptcy system that a court may raise it and dispose of it whenever its sanctity is questioned); see also In re Plaza Hotel Corp., 111 B.R. 882, 891 (Bankr. E.D. Cal. 1990) ("the court's continuing supervisory role during the case includes the ability to revisit such issues as conflicts whenever appropriate" and "the court [must] be prepared to revoke its approval if circumstances so dictate").

reorganization.[71] Similarly, the myriad conflicts detailed herein precludes approval of the Settlement and Plan.

45. As described above, the Plan process was exemplified by disconcerting conflicts of interest and insider dealing. Such a process is the anathema of good faith. In fact, the good faith requirement was succinctly stated by this Court in Coram Healthcare: "The good faith standard requires that the plan be 'proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.' . . In evaluating the totality of circumstances surrounding a plan a court has 'considerable judicial discretion' in finding good faith, with the most important feature being an inquiry into the "fundamental fairness" of the plan."[72] It is impossible to conclude that this Plan represents or would result in fundamental fairness. The rampant conflicts of interest and insider dealing have produced a Plan so at odds with the objectives and purposes of the Bankruptcy Code that confirmation must be denied.

46. Plainly, a conflict precluding WG&M from representing the Debtors in litigating the JPMorgan Actions similarly precluded WG&M from representing the Debtors in negotiating a resolution of such litigation against JPMC, WG&M's other client.[73] But, throughout the

---

71 See Project Orange 431 B.R. at 369-375 (finding that "even if [conflicts counsel] performed all work related to [creditor] in this case, the fig leaf of conflicts counsel does not convince the Court that retention of DLA Piper as general bankruptcy counsel is appropriate.") (emphasis excluded).

72 See Coram Healthcare, 271 B.R. at 234.

73 See Project Orange, 431 B.R. at 375 (Bankr. S.D.N.Y. 2010) (finding that debtor's counsel was conflicted in litigation against a creditor and was similarly conflicted in negotiating a settlement against that same creditor); In re Amdura Corp., 121 B.R. 862, 867 (Bankr. D. Colo. 1990) (finding that debtors' counsel was conflicted in prosecuting claims as well as negotiating in the bankruptcy proceeding against a creditor that was counsel's current client in unrelated matters); In re Am. Printers & Lithographers, Inc.,

negotiations of the Settlement, WG&M and JPMC both had the interests of JPMC in mind and therefore were incapable of engaging in arm's length negotiations.[74] From the outset of the negotiations ultimately leading to the Settlement, a goal of WG&M was to protect JPMC.[75] [REDACTED][76] This goal of protecting JPMC directly contravened WG&M's mandate to maximize value for, and vindicate the rights of, stakeholders of WMI.

47. Indeed, JPMC and the Debtors worked together in a non-adversarial manner to leverage the other parties-in-interest to agree to the Settlement. Prior to the filing of a draft of the proposed original settlement in March 2010, JPMC and the Debtors frequently reported amongst themselves on the progress of negotiations with other parties.[77] Such communications continued after the proposed original settlement was filed, and reflect a noticeable absence of

---

148 B.R. 862, 865-866 (Bankr. N.D. Ill. 1992) (finding that conflict prevented debtor's counsel from representing debtor in negotiations with secured creditor).

74 See Berry v. School Dist. of Benton Harbor, 184 F.R.D. 93, 105 (W.D. Mich. 1998) ("Two types of collusive conduct have been identified by the courts. The first is where counsel or a named representative has benefited at the expense of the class as a whole. The second is where the parties have failed to approach the settlement as true adversaries."); cf. Cohen v. Nat'l Union Fire Ins. Co. of Pittsburg, PA (In re County Seat Stores, Inc.), 280 B.R. 319, 327 (Bankr. S.D.N.Y. 2002) ("a truly adverse party does not (or should not) invoke fears of collusion.").

75 See Coffey Aff., Ex. M, Transcript of Hearing dated May 5, 2010, p. 57:11-20 (Brian Rosen of WG&M characterizing the Equity Committee's opposition to the proposed global settlement as an attempt to "milk" more money from JPMC).

76 See Coffey Aff., Ex. N, [REDACTED].

77 See Coffey Aff., Ex. O [REDACTED].

any active role by Quinn Emmanuel in directing such negotiations and any adversity between WG&M and JPMC.[78] And, JPMC and the Debtors have continued to devise ways to pressure the other case parties to accede to the WG&M/JPMC settlement scheme.[79]

48. Given the significant conflicts involved in the negotiation of the Settlement, neither that agreement, nor the Plan pursuant to which it would be foisted upon estate constituents, should be approved.

II. The Plan Should Not Be Confirmed Because It <u>Incorporates Releases In Violation Of Applicable Law</u>.

49. Bankruptcy Code Section 1129(a)(1) provides that a court may confirm a plan only if "the plan complies with the applicable provisions of [title 11]."[80] This would include Bankruptcy Code Sections 524(e) (providing that a debtor's discharge "does not affect the

---

78 <u>See</u> Coffey Aff., Ex. P, [redacted].

79 <u>See</u> Coffey Aff., Ex. Q [redacted].

80 <u>See</u> 11 U.S.C. § 1129(a)(1).

liability of any other entity . . .")[81] and 365(c)(2) (prohibiting assumption of contracts for the issuance of securities of a debtor).

50. The Plan cannot be confirmed because it provides impermissible blanket releases for numerous non-Debtor third parties in contravention of the Bankruptcy Code and applicable case law. The non-Debtor releases operate as an impermissible discharge of claims against the non-Debtor Released Parties and should not be approved.[82] Moreover, by foreclosing pursuit the claims against third-parties, the Debtors would give up, potentially, hundreds of million of dollars in value that could otherwise be allocated to estate constituents.

---

81 See 11 U.S.C. § 524(e); First Fid. Bank v. McAteer, 985 F.2d 114, 118 (3d Cir. 1993).

82 The Plan provides that each of the following parties is a "Released Party:" each of the WMI Entities, WMB, each of the Debtors' estates, the Reorganized Debtors, the Creditors' Committee and each of its members in their capacity as members of the Creditors' Committee, the Trustees, the Liquidating Trust, the Liquidating Trustee, the JPMC Entities, the Settlement Note Holders, the FDIC Receiver and FDIC Corporate, and ***each of the foregoing parties' respective Related Persons***. Plan § 1.160 at 20.

The Plan provides that each of the following parties is a "Related Person:" with respect to any Entity, such predecessors, successors and assigns (whether by operation of law or otherwise) and their respective present and former Affiliates and each of their respective current and former members, partners, equity holders, officers, directors, employees, managers, shareholders, partners, financial advisors, attorneys, accountants, investment bankers, consultants, agents and professionals (including without limitation, any and all professionals retained by WMI or the Creditors' Committee in the Chapter 11 Cases either (a) pursuant to an order of the Bankruptcy Court other than ordinary course professionals or (b) as set forth on Schedule 3.1(a) to the Global Settlement Agreement), or other representatives, nominees or investment managers, each acting in such capacity, and any Entity claiming by or through any of them (including their respective officers, directors, managers, shareholders, partners, employees, members and professionals), but excluding the "Excluded Parties," as such term is defined in the Global Settlement Agreement. Plan § 1.158 at 19.

A. The Impermissible "Forced" Third Party Releases.

51. Sections 43.2 and 43.6 of the Plan provide that each holder of a Claim or Equity Interest shall release the Released Parties from all of the Released Claims held by non-Debtors (including members of the TPS Consortium).[83]

52. Moreover, holders of Claims and Interests that have been released pursuant to the Plan (even non-consensually) are permanently enjoined under the Plan from taking any action in connection with such released Claims or Equity Interests.[84] Finally, the Debtors seek to bolster the third-party releases pursuant to the Plan's Bar Order at Section 43.9,[85] and Supplemental Injunction at Section 43.12.[86]

53. The effectiveness of the Settlement and the Plan is conditioned upon, among other events, this Court's entry of a confirmation Order enjoining all claims against the Settlement Parties and Related Persons.[87] The Debtors state that the Settlement and Plan are conditioned upon the third-party releases, and, as such, the third-party releases are essential for the successful reorganization of the Debtors. And, the Debtors threaten to seek at the Confirmation Hearing to bind and enforce the Releases against any parties who opt out, and to deliver to all such parties the distributions they otherwise would be entitled to receive under the Plan.[88] Thus, the Plan's

---

83 See Plan § 43.2(b) at 84; see also Plan § 43.6 at 86-87; Settlement § 2.24 at 48.

84 See Plan § 43.3 at 84-85; see also Plan § 43.7 at 87-88; Settlement § 2.7 at 33-34.

85 See Plan § 43.9 at 88.

86 See Plan § 43.12 at 89-90.

87 See Settlement § 3.7 at 57-58.

88 See *Disclosure Statement for the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 for the United States Bankruptcy Code*, dated October 6, 2010 [Docket No. 5549] at 15-16 (the "Disclosure Statement").

release and permanent injunction provisions are non-consensual, and overreaching. Yet, the Debtors persist and state that the releases of non-Debtors in the Plan are necessary to the success of their reorganization.[89] Such self-serving statements cannot be used to circumvent applicable law.

54. As this Court correctly held in Coram Healthcare, the Bankruptcy Code does not provide bankruptcy courts with the jurisdiction or power to compel the release of claims by non-Debtors against other non-Debtors.[90] And, any settlement or plan purporting to require such releases cannot be approved.[91] Indeed, any Settlement requiring such releases would be contrary

---

89 See Plan Section 43.4 which provides that "[e]ach of the discharge, injunction, and release provisions provided in this Article XLIII is an integral part of the Plan and is essential to its implementation. Each of the Released Parties shall have the right to independently seek the enforcement of the discharge, injunction and release provisions set forth in this Article XLIII." Plan at 85; see also Plan at 31; Settlement § 2.24 at 48.

90 See Coram Healthcare, 315 B.R. at 335-37.

91 See id.; In re Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999) (plan could not be confirmed where it required non-consensual release of third party claims); In re Digital Impact, Inc., 223 B.R. 1, 10 (Bankr. N.D. Okla. 1998) (plan may not be confirmed if any party who would be bound by the release did not vote in favor of the plan); In re Arrowmill Dev. Corp., 211 B.R. 497, 506 (Bankr. D. N.J. 1997) ("Keeping in mind the Third Circuit's analysis that [Bankruptcy Code Section] 524(e) specifically limits the scope of the discharge, and that the Bankruptcy Code does not contemplate a discharge of nondebtors, this court holds that plans of reorganization may not contain provisions which discharge nondebtors."); In re West Coast Video Enters., Inc., 174 B.R. 906, 911 (Bankr. E.D. Pa. 1994) ("each creditor bound by the terms of the release must individually affirm same. . ."); In re Elsinore Shore Assocs., 91 B.R. 238, 252 (Bankr. D.N.J. 1988) (plan provisions deeming non-debtor proponents and their principals to be discharged and released from any and all claims prohibited by the Bankruptcy Code and relevant case law); In re Monroe Well Serv., Inc., 80 B.R. 324, 334 (Bankr. E.D. Pa. 1987) (debtors could not obtain confirmation of a plan which would attempt, over their objection, to discharge the obligations of non-debtors).

to applicable law, and, as a result, incapable of approval.[92] As such, as long as the Settlement and Plan purport to require the release of direct third party claims against JPMC, the Trust Preferred Securities-related releasees, and other non-Debtor parties, they remain incapable of approval.

55. This Court's Coram and Zenith decisions are completely consistent with the Third Circuit's decisions dealing with third-party releases.[93] In this regard, Genesis Health is also instructive.[94] The Chapter 11 plan proposed in Genesis Health provided that as part of the proposed plan, the senior secured lenders would receive a non-consensual third-party release. The Genesis Health Court ruled that the requested release was not permissible.[95] In arriving at that conclusion, this Court distinguished the Genesis Health case from the A.H. Robins case discussed in Continental Airlines, where "the entire reorganization of a massive and complex Chapter 11 case 'hinged' on the approval of certain releases."[96] Confirmation of a Chapter 11

---

92 See Yockey v. Horn, 880 F.2d 945, 950 (7th Cir. 1989); Jackson Purchase Rural Electric Cooperative Assoc. v. Local Union 816, 646 F.2d 264, 267 (6th Cir. 1981); Murtagh v. University Computing Co., 490 F.2d 810, 816 (5th Cir. 1974); Atlantic Co. v. Broughton, 146 F.2d 480, 482 (5th Cir. 1944) ("Though settlements in accord and satisfaction are favored in law, they may not be sanctioned and enforced when they contravene and tend to nullify the letter and spirit of an Act of Congress.").

93 See In re PWS Holding Corp., 228 F.3d 224, 247 (3d Cir. 2000) (allowing exculpations only to the extent required under Bankruptcy Code Section 1103(c)); In re Continental Airlines, 203 F.3d 203, 212-13 (3d Cir. 2000) (criticizing lower court for not examining its jurisdiction to grant the releases at issue and, in dicta, suggesting third party releases might be available only in some extraordinary circumstances not then before the court).

94 266 B.R. 591 (Bankr. D. Del. 2001).

95 Id. at 607-09.

96 Id. at 607-08; see also In re Exide Tech., 303 B.R 48, 74-75 (Bankr. D. Del. 2003) (following Genesis Health and declining to approve non-consensual third party releases).

plan for these Debtors in no way "hinges" on this Court's approval of non-consensual releases of non-Debtors.

56. The "truly unusual circumstances" that could possibly validate third-party releases are plainly not present here. Such "unique" circumstances would exist only in mass tort, or securities and consumer fraud cases where the non-debtor is co-liable with the debtor on a multitude of claims and, in exchange for a release, the non-debtor parties have created or contributed significant amounts to a fund from which the claims will be satisfied.[97]

57. Under even the most flexible formulations in other Circuits regarding the limited situations in which third party releases may be compelled (and, given the Third Circuit's decisions in Continental and PWS, it is unclear whether such cases have any precedential value in this case), it is not sufficient for the Debtors to recite that the non-Debtor Released Parties contribute an alleged benefit to the Debtors' Estates under the Settlement and Plan.[98] Rather, those parties must have provided substantial consideration, whether financial or otherwise.[99]

---

97 See Continental, 203 F.3d at 212-13 ("A central focus of these . . . reorganizations was the global settlement of massive liabilities against the debtors and co-liable parties. Substantial financial contributions from non-debtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities and made these reorganizations feasible.").

98 See Deutsch Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.) 416 F.3d 136, 143 (2d Cir. 2005) ("a non-debtor release is not adequately supported by consideration simply because the non-debtor contributed something to the reorganization and the enjoined creditor took something out.").

99 See JPMorgan Chase Bank, N.A. v. Charter Communications Operating, LLC (In re Charter Communications), 419 B.R. 221, 258-60 (Bankr. S.D.N.Y. 2009) (finding unusual circumstances that warranted a non-debtor release where the released party, who was the chairman of the board and controlling shareholder, was the linchpin to the debtor's ability to, among other things, (i) reinstate its senior debt as required by the plan, (ii) gain billions of dollars in future tax savings, and (iii) raise substantial capital in a rights offering, and such released party was susceptible to numerous lawsuits for which he could seek indemnification from the debtors).

Even if the non-debtor released parties expended significant time and resources negotiating various aspects of the Settlement and Plan, such efforts are made in every Chapter 11 case and are insufficient to warrant a release of claims against them.[100] Further, the fact that certain parties-in-interest may have made concessions is of no consequence as every settlement in a Chapter 11 case is the result of give and take.[101] As such, there is nothing significant about the "consideration" provided by the non-debtor released parties, and therefore there is no justification for granting the Non-Debtor Releases under the Settlement and Plan.

58. Moreover, if creditors and equity holders vote to reject the Plan, they cannot be deemed to have consented to the non-debtor releases and thus, should not be bound by the releases under the Settlement and Plan. Indeed, no court has found consent where a creditor has voted to reject a plan.[102] Here, the Debtors nonetheless propose to bind all creditors and equity holders to the Non-Debtor releases, even if they vote to reject the Plan. By proposing Plan Section 43.6, the Debtors seek to depart from this Court's well-established precedent in Zenith,

---

[100] See In re Adelphia Communications Corp., 368 B.R. 140, 268-69 (Bankr. S.D.N.Y. 2007) ("I don't doubt that in this case the Settling Parties engage, as the Plan Proponents argue, in 'tireless efforts' to come together to work out a global compromise aimed at resolving these cases. But that's not unique. It's something creditors have to do in every chapter 11 case, at the risk of destroying themselves (or their recoveries in the case) with their own quests for incremental recoveries . . . It would set the law on its head if parties could get around it by making a third party release a *sine qua non* of their deal, to establish a foundation for an argument that the injunction is essential to the reorganization, or even 'an important part' of the reorganization.").

[101] Id. (Stating that "the 'give ups' that parties made were of rights to recover that were subject to fair debate. In the case of creditors, even those that are Settling Parties, they were merely striking the kinds of deals with respect to their shares of the pie that chapter 11 contemplates.").

[102] See Zenith, 241 B.R. at 111 (non-derivative, third-party claims may be released only with the "affirmative agreement of the creditor affected"); see also In re DBSD N. Am., Inc., 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009) (finding that those who voted against the debtor's plan had not consented to the third party release provisions).

concluding it is not appropriate to force a third party release if such claimants did not affirmatively consent to release their claims. Absent "unique" circumstances, the Non-Debtor releases cannot be approved without the consent of the parties affected by those releases.

59. Even if the Court were to depart from its well-founded decisions in Coram and Zenith that bankruptcy courts lack jurisdiction to compel third party releases (which the Court should not do), it is clear that the proposed releases in theses cases fail to satisfy even the most liberal standards. In the Spansion case (a case clearly distinguishable from this case), Judge Carey found that there are three hallmarks of a permissible non-consensual release, including: (i) fairness; (ii) necessity to the reorganization; and (iii) specific factual findings supporting items one and two.[103] Accordingly, in order to meet the burden of establishing that the Debtors' proposed third party releases are fair and necessary to the reorganization, the Debtors must establish by a preponderance of the evidence that, one, there is material, specific and identifiable consideration flowing from the releasees to the releasors, either directly or through the Plan, that is a fair exchange for the releases being granted, and two, it is unlikely the Debtors will be able to confirm a Plan, not necessarily the specific Plan before the Court, absent such releases.[104]

60. Under any standard (even the most liberal ones), the third-party releases in this case are clearly inappropriate and cannot be approved.

---

[103] See Spansion, 426 B.R. at 144; Debtors v. Walton (In re United Artists Theatre Co.), 315 F.3d 217, 227 (3d Cir. 2003) ("The 'hallmarks of permissible non-consensual releases' are 'fairness, necessity to the reorganization, and specific factual findings to support these conclusions' . . . Added to these requirements is that the releases 'were given in exchange for fair consideration.") (quoting Continental, 203 F.3d at 214).

[104] See Saxby's Coffee, 2010 Bankr. LEXIS 3094 at *18 (courts may approve third party releases only when the reorganization is widely supported by the creditor constituency that includes the parties being restrained, accords significant benefits to that constituency, and the court is satisfied that the creditors being restrained also are being treated fairly); see also Continental, 203 F.3d at 214; Spansion, 426 B.R. at 144; Genesis, 266 B.R. 607-608; Exide, 303 B.R. at 75.

B. The Inappropriate Releases Of Estate Claims.

61. Section 43.5 of the Plan provides for a broad release of the Released Parties by the Debtors, of all Claims and Causes of Actions that the Debtors may have against any Released Party or any of their Related Persons.[105] The Settlement also contemplates releases by the Debtors and their estates of claims against certain third parties, including JPMC, and covenants not to sue the Settlement Parties.[106]

62. At least five factors are relevant to determine whether such a release is appropriate: (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources; (2) a substantial contribution to the plan by the non-debtor; (3) the necessity of the release to the reorganization; (4) the overwhelming acceptance of the plan and release by creditors and interest holders; and (5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan.[107]

63. Here, the Plan fails to meet each of the elements of the test with respect to the claims the estates would propose to release. The Released Parties have not substantially contributed to the Plan. For instance, by arrogating itself to additional estate value to which it is not entitled, JPMC's participation in the Plan process has resulted in a net decrease in value distributable to the Debtors' stakeholders. Further, the Trust Preferred Securities-related

---

105 See Plan § 43.5 at 85-86; see also Plan § 43.2 at 83-84.

106 See Settlement §§ 3.2, 3.3, 3.4, 3.5, 3.6; 5.3(c).

107 See Zenith, 241 B.R. at 110 (citing In re Master Mortgage Inv. Fund, Inc., 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)); see also In re S. Canaan Cellular Investments, Inc., 427 B.R. 44, 72 (Bankr. E.D. Pa. 2010).

releasees do not appear to have had any part in the formulation of the Plan or otherwise have contributed to the Plan process.

64. JPMC has taken the position that it will not go forward under the Plan unless it receives a full release of all claims against it. As discussed herein, the proposed releases of JPMC are not only prohibited by law in circumstances applicable here, but are wholly unwarranted under the facts of these cases. Conversely, the Debtors' estates would be benefited tremendously through a reorganization on terms different than those contemplated under the Plan and Global Settlement Agreement (i.e., a reorganization under which the Debtors' estates retained substantially all of their value for distribution to its stakeholders rather than third-parties without claims or interests). Moreover, the Trust Preferred Securities-related releasees have not participated in the Plan process, and do not have the ability to even vote under the Plan. As such, the releases proposed to be granted to these parties cannot be characterized as essential to the Debtors' reorganization.

65. Voting results have yet to be disclosed. But, the TPS Consortium anticipates that Classes 19 through 22 (those disadvantaged by the proposed releases of claims against JPMC and other third parties) will reject the Plan.[108]

66. There is no identity of interest between the non-Debtor Released Parties and the Debtors (particularly with respect to JPMC, which, pursuant to the Purchase and Assumption Agreement, specifically excluded from "purchased assets" any and all claims against WMI). Moreover, with respect to the other Trust Preferred Securities-related releasees (i.e., those involved in the structuring, issuance and sale of the Trust Preferred Securities), indemnification rights (if any) would lie, in the first instance, against the actual issuers of the Trust Preferred

[108] Indeed, Classes 21 and 22 are slated to receive nothing under the plan, and, therefore, are presumed to reject the Plan. See 11 U.S.C. § 1126(g).

Securities rather than WMI. As such, pursuit of claims against these parties would be unlikely to deplete the Debtors' resources.

67. Finally, with respect to the final factor, not all creditors or interest holders will be paid in full under the Plan. In fact, to the contrary, JPMC and the Debtors have manufactured a distribution scheme that ensures interest holders will receive minimal or no distributions by shunting significant value out of the Debtors' estates and delivering it to JPMC and other Settlement Parties.

68. By any scorecard the Plan falls woefully short of meeting even a "flexible test" for approval of third party releases. As such, as long as the Settlement and Plan purport to require the release of direct third party claims against JPMC, the Trust Preferred Securities-related releasees, and other non-Debtor parties, they remain incapable of approval.

C. The Impermissible Releases Cannot Be Cleansed Under Rule 9019.

69. The Debtors fare no better in seeking to cloak the third-party releases as part of a Rule 9019 settlement. As a fundamental matter, a Rule 9019 settlement presupposes there is something to settle in the first instance.[109] It is axiomatic that parties that have not consented to the releases cannot be deemed to be parties to the purported "settlement." In any event, the Debtors cannot end-run the stringent requirements for approval of such releases under the guise of a settlement proclaimed as a lynchpin of the Plan.[110] The third-party release and injunction

---

[109] See In re Nationwide Sports Distributions, Inc., 227 B.R. 455, 460 (Bankr. E.D. Pa. 1998) ("The standard for the application of 9019(a)...presupposes the compromise of a bankruptcy fiduciary of claims belonging to or raised against specific individuals or entities.').

[110] See Adelphia, 368 B.R. at 269 ("It would set the law on its head if parties could get around [the legal standards] by making a third party release a *sine qua non* of their deal, to establish a foundation for an argument that the injunction is essential to the reorganization...").

provisions at the forefront of the Settlement and Plan are unwarranted and do not pass muster under this Court's authority. Therefore, the Plan cannot be confirmed so long as these provisions are included therein. Confirmation of the Plan should be denied.

70. Given the potential value of such claims and the Debtors' failure to adequately investigate and pursue such claims, these releases are not justified. Moreover, these releases are inappropriate under applicable law.

71. Similar to the releases of third party claims against the non-Debtor Released Parties, the proposed releases of estate claims against third parties (including JPMC) fail to meet the applicable standard set forth by this Court in Coram Healthcare: "[w]here a compromise is part of a plan of reorganization, the court has the duty 'to determine that a proposed compromise forming part of a reorganization plan is fair and equitable.'"[111]

72. Here, for the same reasons as described above with respect to releases of third-parties, the releases of estate claims, in particular those against JPMC and the Trust Preferred Securities-related releases, under the Settlement and Plan are inappropriate and should not be approved. Therefore, the Plan should not be confirmed.

III. The Plan Should Not Be Confirmed Because It Rests On Assumption Of Contracts Not Capable Of Assumption Under Applicable Law.

A. The Attempted Assumption Of The Exchange Agreements Violates Bankruptcy Code Sections 365(c)(2) And 1129(a)(1).

73. Bankruptcy Code Section 1129(a)(1) imposes the obligation that the Plan comport with the applicable provisions of the Bankruptcy Code, including Bankruptcy Code Section 365(c)(2). Bankruptcy Code Section 365(c)(2) prohibits a trustee or debtor in possession from assuming or assigning an executory contract to "make a loan, or extend other debt financing or

---

111 See Coram Healthcare, 315 B.R. at 334 (citing TMT Trailer Ferry, 390 U.S. 414, 424).

financial accommodations, to or for the benefit of the debtor, *or to issue a security of the debtor*."[112]

74. The Bankruptcy Code defines "security" to include stock, treasury stock, transferable shares and other claims or interests commonly known as securities.[113] While the term "issue" is not defined in the Bankruptcy Code, courts considering its meaning within the context of Bankruptcy Code Section 365(c)(2) have held that the term bears the meaning ascribed to it "[i]n its ordinary commercial sense . . . ."[114] As such, agreements to "issue" securities include agreements "to emit, put into circulation, or dispose of securities already authorized and prepared for disposition," to a specified party.[115] The court in Teligent also surmised that "issue" (in the context of Bankruptcy Code Section 365(c)(2)) refers to "newly created rather than existing stock."[116] Finally, the Teligent court noted that, "while others may transfer a corporation's security, only the corporation appears capable of 'issuing' it."[117]

---

112 See 11 U.S.C. § 365(c)(2) (emphasis added).

113 See 11 U.S.C. § 101(49).

114 See In re Ardent, Inc., 275 B.R. 122, 124 (Bankr. D. D.C. 2001) (quoting In re Teligent, Inc., 268 B.R. 723, 733 (Bankr. S.D.N.Y. 2001)).

115 See In re Teligent, Inc., 268 B.R. at 733.

116 Id. at 733, 734 (finding the section inapplicable to an agreement where issuance of securities was an insignificant component of the contract at issue, but stating that Bankruptcy Code Section 365(c)(2)'s "proscription only applies to the issuance of 'new' securities."). While Teligent determined that Bankruptcy Code Section 365(c)(2) did not apply with respect to a contract where issuance of securities of a debtor was incidental to the agreement's purpose, it is clearly distinguishable from this case where a primary purpose of the Exchange Agreements was the issuance of the WMI Preferred Stock to effectuate the Conditional Exchange.

117 Id. (finding relevant that stock in question could have been purchased on the open market and transferred to the non-debtor party to the subject contract).

75. When, as here, "the [Bankruptcy Code's] language is plain, 'the sole function of the courts . . . is to enforce it according to its terms.'"[118] Where a contract is incapable of assumption because of Bankruptcy Code Section 365(c)(2)'s proscriptions, that contract must be deemed rejected.[119] The rejection of an executory contract by a debtor constitutes a breach of that agreement as of immediately prior to the commencement of the chapter 11 case.[120] That breach relieves the non-debtor party to the rejected contract of any further performance obligations to the debtor.[121]

76. As a result of WMI's failure to issue the WMI Preferred Stock as required under the Exchange Agreements, the Conditional Exchange was never effectuated before the Petition Date. Thus, as a matter of law, WMI cannot now effectuate the Conditional Exchange because WMI is prohibited, under Bankruptcy Code Section 365(c)(2), from assuming the Exchange Agreements pursuant to which the WMI Preferred Stock would be issued and the Conditional Exchange effected. Yet, notwithstanding Bankruptcy Code Section 365(c)(2)'s clear prohibition,

---

118 United States v. Ron Pair Enters., 489 U.S. 235, 241, (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

119 Accord In re UAL Corp., 293 B.R. 183, 187 (Bankr. N.D. Ill. 2003) (had the contract in question been subject to Bankruptcy Code Section 365(c)(2), the result would have been automatic rejection); In re Ardent, Inc., 275 B.R. 122, 126 (Bankr. D. D.C. 2001) (ordering contract to issue securities to be, and to be deemed, rejected after concluding Bankruptcy Code Section 365(c)(2) applied to prohibit assumption).

120 See 11 U.S.C. § 365(g).

121 A party is excused from performance under a contract when the other party to the contract has substantially or materially breached the contract. See Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 186 (2d. Cir. N.Y. 2007) (citing Hadden v. Consol. Edison Co. of N.Y., 34 N.Y.2d 88, 96, 312 N.E.2d 445, 356 N.Y.S.2d 249 (1974) (a party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach.).

this is exactly what the Debtors propose to accomplish under the Plan. The Debtors seek to assume and assign to JPMC:

> "[a]ny and all contracts, as and to the extent necessary or required to transfer to JPMC or its designee any and all right, title and interest the WMI Entities may have or may ever have had in the Trust Preferred Securities free and clear of all claims, liens, interests and encumbrances, as contemplated in Section 2.3 of the Global Settlement Agreement, as and to the extent such contracts are or may be executory contracts, including, without limitation, (a) offering circulars, (b) trust agreements, (c) exchange agreements, (d) side letters, and/or (e) any additional ancillary and subsidiary documents; provided, however, that the foregoing is without prejudice to the rights of the Debtors and JPMC with respect to the Trust Preferred Securities and all related contracts in the event the Global Settlement Agreement is not approve and/or terminates."[122]

77. As detailed in the TPS Action, as a result of, inter alia, WMI's failure to issue the WMI Preferred Stock as required under the Exchange Agreements, the Conditional Exchange was never effectuated before the Petition Date. As such, the Exchange Agreements simply remain, if anything, executory contracts within the purview of Bankruptcy Code Section 365(c)(2).[123]

78. Here, the Exchange Agreements clearly contemplate the issuance of securities within the meaning of Bankruptcy Code Section 365(c)(2) (indeed, WMI's issuance of the WMI Preferred Stock was to have set in motion the series of events, including the creation of the Depositary Shares, that would allow any "exchange" to occur). The WMI Preferred Stock to be issued by WMI to the applicable Depositaries to issue the Depositary Shares in exchange for the

---

122 See *Plan Supplement in Support of Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated October 29, 2010, Exhibit D, [Docket No. 5724] at 7-8.

123 See In re Exide Techs., 378 B.R. 762, 765 (Bankr. D. Del. 2007) ("In determining whether a contract is executory and, hence, subject to rejection, courts in this Circuit utilize the Countryman standard, which provides that a contract is executory when 'the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.'").

Trust Preferred Securities falls squarely within the Bankruptcy Code's definition of securities. Moreover, neither the WMI Preferred Stock nor the Depositary Shares in question have been issued (and, as such, could not be purchased on the open market and transferred to holders of Trust Preferred Securities, a factor given importance in the Teligent decision). WMI's prospective performance under the Exchange Agreements to effectuate the Conditional Exchange would thus clearly entail WMI "emitting," "putting into circulation" or disposing of "new" or "newly issued" securities. As such, to the extent the issuance of the WMI Preferred Stock (and/or the Depositary Shares) and/or the Conditional Exchange were not accomplished prior to the Petition Date, ***Bankruptcy Code Section 365(c)(2) constitutes an absolute bar against these transactions being effectuated now***.

79. The Plan's provision to assume the Exchange Agreements directly violates the plain terms of Bankruptcy Code Section 365(c)(2), and thus, the Plan cannot be confirmed pursuant to Bankruptcy Code Section 1129(a)(1). WMI failed to effectuate the Conditional Exchange pursuant to the terms of the governing agreements and/or applicable law, and is now legally prohibited from "completing" the Conditional Exchange because of WMI's voluntary bankruptcy and the interplay of Bankruptcy Code Section 365(c)(2).

80. Although inadmissible hearsay, the Examiner, in his report, suggested that Bankruptcy Code Section 365(c)(2)'s proscriptions might be sidestepped by reading into the statute a "new money" requirement. Indeed, some courts have done so.[124] Putting aside whether cases such as Iridium run afoul of the Supreme Court's consistent reminder to refrain from

---

[124] See, e.g., The Chase Manhattan Bank v. Iridium African Corp., No. Civ. A. 00-564JJF, 2004 WL 323178, at *4 (D. Del. Feb. 13, 2004) (purpose is to ensure that third-party is not required to extend new credit to the Debtor).

straying from the straight-forward language of the statute,[125] the exchange of securities, if allowed under the Exchange Agreements, absolutely would result in members of the TPS Consortium holders being compelled to advance "new value" (in the form of the Trust Preferred Securities) to the Debtors. If the "exchange" were to be effected, the result would be that the investors would transfer their priority rights in the underlying collateral pool, a right having a value of $4 billion. This release of priority claims to the collateral is the equivalent of an equity infusion in the debtor.[126]

81. Similarly, the Examiner's conclusory suggestion that the Defendants can overcome Bankruptcy Code Section 365(c)(2)'s bar on the assumption and enforcement of the Exchange Agreements through issuance, under the Plan, of the WMI Preferred Stock and/or Depositary Shares is incorrect.[127] First, it is the Exchange Agreements that dictate the terms on which a Conditional Exchange can occur, if at all. Even if the Debtors were authorized to issue securities under their Plan, without the Exchange Agreements (which cannot be assumed and/or enforced), the Conditional Exchange cannot occur.[128] Further, whether WMI can issue securities pursuant to a Plan is irrelevant to the Court's inquiry into WMI's ability to now assume and/or perform under the Exchange Agreements – the documents governing the occurrence and non-occurrence of a Conditional Exchange.

---

125 See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000) (where the meaning of the Code is clear its operation is unimpeded by contrary prior practice).

126 See Seitz v. Yudin (In re Cavalier Industries, Inc.), No. 99-31737DWS, 2002 WL 975868, at *4 (Bankr. E.D. Pa. Apr. 16, 2002).

127 See Examiner's Report, at 172.

128 See Chicago Bd. Of Trade v. Johnson, 264 U.S. 1 (1924) (state law limitations on a debtor's contract rights will be recognized in bankruptcy, meaning that bankruptcy does not expand the terms and/or limitations of a debtor's prepetition contract rights).

B. The Inability To Assume The Exchange Agreements Renders The Plan Unconfirmable Under Bankruptcy Code Section 1129(a)(11).

82. Bankruptcy Code Section 1129(a)(11), generally referred to as the "feasibility" test, requires that "[c]onfirmation of the plan [be] not likely to be followed by liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[129]

83. Courts in the Third Circuit have held that the feasibility standard "requires courts to determine whether the Plan is feasible and has a reasonable likelihood of success."[130] The key element of feasibility is whether there exists a reasonable probability the provisions of the plan can be performed, and the purpose of the feasibility test is to protect against visionary or speculative plans.[131]

84. If the Debtors cannot assume the Exchange Agreements as a result to Bankruptcy Code Section 365(c)(2)'s proscription against assumption of contracts to issue securities of a debtor (and as demonstrated above they cannot), and, therefore, cannot arrogate themselves to the $4 billion represented by the Trust Preferred Securities – the Plan will not go forward (as all parties to the "settlement" (JPMC included) have made clear that, without the deliver of the Trust Preferred Securities to JPMC, there is no Settlement). As such, giving effect to Bankruptcy Code Section 365(c)(2), the Plan is not feasible for purposes of Bankruptcy Code Section 1129(a)(11).

---

[129] 11 U.S.C. § 1129(a)(11).

[130] See In re Aleris Int'l, Inc., 2010 Bankr. LEXIS 2997, at *84 (Bankr. D. Del. May 3, 2010); In re G-1 Holdings, Inc., 420 B.R. 216, 267 (D.N.J. 2009) (citations omitted).

[131] See In re Congoleum Corp., 362 B.R. 198, 203 (Bankr. D.N.J. 2007); Aleris, 2010 Bankr. LEXIS at * 86.

IV. The Plan Should Not Be Confirmed Because It Inappropriately Pays Postpetition Interest Claims At The "Contract" Rate.

A. To The Extent Postpetition Interest Is Payable, The Appropriate Rate Of Interest Is The Federal Judgment Rate.

85. The Plan provides that before members of Class 19 receive any recovery whatsoever, unsecured creditors receiving value from the Debtors under the Plan will also receive, in accordance with the distribution provisions of the Plan, payment on their "Postpetition Interest Claims."[132]

86. In direct contravention of case law demonstrating that the appropriate rate of so-called "solvent debtor" interest is the Federal Judgment Rate of interest – and without any explanation in the Disclosure Statement as to any circumstances of these cases justifying a higher rate of interest – the Plan defines those "Postpetition Interest Claims" as interest:

> *...calculated at the contract rate set forth in any agreement related to such Allowed Claim or, if no such rate or contract exists, at the federal judgment rate...*[133]

87. The general rule is that unsecured creditors are not entitled to recover postpetition interest on their allowed claims.[134] Indeed, "the *presumption* is that unsecured creditors receive no interest at all."[135]

---

132 See Plan Art. VI-XXIV.

133 Plan § 1.146 (emphasis added).

134 See 11 U.S.C. § 502(b)(2) (excluding "unmatured interest" from a creditor's allowed claim); United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 372-73 (1988) (generally, creditors cannot recover interest that accrues on their claims during the pendency of a bankruptcy); In re Dow Corning Corp., 237 B.R. 380 (Bankr. E.D. Mich. 1999) ("Dow I").

135 See In re W.R. Grace & Co., No. 01-1139-JKF, 2009 Bankr. LEXIS 1280, at *7 (Bankr. D. Del. May 19, 2009).

88. There are limited exceptions to this general rule. First, a plan must provide for postpetition interest where it purports to render a claim unimpaired.[136] Second, to the extent a claim is oversecured pursuant to Bankruptcy Code Section 506(b), postpetition interest will accrue.[137] Finally, if the debtor is solvent, before interest holders can retain any value under a plan, postpetition interest will be payable to unsecured creditors "at the legal rate" to the extent necessary pursuant to Bankruptcy Code Section 1129(a)(7).[138]

89. Here, each of the classes receiving value from the Debtors under the Plan that are also afforded Postpetition Interest Claims are characterized as "impaired."[139] Accordingly, the unimpairment exception to the general prohibition on postpetition interest does not apply here. Moreover, none of those claims is an oversecured claim.[140] As such, the only potentially applicable exception to the general prohibition against postpetition interest is the so-called "solvent debtor" exception of Bankruptcy Code Section 1129(a)(7), which, in essence, provides that creditors are entitled to postpetition interest "at the legal rate" before interest holders can retain any value under a plan.[141]

---

[136] See In re The Seasons Apartments LP, 215 B.R. 953 (Bankr. W.D. La. 1997).

[137] See United States Trust Co. v. LTV Steel Co. (In re Chateaugay Corp.), 150 B.R. 529, 539 (Bankr. S.D.N.Y. 1993).

[138] See Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231, 1234 (9th Cir. 2002).

[139] See Disclosure Statement at II(B)(5).

[140] Id.

[141] As noted herein, even if there were some basis to award postpetition interest pursuant to the "fair and equitable" requirements of Bankruptcy Code Section 1129(b), payment of the FJR would nevertheless be appropriate because the case law finding such a basis are inapposite here, where the Plan is in effect a liquidating plan.

90. However, as set forth herein, the statutory language and case law make clear that that exception does not provide a basis for payment of contract rates of interest. Rather, where a debtor is solvent, the applicable rate of interest is the FJR, not individual creditor contract rates. Moreover, even if the cramdown principles of Bankruptcy Code Section 1129(b) were applicable to the treatment of unsecured creditors here, the Debtors have failed to demonstrate that payment of the higher contract rates would be fair and equitable. In fact, the collusive nature of the Settlement underlying the Plan, coupled with the conduct of unsecured creditors in opposing the efforts of the TPS Consortium and Equity Committee, demonstrate that even if the case law applying Bankruptcy Code Section 1129(b) were applicable here, the appropriate rate of postpetition interest, if any, is the FJR.

91. Accordingly, because the Plan provides unsecured creditors with contract rates of postpetition interest in direct contravention of case law demonstrating that the FJR is the appropriate rate of "solvent debtor" interest, and the circumstances demonstrate that payment of any interest at a rate other than the FJR would not be fair and equitable, the Plan impermissibly provides unsecured creditors with value in excess of their claims.[142] As such, the Plan may not be confirmed as a matter of law.

1. The "Legal Rate" of Interest Under Sections 1129(a)(7) and 726 of the Bankruptcy Code is the Federal Judgment Rate.

92. As a condition of confirmation, Bankruptcy Code Section 1129(a)(7)(A)(ii) requires that impaired creditors (unless they accept alternative treatment) receive value that is not

---

[142] See 11 U.S.C. § 1129(a)(7); see also Genesis Health, 266 B.R. at 612 ("A corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims."); In re MCorp Fin. Inc., 137 B.R. 219, 235 (Bankr. S.D. Tex. 1992) ("[A] dissenting class should be assured that no senior class receives more than 100 percent of the amount of its claims."); see also 7 Collier on Bankruptcy ¶ 1129.04[4][a][i] (15th ed. rev. 2004) ("'[F]air and equitable' can be seen to have two key components: the absolute priority rule; and the rule that no creditor be paid more than it is owed.").

less than what they would receive in a Chapter 7 liquidation. Distribution under Chapter 7 is governed by Bankruptcy Code Section 726. Pursuant to subsection (a)(5) of that provision, once all administrative claims, general unsecured claims, tardily-filed general unsecured claims, and fines and/or penalties are paid, there is a fifth-priority payment of "interest at the *legal rate* from the date of the filing of the petition." (Emphasis added.) Courts consistently interpret the reference in Bankruptcy Code Section 726(a)(5) to interest "at the legal rate" to mean that creditors are entitled to postpetition interest at the FJR.[143]

93. The application of the FJR in the payment by a solvent debtor of postpetition interest is supported by several factors, including: (1) principles of statutory interpretation; (2) uniformity within federal law; (3) equitable treatment of creditors; and (4) judicial efficiency.[144] First, principles of statutory interpretation compel the conclusion that the phrase "interest at the legal rate" in Bankruptcy Code Section 726(a)(5) means interest at the FJR.[145] Congress specifically chose the language "interest at the legal rate," by inserting it into the statute to replace the originally proposed language "interest on claims allowed."[146] Thus, in drafting Bankruptcy Code Section 726(a)(5), Congress specified what type and amount of interest could be awarded with the specific phrasing "at the legal rate," rather than making a general reference to a creditor's entitlement to interest from a solvent debtor.[147]

---

143 See, e.g., In re Cardelucci, 285 F.3d at 1234; Dow I, 237 B.R. at 412; In re Melenyzer, 143 B.R. 829, 834 (Bankr. W.D. Tex. 1992).

144 See Cardelucci, 285 F.3d at 1236; Dow I, 237 B.R. at 400-10.

145 See Cardelucci, 285 F.3d at 1234-36; In re Country Manor of Kenton, 254 B.R. 179, 182 (N.D. Ohio 2000); Dow I, 237 B.R. at 400-11.

146 See Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, § 4-405(a)(8), (1st Sess. 1973).

147 See Cardelucci, 285 F.3d at 1234-35; Dow I, 237 B.R. at 403.

94. Moreover, courts have recognized that the use of "the" instead of the indefinite "a" or "an," in Bankruptcy Code Section 726(a)(5), indicates that Congress meant for a single, uniform source to be used to calculate postpetition interest.[148] In addition, the use of the phrase "legal rate" indicates that Congress intended the single source to be statutory, in that the commonly understood meaning of "at the legal rate" at the time the Bankruptcy Code was enacted was a rate fixed by statute.[149]

95. Significantly, had Congress intended to provide interest under Bankruptcy Code Section 726(a)(5) at state judgment rates or contractual rates of interest, it certainly knew how to specify such an arrangement.[150] Moreover, application of the FJR to postpetition interest claims promotes uniformity within federal law.[151] On the filing of the bankruptcy petition, creditors must pursue their rights to the claim in federal court; thus, entitlement to a claim and interest on that claim is a matter of federal law that requires a uniform outcome.[152] Further, because

---

148 See Cardelucci, 285 F.3d at 1234; Dow I, 237 B.R. at 404; Melenyzer, 143 B.R. at 831 n.2.

149 See Cardelucci, 285 F.3d at 1234-35; see also Dow I, 237 B.R. at 404-05; Melenyzer, 143 B.R. at 831 n.2; Country Manor, 254 B.R. at 182; 3 Norton Bankruptcy Law & Practice 2d § 73:7 n.55 (1997 & Supp. 2000) (stating "interest is set at the [FJR] as of the petition date"); 6 Collier on Bankruptcy ¶726.02(5) (15th ed. rev. 1997) ("The reference in the statute to the 'legal rate' suggests that Congress envisioned a single rate, probably the federal statutory rate for interest on judgments.").

150 See Country Manor, 254 B.R. at 182 (questioning why, "if both §§ 506(b) and 726(a)(5) were intended to refer to the agreed upon interest rate . . . is the term 'agreement' specified in [section 506(b)] and not [section 726(a)(5)]").

151 See Cardelucci, 285 F.3d at 1235; Dow I, 237 B.R. at 399 n.14; see also Beguelin v Volcano Vision Inc. (In re Beguelin), 220 B.R. 94, 100-01 (citing Godsey, 134 B.R. 865, 867 (Bankr. M.D. Tenn. 1991).

152 See Bursch v. Beardsley & Piper, Div. of Pettibone Corp., 971 F.2d 108, 114 (8th Cir. 1992) ("[O]nce a bankruptcy petition is filed, federal law, not state law, determines a creditor's rights.").

Bankruptcy Code Section 502(a) provides that an allowed claim is equivalent to a federal money judgment, the FJR is the appropriate rate for postpetition interest on claims pursuant to Bankruptcy Code Section 726(a)(5).[153]

96. Thus, the legislative history and case law interpreting Bankruptcy Code Section 726(a)(5) make it plain that the FJR is the appropriate rate of interest to be paid on claims in a solvent debtor case. Here, given that, as set forth below, there is no basis to award interest other than that permissible pursuant to the "solvent debtor" exception, the Plan's provision of interest at contract rates is in direct contravention of relevant case law and legislative history. There is, in short, no basis for the Plan's proposed payment of postpetition interest to unsecured creditors at the contract rate. Rather, to the extent that unsecured creditors are entitled to any postpetition interest, that entitlement arises solely by virtue of the "best interests" test of 1129(a)(7) and 726(a)(5) - which requires *only* payment of interest at the applicable FJR as of the petition date.[154] Payment of anything beyond the FJR would result in an impermissible diversion of value to unsecured creditors in excess of their claims - value that otherwise would flow to Class 19.

---

153 See Country Manor, 254 B.R. at 183; Cardelucci, 285 F.3d at 1235; Melenyzer, 143 B.R. at 833; see also Wasserman v. Cambridge, 151 B.R. 4, 6 (D. Mass. 1993); Dow I, 237 B.R. at 406.

154 See, e.g., Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Assoc. (In re Premier Entm't Biloxi LLC), No. 06- 50975, 2010 Bankr. LEXIS 2994, at * 167-74 (Bankr. S.D. Miss. Sept. 3, 2010) (finding that the FJR provides the appropriate measure of interest in a solvent debtor case).

2. Even if the Cramdown Principles of Section 1129(b) Were Applicable, The Circumstances of These Cases Do Not Warrant Payment of Interest To Unsecured Creditors Beyond the FJR.

97. Even if Bankruptcy Code Section 1129(b) could justify the payment of contract interest in certain circumstances, the circumstances of *these* cases – a self-serving Settlement by conflicted parties resulting in an overreaching Plan that, among other things, improperly determines ownership of the Trust Preferred Securities – undermine any notion that postpetition interest at the contract rate is appropriate. First, the Debtors bear the burden of demonstrating that the Plan is fair and equitable.[155] Here, in light of the circumstances giving rise to the Plan, and in balancing the equities between the unsecured creditors that are party to the Settlement and the non-settling members of Class 19, the Debtors simply cannot meet their burden to demonstrate that contract rate postpetition interest is appropriate.

98. In Coram Healthcare, this Court held that in a cram down, "the specific facts of each case will determine what rate of [postpetition] interest is fair and equitable."[156] Notably, the "actions of [creditors] are relevant" in making that determination.[157] Accordingly, in Coram Healthcare, this Court was not compelled to award interest beyond the FJR because, among other

---

155 See, e.g., United States v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654-55 (B.A.P. 9th Cir. 1994); 266 Washington Associates v. Citibank, N.A. (In re Washington Associates), 147 B.R. 827, 830 (E.D.N.Y. 1992) (burden of proof on confirmation "rests squarely on the plan's proponent").

156 315 B.R. at 347.

157 Id. at 346 (finding the FJR of interest fair and equitable because conduct of certain creditors ultimately resulted in delay in cases); see also In re Dow Corning Corp., 244 B.R. 678, 695 (Bankr. E.D. Mich. 1999) ("[t]he touchstone of each decision on allowance of interest in bankruptcy . . . and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor") (citations omitted).

things, the noteholders generally had "acted as a group in this case in advancing their interests and opposing the Equity Committee."[158]

99. First, it must be noted that here, unlike in Coram Heathcare or Dow, in which the courts considered the general equitable principles of Chapter 11 in addition to the plain language of Bankruptcy Code Sections 1129(a)(7) and 726(a)(5) (so-called "solvent debtor" interest), the Plan here is essentially a liquidating plan. There is no reorganized debtor that will continue to operate as a going concern and that, accordingly, would have received the "benefit" of the Chapter 11 process without affording creditors of their contractual rights.[159] Accordingly, the "fairness" concerns implicit in a court's analysis of a reorganizing plan under Chapter 11 have little application here, where there is no concern that an entity's restructuring is occurring at the expense of creditors with contractual rights to payment. The only "concern" here is the potential right to so-called solvent-debtor interest under Bankruptcy Code Section 1129(a)(7) and 726(a)(5) – interest that, as set forth herein, plainly would accrue (if at all) at the FJR.

100. Moreover, even if the fairness concerns implicit in Coram Healthcare were applicable here, the circumstances of these cases demonstrate that if postpetition interest is to be afforded to unsecured creditors at all, payment of interest at the FJR is more than fair and equitable. Stated differently, the payment of postpetition interest beyond the FJR would not be fair and equitable to the members of the TPS Consortium, because it would result in an effective windfall on the part of the very creditors who orchestrated the discriminatory Settlement and Plan. Moreover, the Debtors have not demonstrated that the unsecured creditors have suffered any harm or delay that would justify postpetition interest beyond interest at the FJR. And, in

---

158 315 B.R. at 347.

159 See, e.g., In re Dow, 244 B.R. at 695, *rev'd on other grounds* 456 F.3d. 668 (6th Cir. 2006) (drawing distinction between FJR interest to be paid as a "floor" by a solvent debtor pursuant to § 1129(a)(7), and the "fairness" concerns implicit in § 1129(b)).

fact, as in Coram Healthcare, the unsecured creditors in these cases, lead by institutional investors holding various classes of unsecured claims, have largely acted as a group in advancing their own interests and opposing both the TPS Consortium and the Equity Committee.

101. Given that it appears that the Settlement was the result of a collusive arrangement amongst the parties thereto, whereby those parties' claims and interests would be satisfied nearly in full (with all residual value shunted from the Debtors' estates for the benefit of non-Debtor parties), it would in fact be wholly inequitable to afford unsecured creditors the benefit of that collusive bargain. Rather, the circumstances here demonstrate that the appropriate rate of postpetition interest – if any – is the FJR. Accordingly, the Plan should not be confirmed because the circumstances do not justify payment of postpetition interest to unsecured creditors at any rate other than the FJR.

102. Critically important is the fact that, if interest were to be paid at the FJR, rather than the various contract rates, it would free up approximately $700 million capable of distribution to other case consituents – more than enough to get Classes 19 and 20 a meaningful recovery though the value "waterfall."

RESERVATION OF RIGHTS

103. The TPS Consortium reserves the right to amend, modify or supplement this Objection prior to the conclusion of the hearing on confirmation of the Plan and to review and object to any amended or revised version of the Settlement or Plan. The TPS Consortium also reserves the right to object to any documents contained in the Plan Supplement and any amendments, modifications or supplements thereto prior to the conclusion of the hearing on confirmation of the Plan. The TPS Consortium reserves the right to assert additional objections at the hearing on confirmation of the Plan. Moreover, any failure to respond herein to a specific

statement or omission contained in the Settlement, Plan, or Plan Supplement shall not be deemed acceptance thereof.

CONCLUSION

104. For the reasons set forth above, this Court should enter an order sustaining the Objection and denying confirmation of the Plan, and granting such other and further relief as it deems just and proper.

Dated: Wilmington, Delaware
November 19, 2010

Respectfully submitted,

CAMPBELL & LEVINE LLC

/s/ Bernard G. Conaway

Marla Rosoff Eskin, Esq. (DE 2989)
Bernard G. Conaway, Esq. (DE 2856)
Kathleen Campbell Davis, Esq. (DE 4229)
800 North King Street, Suite 300
Wilmington, DE 19809
(302) 426-1900
(302) 426-9947 (fax)

– and –

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Sigmund Wissner-Gross, Esq.
Seven Times Square
New York, NY 10036
(212) 209-4800
(212) 209-4801 (fax)

– and –

Jeremy B. Coffey, Esq.
Daniel J. Brown, Esq.
One Financial Center
Boston, MA 02111

Counsel for the TPS Consortium

EXHIBIT A

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT B

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT C

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT D

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT E

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT F

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT G

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT H

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT I

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT J

1
2 UNITED STATES BANKRUPTCY COURT
3 DISTRICT OF DELAWARE
4 Case No. 08-12229 (MFW)
5 Adv. Case No. 10-51387 (MFW)
6 Adv. Case No. 10-51297 (MFW)
7 -x
8 In the Matter of:
9
10 WASHINGTON MUTUAL, INC., et al.,
11
12 Debtors.
13 -x
14
15 -x
16 BLACKHORSE CAPITAL LP, et al.,
17 Plaintiffs,
18 -against-
19 JPMORGAN CHASE BANK, N.A., et al.,
20 Defendants.
21 -x
22
23
24
25

1

2 -x

3 MICHAEL WILLINGHAM and ESOPUS CREEK

4 VALUE LP,

5 Plaintiffs,

6 -against-

7 WASHINGTON MUTUAL, INC.,

8 Defendants.

9 -x

10

11 United States Bankruptcy Court

12 824 North Market Street

13 Wilmington, Delaware

14

15 November 9, 2010

16 10:30 AM

17

18 B E F O R E:

19 HON. MARY F. WALRATH

20 U.S. BANKRUPTCY JUDGE

21

22 ECR OPERATOR: BRANDON MCCARTHY

23

24

25

1 for the 300 odd pages of Mr. Hochberg's report, he dedicates
2 three and a half pages to our adversary proceeding. That's the
3 analytical portion of the lawsuit. And I think that makes
4 sense, because we had a scheduled trial date. We spoke with
5 Mr. Hochberg, and we told him that, you know, it didn't seem to
6 make an awful lot of sense for you to opining about the
7 ultimate issues, if Your Honor's going to be hearing them in
8 six weeks.
9 And, so, in light of that, three and a half pages of
10 "analysis" doesn't really surprise us. The analysis, though,
11 which I think is important, covers only two out of nine counts
12 in the complaint, and cites about three cases. So, it's not
13 much analysis, at least as far as our perspective is concerned.
14 He does, at the conclusion, draw certain conclusions that he
15 expresses, I would characterize them as flippant, in light of
16 the fact that he doesn't have analysis to back it up, and it's
17 somewhat unfavorable. And that's the part where I thought Your
18 Honor may want to know what we have to think about all that.
19 THE COURT: I'm going to hear it on the 1st, I
20 suspect.
21 MR. STARK: You are, but it bears upon what we do
22 between now and then. That report doesn't move us very much.
23 We believe firmly in our case. We're actually very much
24 looking forward to the trial on the 1st. And we don't
25 generally believe that, as much respect as we have for Mr.

1 Hochberg in the role of an examiner, in a case as grandiose and
2 as interesting as this one is, it doesn't move us. We have a
3 lot of fight in us, and Your Honor I think knows us well enough
4 to presume that.
5 There are some partial summary judgment motions that
6 are on file. We'll respond to them in due course. We'll
7 respond to them appropriately in due course. That's makes it a
8 little bit unclear as to what December 1st is. Is it going to
9 be argument? These are complicated issues. The -- again, the
10 complaint was ninety odd pages, had lots of counts in it, and I
11 fear that someone reading the examiner's three and a half pages
12 of "analysis", would draw the conclusion it's relatively
13 simple. It is far from simple. And three case cites isn't
14 going to get you there. So -- and I believe the summary
15 judgment motions themselves are dozens and dozens of pages long
16 each.
17 So, we have a lot to do on the 1st. And I don't know
18 whether or not the 1st is just simply argument. These are
19 partial summary judgment motions. And so we have a procedural
20 point that I will discuss in due course, outside of the
21 courtroom, with the debtors and JPMorgan, about how we are
22 going to proceed. And hopefully, we'll do that in time for the
23 November 23rd hearing, and we can give Your Honor a consensus
24 view -- a mature view of about how we ought to handle the
25 December 1st trial. Whether it's just going to be argument, or

1

2 C E R T I F I C A T I O N

3

4 I, Karen Schiffmiller, certify that the foregoing transcript is

5 a true and accurate record of the proceedings.

6 Karen Schiffmiller

Digitally signed by Karen Schiffmiller
DN: cn=Karen Schiffmiller, o, ou, email=digital1@veritext.com, c=US
Date: 2010.11.10 16:39:00 -05'00'

7 ______________________________

8 KAREN SCHIFFMILLER

9

10 Veritext

11 200 Old Country Road

12 Suite 580

13 Mineola, NY 11501

14

15 Date: November 9, 2010

16

17

18

19

20

21

22

23

24

25

EXHIBIT K

1
2 UNITED STATES BANKRUPTCY COURT
3 DISTRICT OF DELAWARE
4 Case No. 08-12229 (MFW)
5 Adv. Case No. 10-50731 (MFW)
6 Adv. Case No. 10-50911 (MFW)
7 Adv. Case No. 10-51387 (MFW)
8 -x
9 In the Matter of:
10 WASHINGTON MUTUAL, INC., et al.,
11 Debtors.
12 -x
13 OFFICIAL COMMITTEE OF
14 EQUITY SECURITY HOLDERS,
15 Plaintiff,
16 -against-
17 WASHINGTON MUTUAL, INC.,
18 Defendant.
19 -x
20 BROADBILL INVESTMENT CORP.,
21 Plaintiff,
22 -against-
23 WASHINGTON MUTUAL, INC.,
24 Defendant.
25 -x

1 -x
2 BLACKHORSE CAPITAL LP, et al.,
3 Plaintiffs,
4 -against-
5 JPMORGAN CHASE BANK, N.A., et al.,
6 Defendants.
7 -x
8 U.S. Bankruptcy Court
9 824 North Market Street
10 Wilmington, Delaware
11
12 September 7, 2010
13 3:00 PM
14
15 B E F O R E:
16 HON. MARY F. WALRATH
17 U.S. BANKRUPTCY JUDGE
18
19 ECR OPERATOR: BRANDON MCCARTHY
20
21
22
23
24
25

1 use that at confirmation and it's improper because first, the
2 request to seek information that is privileged and work product
3 and has not been put at issue by the debtors and the motion
4 makes clear that TPS is trying to lay a foundation to later
5 argue that there's been a waiver which as I indicated, there
6 has not been.
7 We had a meet and confer which was not mentioned a
8 couple of weeks ago where we indicated that we did not intend
9 to put the advice of counsel at issue at confirmation and we
10 asked the TPS group to tell us the impact of that on the
11 request because we think it makes most of them moot and
12 irrelevant. They did not respond. Instead they just went and
13 filed the motion.
14 We also, Your Honor, offered to provide additional
15 responses to the request if TPS admitted -- I'm sorry,
16 stipulated that they would not argue that there had been a
17 waiver of privilege or work product protection and they did not
18 respond to that offer either. Instead they went and filed the
19 motion.
20 The first page of the motion itself, Your Honor, it
21 states that they claim that because the debtors had not yet
22 indicated whether they planned to put the advice of counsel at
23 issue, they had to serve the requests. But the requests don't
24 ask do you plan to put the advice of counsel at issue. The
25 requests are broad, vague, ambiguous, because they cover

1 multiple subjects and ask whether the debtors relied on, based
2 decisions on, advice of counsel and these are clearly not the
3 type of things that are appropriate for requests for admission
4 which are, in fact, the goal of request for admission is to
5 narrow the issue for trials and streamline the proof. This, in
6 fact, would do the opposite.
7 As an initial matter, Your Honor, the fairness of the
8 settlement at confirmation can be established objectively
9 without putting the advice of counsel at issue. And the
10 contents of communications between counsel and the debtors and
11 the private thoughts of counsel are irrelevant and unnecessary
12 for confirmation of the settlement. And settlements are
13 routinely approved without putting the advice of counsel at
14 issue as I am sure Your Honor is well aware.
15 As I indicated, Your Honor, the debtors do not plan to
16 put the advice of counsel at issue. I don't think the
17 qualifications that were pointed out are problematic in any
18 way. That is the current intention of the debtors and the case
19 law cited by TPS even supports that proposition. In the Home
20 Indemnity case, for instance, which they cited the Court said
21 "As long as the reasonableness of the settlement was defended
22 at trial on objective terms apart from the advice of counsel,
23 the attorney-client privilege would be protected."
24 And the Court there found there was sufficient
25 objective evidence of the reasonableness of the settlement to

1

2 C E R T I F I C A T I O N

3

4 I, Penina Wolicki, certify that the foregoing transcript is a

5 true and accurate record of the proceedings.

6 Penina Wolicki Digitally signed by Penina Wolicki
DN: cn=Penina Wolicki, c=US
Reason: I am the author of this document
Date: 2010.09.09 15:08:19 -04'00'

7 ______________________________

8 Penina Wolicki

9

10 Veritext

11 200 Old Country Road

12 Suite 580

13 Mineola, NY 11501

14

15 Date: September 8. 2010

16

17

18

19

20

21

22

23

24

25

EXHIBIT L

1
2 UNITED STATES BANKRUPTCY COURT
3 DISTRICT OF DELAWARE
4 Case No. 08-12229 (MFW)
5 -x
6 In the Matter of:
7
8 WASHINGTON MUTUAL, INC., et al.,
9
10 Debtors.
11
12 -x
13
14 United States Bankruptcy Court
15 824 North Market Street
16 Wilmington, Delaware
17
18 September 24, 2010
19 10:32 AM
20
21 B E F O R E:
22 HON. MARY F. WALRATH
23 U.S. BANKRUPTCY JUDGE
24
25 ECR OPERATOR: BRANDON MCCARTHY

1 waiver, I agree that the doctrine is narrowly construed in the
2 Third Circuit and only exists where a party has disclosed the
3 information and has attempted to use it as a sword in court. I
4 find no evidence that the debtors are attempting to use it as a
5 sword. They have not voluntarily disclosed it. In fact, under
6 the confidentiality agreement procedure, they've sought to have
7 it returned and I don't think there's any assertion that it was
8 produced other than inadvertently.
9 The Texas Group relies on general statements in the
10 plan of reorganization, disclosure statement and settlement
11 agreement that simply says the debtor relied on advice of
12 counsel. I don't think that's sufficient to waive the
13 privileges nor is it sufficient to show that the
14 attorney/client advice was relevant or goes to the heart of the
15 case. I think the first step is to show that the debtor sought
16 to use it as a sword. There's no evidence here that the debtor
17 has. I've said before to the extent the debtor has said it is
18 not going to rely on advice of counsel in proving its case on
19 confirmation. I'm holding the debtor to that. And it cannot
20 present any evidence to that effect. So, I will deny the
21 motion.
22 MR. ELSBERG: Your Honor, I have a basic form of order
23 denying the motion, if I may approach?
24 THE COURT: You may. All right. I'll enter that
25 order.

1

2 C E R T I F I C A T I O N

3

4 I, Ellen S. Kolman, certify that the foregoing transcript is a

5 true and accurate record of the proceedings.

6 Ellen

7 Kolman

Digitally signed by Ellen Kolman
DN: cn=Ellen Kolman, o, ou,
email=digital1@veritext.com,
c=US
Date: 2010.09.27 14:10:07 -04'00'

8

9 ELLEN S. KOLMAN

10

11 Veritext

12 200 Old Country Road

13 Suite 580

14 Mineola, NY 11501

15

16 Date: September 27, 2010

17

18

19

20

21

22

23

24

25

EXHIBIT M

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW)

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

May 5, 2010

10:30 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

1 to use equitable concepts like waiver or latches (ph.) to
2 defeat and express right to seek relief. That's the conclusion
3 that Judge Rey arrived at in a case called Vision Development
4 Group of Broward County, 2008 WL 2676827. It's, again, out of
5 the bankruptcy court, Southern District of Florida, where he
6 found that the concept of a late-stage waiver, meaning that
7 they filed it as we're proceeding towards confirmation is
8 inconsistent with the statutory language which permits filing
9 at any time prior to confirmation.
10 I think the equity committee's point about the timing
11 in the wake of the announcement of the settlement indicates
12 that they have timely sought a review of the claims and causes
13 of action. We can address the specific cases and how they're
14 in opposite, like Bradley's, clearly different then what we
15 have going on in these cases, if need be.
16 Second Your Honor, the cases concluding that the
17 classic valuation disputes are not appropriate subject matter
18 for investigation clearly distinguishable. Cases like
19 Spansion, Cleatech (ph.), Erickson. We're not talking about
20 enterprise valuation or asset value or allocation amongst
21 affiliated debtors or even a hard or intangible asset
22 valuation. This is a decidedly different situation. We're
23 talking about claims and causes of action that have not seen a
24 full expression yet and that's materially different then those
25 cases. We're concerned here with what happened and what

1
2 C E R T I F I C a T I O N
3
4 I, Lisa Bar-Leib, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.
6 Lisa Bar-Leib Digitally signed by Lisa Bar-Leib
DN: cn=Lisa Bar-Leib, c=US
Reason: I am the author of this document
7 Date: 2010.05.06 11:33:57 -04'00'
8 LISA BAR-LEIB (CET**D-486)
9 AAERT Electronic Certified Transcriber
10
11 Veritext
12 200 Old Country Road
13 Suite 580
14 Mineola, NY 11501
15
16 Date: May 5 2010
17
18
19
20
21
22
23
24
25

EXHIBIT N

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT O

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT P

*****CONFIDENTIAL – FILED UNDER SEAL *****

EXHIBIT Q

*****CONFIDENTIAL – FILED UNDER SEAL *****

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

AFFIDAVIT OF JEREMY B. COFFEY IN SUPPORT OF THE OBJECTION OF THE TPS CONSORTIUM TO CONFIRMATION OF THE SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

STATE OF MASSACHUSETTS	)	
	)	ss.
COUNTY OF SUFFOLK	)	

I, Jeremy B. Coffey, being duly sworn, deposes and states:

1. I am a partner with the law firm of Brown Rudnick LLP ("Brown Rudnick"), with offices at, among other locations, One Financial Center, Boston, Massachusetts 02111 and Seven Times Square, New York, New York 10036. Unless otherwise stated, I have personal knowledge of the facts stated herein.

2. Brown Rudnick represents 683 Capital Partners, LP, Black Horse Capital LP, Black Horse Capital Master Fund Ltd., Greywolf Capital Partners II, Greywolf Overseas Fund, Guggenheim Portfolio Company VII, LLC, HFR RVA Combined Master Trust, IAM Mini-Fund 14 Limited, LMA SPC for and on behalf of the MAP 89 Segregated Portfolio, Lonestar Partners LP, Mariner LDC, Nisswa Convertibles Master Fund Ltd., Nisswa Fixed Income Master Fund Ltd., Nisswa Master Fund Ltd., Paige Opportunity Partners LP, Paige Opportunity Partners Master Fund, Pandora Select Partners, LP, Pines Edge Value Investors Ltd, Riva Ridge Capital

Management LP, Riva Ridge Master Fund, Ltd., Scoggin Capital Management II LLC, Scoggin International Fund Ltd., Scoggin Worldwide Fund Ltd., Visium Global Fund, Ltd., VR Global Partners, L.P., Whitebox Asymmetric Partners LP, Whitebox Combined Partners, LP, Whitebox Convertible Arbitrage Partners, LP, Whitebox Hedged High Yield Partners, LP and Whitebox Special Opportunities LP, Series B, (collectively, the "TPS Consortium") in connection with the above-captioned Chapter 11 bankruptcy proceedings of the above-captioned Debtors, Bankr. Case No. 08-12229 (MFW), as well as certain members of the TPS Consortium in the adversary proceeding captioned as Bankr. Case No. 10-51387 (MFW), both pending before the Honorable Judge Mary F. Walrath of the United States Bankruptcy Court for the District of Delaware.

3. I submit this affidavit in support of the *Objection of the TPS Consortium to Confirmation of the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, filed contemporaneously herewith (the "Objection").[1]

4. Attached hereto as Exhibit A is a true and correct copy of relevant portions of the deposition transcript of Joseph F. Feil, dated November 16, 2010.

5. Attached hereto as Exhibit B is a true and correct copy of relevant portions of the deposition transcript of William C. Kosturos, dated November 16, 2010.

6. Attached hereto as Exhibit C are true and correct copies of the following documents produced to the TPS Consortium in discovery pursuant to subpoena: JPMCD_0000000036.00001-2 (emails between Brian Rosen and Travis Epes) [Non-Public];

---

1 Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Objection.

JPMCD_0000000069.00001-2 (May 13, 2010 emails between JPMC, the Debtors, Weil Gotshal and others) [Non-Public].

7. Attached hereto as <u>Exhibit D</u> are true and correct copies of the following documents produced to the TPS Consortium in discovery pursuant to subpoena: JPMCD_000000132.00001-3 (emails between the FDIC and JPMC) [Non-Public]; JPMCD_0000000121.00001 (May 12, 2010 email from William Kosturos to Donald McCree) [Non-Public]; JPMCD_00000001543.00001 (May 13, 2010 email from counsel for JPMC to counsel for the FDIC) [Non-Public]; JPMCD_000001868.00001 (May 21, 2010 email from Brian Rosen to Stacey Friedman) [Non-Public].

8. Attached hereto as <u>Exhibit E</u> is a true and correct copy of relevant portions of the deposition transcript of Travis Epes, dated November 12, 2010.

9. Attached hereto as <u>Exhibit F</u> are true and correct copies of the following documents produced to the TPS Consortium in discovery pursuant to subpoena: WGM_00009734 – WGM_00009754 (Weil Gotshal's term sheet dated March 5, 2009) [Non-Public]; JPMCD_00000001627.00001 (March 12, 2009 email between JPMorgan, the Debtors, Weil Gotshal and Sullivan & Cromwell) [Non-Public].

10. Attached hereto as <u>Exhibit G</u> are true and correct copies of the following documents produced to the TPS Consortium in discovery pursuant to subpoena: JPMCD_000001562.00001 (March 12, 2009 email from WG&M to S&C enclosing term sheet) [Non-Public]; JPMCD_0000000026.00001-5 (March 18, 2009 email from S&C to WG&M and others) [Non-Public]; JPMCD_00000001564.00001 (March 23, 2009 email enclosing term sheet) [Non-Public]; JPMCD_000001530.00001 (April 27, 2009 email from S&C to WG&M

enclosing term sheet) [Non-Public]; JPMCD_00000001569.00001 (October 25, 2009 email enclosing term sheet enclosing term sheet) [Non-Public]; JPMCD_00000001572.00001-3 (January 12, 2010 email enclosing term sheet) [Non-Public].

11. Attached hereto as Exhibit H are true and correct copies of the following documents produced to the TPS Consortium in discovery pursuant to subpoena: JPMCD_0000000184.00001 (February 19, 2010 email among the Debtors, JPMorgan, the FDIC, WMB bondholders and other parties) [Non-Public]; JPMCD_00000001725.00001 (March 24, 2010 email from Sullivan & Cromwell to various parties) [Non-Public]; JPMCD_0000000146.00001-2 (March 25, 2010 email from Sullivan & Cromwell to Weil Gotshal) [Non-Public]; JPMCD_00000001415.00001 (March 19, 2010 email among Weil Gotshal, Sullivan & Cromwell and others) [Non-Public]; JPMCD_0000000128.00001-2 (May 11, 2010 emails among Weil Gotshal, Sullivan & Cromwell and others) [Non-Public].

12. Attached hereto as Exhibit I is a true and correct copy of the following document produced to the TPS Consortium in discovery pursuant to subpoena: WGM_00009851 (email setting forth certain holdings information [Non-Public].

13. Attached hereto as Exhibit J is a true and correct copy of relevant portions of a hearing transcript in these proceedings dated November 9, 2010.

14. Attached hereto as Exhibit K is a true and correct copy of relevant portions of a hearing transcript in these proceedings dated September 7, 2010.

15. Attached hereto as Exhibit L is a true and correct copy of relevant portions of a hearing transcript in these proceedings dated September 24, 2010.

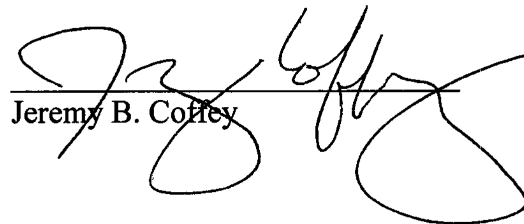
16. Attached hereto as Exhibit M is a true and correct copy of relevant portions of a hearing transcript in these proceedings dated May 5, 2010.

17. Attached hereto as Exhibit N is a true and correct copy of the following document produced to the TPS Consortium in discovery pursuant to subpoena: JPMCD_0000001907.00001-2 (February 25, 2009 email from Weil Gotshal to Sullivan & Cromwell) [Non-Public].

18. Attached hereto as Exhibit O is a true and correct copy of the following document produced to the TPS Consortium in discovery pursuant to subpoena: JPMCD_000000215.00001 (December 7, 2009 email between Donald McCree and William Kosturos) [Non-Public].

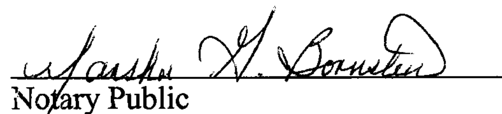
19. Attached hereto as Exhibit P is a true and correct copy of the following document produced to the TPS Consortium in discovery pursuant to subpoena: JPMCD_000000147.00001 (March 23, 1010 email from William Kostorus to Donald McCree) [Non-Public].

20. Attached hereto as Exhibit Q are true and correct copies of the following documents produced to the TPS Consortium in discovery pursuant to subpoena: JPMCD_000000126.00001 (May 12, 2010 email between Donald McCree and William Kosturos) [Non-Public]; JPMCD_000000130.00001 (May 11, 2010 email between Donald McCree and William Kosturos) [Non-Public]; JPMCD_000000135.00001 (April 14, 2010 email between Donald McCree and William Kosturos) [Non-Public]; JPMCD_0000000134.00001-2 (April 14, 2010 email between Donald McCree and William Kosturos) [Non-Public]; JPMCD_0000000136.00001 (April 13, 2010 email between Donald McCree and William Kosturos) [Non-Public].

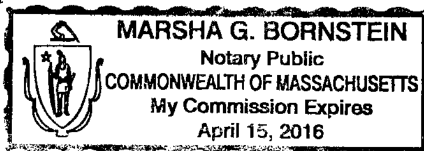


Jeremy B. Coffey

Sworn to before me this 19th day
of November 2010



Notary Public



MARSHA G. BORNSTEIN
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
April 15, 2016

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

SUPPLEMENTAL OBJECTION[1] OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS TO CONFIRMATION OF THE MODIFIED SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE, FILED ON FEBRUARY 7, 2011

The consortium of holders of interests subject to treatment under Class 19 of the Plan (as defined herein) (the "TPS Consortium"),[2] by and through its undersigned counsel, hereby files this objection (the "Objection") to confirmation of the Modified Sixth Amended Joint Plan of Washington Mutual Inc., ("WMI") and WMI Investment Corp. ("WMI Investment," and together with WMI, the "Debtors"), filed on February 7, 2011, as modified on March 16, 2011 and March 25, 2011 (the "Plan") [Docket Nos. 6696, 6964, and 7038].[3] In support of this Objection, the TPS Consortium respectfully represents as follows:

---

[1] The TPS Consortium expressly incorporates by reference herein each of the arguments set forth in the *Objection Of The TPS Consortium To Confirmation Of The Sixth Amended Joint Plan Of Affiliated Debtors Pursuant To Chapter 11 Of The United States Bankruptcy Code* [Docket No. 6020] (the "Initial Objection"), including its objections to the proposed "settlement" underlying the prior and current Plans. A copy of the Initial Objection is attached hereto as Exhibit A.

[2] The TPS Consortium is made up of holders of interests proposed by the Debtors to be treated under Class 19 of the Plan -- described in the Plan and Disclosure Statement (defined herein) as the "REIT Series." As is discussed in greater detail below, the REIT Series securities were purportedly exchanged, prior to the Petition Date, for certain Trust Preferred Securities issued by former affiliates of non-Debtor Washington Mutual Bank.

[3] Capitalized terms not otherwise defined herein shall bear the meanings ascribed thereto in the Plan and/or the Prior Disclosure Statement, dated October 6, 2010 and the Supplemental Disclosure Statement, dated March 16, 2011 [Docket No. 6966] (together, the "Disclosure Statement"), as applicable.

PRELIMINARY STATEMENT

1. The Plan suffers from numerous fatal flaws, which, as a matter of law, render it incapable of confirmation. These defects include, inter alia:

- The Plan would effect the underlying steps of the "conditional exchange" of the Trust Preferred Securities, purports to deliver the Trust Preferred Securities to JPMC "free and clear" of the claims now on appeal before the District Court, and provides releases purporting to affect claims against JPMC and others relating to the Trust Preferred Securities, despite the divestiture of this Court's jurisdiction to grant such relief because of the ongoing appeal of the TPS Litigation in the District Court. As this Court has been divested of jurisdiction to grant the relief requested regarding the Trust Preferred Securities, those securities must be held in escrow and related Plan-terms held in abeyance pending resolution of the TPS Litigation appeal.

- The Plan inappropriately pays post-petition interest on allowed unsecured claims at the "contract" rate rather than at the federal judgment rate set forth in 28 U.S.C. § 1961 ("FJR"). To the extent post-petition interest is payable on allowed unsecured claims, the rate of interest mandated under Bankruptcy Code Section 726(a)(5) – and incorporated into Chapter 11 through the best interests of creditors test under Bankruptcy Code Section 1129(a)(7) – is the FJR. Moreover, to the extent unsecured creditors are paid post-petition interest at the FJR, the Classes of unsecured creditors would be unimpaired and not entitled to vote on the Plan. Consequently, the cramdown provisions of Bankruptcy Code Section 1129(b) will not be implicated (through Bankruptcy Code Section 1129(a)(8)) if the Plan were modified to pay post-petition interest at the FJR. The result of the current structure of the Plan is that it impermissibly provides unsecured creditors (including, in large part, the Settlement Noteholders) with approximately $700 million in value in excess of their claims, a significant portion of which value properly belongs to the Debtors' preferred equity holders pursuant to the Bankruptcy Code's distribution scheme.

- The Plan continues to provide illegal non-consensual releases to third parties (including JPMorgan Chase Bank, N.A. ("JPMC")) and enjoins actions against assets and properties provided to such third parties "free and clear" through the Plan (including the Trust Preferred Securities and the value of Washington Mutual Preferred Funding LLC) notwithstanding the Court's Opinion (defined herein) that such non-consensual releases are impermissible.

- The Plan unfairly discriminates against the dissenting members of Class 19 by providing for an unequal distribution amongst the members of Class 19 based on their votes for a prior Plan and by denying dissenting members an opportunity to re-vote, and discriminates unfairly against disadvantaged members of Class 19 as compared to Class 20, consisting of similarly-situated interest holders by permitting only Class 20 to revote

and allowing Class 20 members their pari passu interests in the residual value of WMI's estate (value denied to disadvantaged members of Class 19). The Plan would also effect a prohibited taking of the dissenting Class 19 members' interests in their allocable share of estate value.

2. As Plan proponents, it is the Debtors' burden to prove and persuade this Court, by a preponderance of the evidence, that the Plan satisfies every applicable confirmation requirement under Bankruptcy Code Sections 1129(a) and (b). As discussed herein and in the Initial Objection, the Debtors cannot carry these burdens and confirmation must be denied.

BACKGROUND

A. The Court's January 2011 Decisions.

3. On January 7, 2011, the Court rendered its decision 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 its ruling in connection with the TPS Litigation, the Court held, inter alia, that a purported "conditional exchange" of non-Debtor trust preferred securities (the "Trust Preferred Securities") for unissued preferred stock of Debtor WMI had occurred hours before the commencement of these cases, notwithstanding the failure of the parties to take any of the steps required under the applicable documents to complete the transaction.[4] That decision has been appealed, and the matter is now before Chief Judge Sleet of the District Court for the District of Delaware (Civ. Action No. 11-124-GWS). Briefing in that matter is expected to be completed prior to this Court's consideration of the Plan.

4. Also on January 7, 2011, the Court entered an opinion [Docket No. 6528] (the "Opinion") and related Order [Docket No. 6529] denying confirmation of the *Sixth Amended*

---

[4] These steps include, inter alia, the failure to issue the WMI preferred stock for which the Trust Preferred Securities were to have been exchanged, the failure to deliver that newly-issued WMI preferred stock to a depositary for creation of "depositary shares" to be delivered to holders of Trust Preferred Securities, the failure to record the purported transfer of the Trust Preferred Securities on the applicable issuers' books and records (as required under UCC Article 8), and the failure to deliver the underlying certificates for the Trust Preferred Securities (also as required under Article 8) (together, the "Completion Steps").

Joint Plan of Affiliated Debtors Pursuant To Chapter 11 of the Bankruptcy Code, dated October 6, 2010, as modified on October 29, 2010 and November 24, 2010 (the "Sixth Amended Plan"). In the Opinion, the Court laid out in detail numerous reasons the Sixth Amended Plan was incapable of confirmation and left certain issues open for consideration should the Debtors again attempt to obtain confirmation of a plan of liquidation. The Debtors filed the current version of the Plan approximately one month later.

B. The Debtors' New Proposed Plan.

5. The current Plan remains premised on a purported "settlement" of various pieces of litigation to which the Debtors are parties, including various actions to which JPMC is also a party. Among the issues "settled" under the Plan is the dispute as to whether the "conditional exchange" had occurred and whether the Trust Preferred Securities were transferred to JPMC prior to the Petition Date. In that regard, the current Plan (like its predecessor, the Sixth Amended Plan) contemplates the Bankruptcy Court entering an affirmative injunction, ordering parties (including non-Debtors) to effectuate all of the steps in the applicable exchange, deposit and trust agreements that WMI failed to carry out pre-petition (i.e., the Completion Steps).[5] Next, the Plan contemplates assumption of agreements necessary to consummation of the "conditional exchange" transaction, including agreements to issue the WMI preferred stock that was never issued pre-petition. As noted in the Initial Objection, this proposed assumption is absolutely prohibited under Bankruptcy Code Section 365(c)(2) and, consequently, Bankruptcy Code Section 1129(a)(1).[6] The Plan also contemplates entry of an Order transferring the Trust

---

[5] See Proposed Settlement, § 2.3(f) ("causing the applicable trustees, registrars, paying agents, depositary, and transfer agents to amend their records (including the securities registers of each Issuing Trust) to reflect a transfer of the Trust Preferred Securities to WMI" and "causing the trustees and boards of directors of the Issuing Trusts to take all necessary, proper and advisable action to reflect JPMorgan as the sole legal, equitable, and beneficial owner of the Trust Preferred Securities").

[6] See Initial Objection, at pp. 41-46.

Preferred Securities "free and clear" of Liens (defined to mean "any charge against or interest in property to secure payment of a debt or performance of an obligation").[7]

6. The basic economic terms of the settlement were negotiated by, inter alia, JPMC and a group of four hedge funds (the "Settlement Noteholders")[8] who have accumulated large positions at various levels of WMI's capital structure slated to receive very favorable treatment under the Plan, including payment of post-petition interest on funded debt at the various contract rates as opposed to interest at the FJR.[9] This difference (contract rate versus FJR) results in overpayment to creditors of the estate in the amount of approximately $700 million, a significant portion of which value otherwise would be allocable to holders of WMI preferred equity under the Bankruptcy Code's distribution scheme.

7. While the Settlement Noteholders were signatories to the settlement underlying the Sixth Amended Plan, they are not signatories to the current version of the settlement agreement. As the Court noted in the Opinion, the Settlement Noteholders have been alleged to have traded illegally in WMI's securities based on non-public information obtained in their negotiations with the Debtors. The Official Committee of Equity Security Holders (the "Equity Committee") is currently investigating this issue, but discovery is not complete as of the filing

---

7 See Plan, §§ 43.1 and 1.124.

8 The Settlement Noteholders include Appaloosa Management L.P., Centerbridge Partners, L.P., Owl Creek Asset Management, L.P., Aurelius Capital Management, LP, and certain affiliates thereof.

9 The Settlement Noteholders previously have represented through counsel that, as of May 14, 2010, in the aggregate they were the beneficial owners of or had investment authority with respect to (i) $453,813,700 in face amount of WMI's senior indebtedness, (ii) $1,291,124,000 in fact amount of WMI's senior subordinated indebtedness, (iii) $792,268,700 in face amount of WMI's junior subordinated indebtedness, and (iv) approximately 955,665 shares of preferred stock issued by WMI. See *First Supplemental Verified Statement of Fried, Frank, Harris, Shriver & Jacobson LLP Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure* [Docket No. 3761], at p. 2. These holdings may have changed as there are pending allegations that the Settlement Noteholders engaged in insider trading activities facilitated by the Settlement to purchase claims that receive preferable treatment under the Plan and to sell claims and interests that receive less favorable treatment.

this Objection.

C. The Plan's Unequal Treatment Amongst Members Of Class 19.

8. Like the Sixth Amended Plan, the current Plan contemplates delivery of the Trust Preferred Securities to JPMC. Under the Sixth Amended Plan, in addition to any distribution from the Debtors' estates, Class 19 claimants also stood to receive from JPMC cash in an amount equal to $1,250.00 times the number of shares of REIT Series (or an amount of JPMC stock of equal value) (in either case, the "Additional Class 19 Consideration") held by such claimants in exchange for, inter alia, granting a release of JPMC.[10] Section 1.161 of the version of the Sixth Amended Plan sent out for solicitation [Docket No. 5659] further provided that if Class 19 voted to accept the Sixth Amended Plan, each member of Class 19 (regardless of its actual vote) would be "deemed" to have granted a release of JPMC and would receive its allocable share of the Additional Class 19 Consideration. Further, Section 43.6 of the version of the Sixth Amended Plan sent out for solicitation contained a similar provision, regarding releases generally, that stated that entities opting out of the demanded releases would nonetheless be bound and forced to accept the distribution they would otherwise be entitled to receive pursuant to the Plan. Subsequently, after the voting deadline for the Sixth Amended Plan, the Debtors modified Section 43.6 of the Sixth Amended Plan to provide that elections to opt out of the third-party releases would be honored and entities so electing would lose the right to a distribution.[11] In addressing this late change to the Sixth Amended Plan, the Court stated in the Opinion that:

> The Court agrees with the UST that the Plan provision with respect to third-party releases has changed materially. This is equally applicable to those who originally opted out of the releases (feeling that even though the Court might find the opt out invalid, they

---

[10] See Sixth Amended Plan, p. 50.

[11] See Opinion, p. 83.

> would still get a distribution) as those who did not bother checking the box to opt out (feeling that the Court would simply enforce the releases anyway).[12]

Section 1.161 of the Sixth Amended Plan, providing for the compelled release of claims and acceptance of plan consideration if Class 19 voted to accept the Sixth Amended Plan, was not modified. Further, as was made clear through the Debtors' witnesses at the confirmation hearing, the Sixth Amended Plan was rife with provisions that could have required releases of claims regardless of an entity's vote or election.

9. To address the Court's concerns about material changes to the release provisions after the close of voting on the Sixth Amended Plan, every impaired class – except Class 19 – was given the opportunity to vote and make an election with respect to releases under the new Plan. But, under the new Plan, members of Class 19 who voted in favor of the Sixth Amended Plan (which, again, was denied confirmation) and who elected to grant the releases demanded thereunder will receive under the new Plan: a) the share of estate value to which they are entitled as a result of their ownership of WMI preferred stock (whatever that value may be); and b) a direct payment from JPMC of the Additional Class 19 Consideration that had been allocated for Class 19 under the Sixth Amended Plan. Based on prior Rule 2019 filings in this case, it appears that the group of Class 19 holders who will receive this favorable treatment is comprised, in significant part, of the Settlement Noteholders. Class 19 members who voted against the Sixth Amended Plan and/or declined to grant the releases demanded thereunder, on the other hand, will receive nothing under the current Plan – not even the estate value to which they would be entitled outside of the Plan and/or in a chapter 7 liquidation.

10. The Equity Committee objected to this unequal treatment amongst members of Class 19 in connection with the Court's consideration of the Supplemental Disclosure Statement

---

[12] Id.

and Plan solicitation procedures (and counsel for the TPS Consortium joined in that objection and presented argument). In response to those objections, counsel for JPMC threatened that, if the Court were to force the Debtors to resolicit Class 19, JPMC would simply refuse to pay any portion of the Additional Class 19 Consideration in exchange for the releases it is slated to receive under the current Plan.[13] The Court declined to compel resolicitation of Class 19, but specifically preserved consideration of the effect of the resulting unequal treatment on the confirmability of the Plan.[14]

ARGUMENT

11. As Plan proponents, it is the Debtors' burden to prove and persuade this Court, by a preponderance of the evidence, that the Plan satisfies every applicable confirmation requirement under Bankruptcy Code Sections 1129(a) and (b).[15] As discussed herein and in the Initial Objection, the Debtors cannot carry these burdens and confirmation must be denied.[16]

I The Plan Cannot Be Confirmed Because It Contemplates Relief This Court Has Been Divested Of Jurisdiction To Grant Given The Pendency Of The Appeal Related To The TPS Litigation.

12. It is axiomatic that the act of filing a notice of appeal of a final Order divests a

---

[13] Transcript of March 21, 2011 Hearing, at p. 56.

[14] Id. at 171.

[15] See, e.g., In re Armstrong World Indus., Inc., 348 B.R. 111, 120 n.15 (D. Del. 2006) (plan proponent must establish by preponderance of the evidence the satisfaction of requirements of Bankruptcy Code Sections 1129(a) and 1129(b)); 7 Collier on Bankruptcy ¶ 1129.02[4] (16th ed.) ("At the [confirmation] hearing, the proponent bears the burdens of both introduction of evidence and persuasion that each subsection of section 1129(a) has been satisfied. If nonconsensual confirmation is sought, the proponent of such a plan will have to satisfy the court that the requirements of section 1129(b) are also met. In either situation, the plan proponent bears the burden of proof by a preponderance of the evidence.").

[16] See In re Sacred Heart Hosp. of Norristown, 182 B.R. 413, 423 (Bankr. E.D. Pa. 1995) (a confirmation hearing warrants a meticulous analysis of whether the Plan meets each of the technical requirements of the Code).

trial court of its jurisdiction over the matters on appeal.[17] The divestiture rule applies to bankruptcy appeals and exists to "prevent[] the confusion and inefficiency which would of necessity result were two courts to be considering the *same issue or issues* simultaneously."[18]

13. The Third Circuit Court of Appeals has recognized the broad nature of the divestiture rule: "Divest means what it says – the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere."[19] Because "a bankruptcy case typically raises a myriad of issues, many totally unrelated and unconnected with the issues involved in any given appeal," however, Bankruptcy Courts "retain jurisdiction over matters presented subsequent to an appeal where the appeal concerns unrelated aspects of the case."[20] Nonetheless, when a determination would "involve a key issue identical to one of the issues involved in the order being appealed," application of the divestiture rule is appropriate.[21]

---

17 See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) ("The 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."); 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.").

18 Trimble v. Cambridge Mgmt. Grp. (In re Trimble), No. 07-2115, 2008 Bankr. LEXIS 835, at *6 (Bankr. D.N.J. March 18, 2008) (emphasis added); see also In re Whispering Pines Estates, 369 B.R. 752, 757 (B.A.P. 1st Cir. 2007) ("The purpose of the general rule is to avoid the confusion of placing the *same matter* before two courts at the same time and preserve the integrity of the appeal process.") (emphasis added).

19 Venen, 758 F.2d at 120-21; see also Trimble, 2008 Bankr. LEXIS 835 at *6 (citing Venen in the bankruptcy context).

20 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).

21 Winimo Realty, 270 B.R. at 108; see also In re Urban Dev. Ltd., Inc., 42 B.R. 741, 743-44 (Bankr. M.D. Fla. 1984) ("In order to assure that the integrity of the appeal process is preserved, it is imperative that once the appeal is lodged, the lower court *should not take any action which in any way would interfere with the appeal process* and with jurisdiction of the appeal court. … When one considers the relief sought by the Debtor in light of the foregoing, it is obvious that this Court should not interfere with the appeal process and entertain any request the Debtor which *either directly or indirectly touches upon the issues involved in*

14. The divestiture rule does not prohibit the Bankruptcy Court from implementing or enforcing the order appealed "because in implementing an appealed order, the court does not disrupt the appellate process *so long as its decision remains intact for the appellate court to review.*"[22] However, "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."[23] "This distinction is particularly important in the context of a [sic] Chapter 11 bankruptcy cases, where the court will issue 'innumerable orders involving a myriad of issues, one or more of which may be on appeal at any given moment.' . . . Permitting the Bankruptcy Court to enforce orders that are on appeal while prohibiting the court from altering such orders allows the least disruption of the court's administration of a bankruptcy plan."[24]

---

the pending appeal. … [I]f this court would grant the injunctive relief sought by the Debtor, this would in effect *not only frustrate but for all practical purposes moot out the appeal and would, in fact, serve as a substitute for the appeal process.*") (emphasis added).

22 In re VII Holdings Co., 362 B.R. 663, 666 n. 3 (Bankr. D. Del. 2007) (emphasis added); In re Winimo Realty Corp., 270 B.R. 99, 105 (S.D.N.Y. 2001) ("[I]n implementing an appealed order, the court does not disrupt the appellate process so long as its decision remains intact for the appellate court to review.") (citation omitted).

23 Winimo Realty, 270 B.R. at 105-06; see also 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); Bialac v. Harsh Inv. Corp. (In re Bialac), 694 F.2d 625, 627 (9th Cir. 1982) (holding Bankruptcy Court lacked jurisdiction to enjoin foreclosure of note because "[a] pending appeal divest[s] the lower court of jurisdiction to proceed further in the matter. . . . Even though a Bankruptcy Court has wide latitude to reconsider and vacate its own prior decisions, not even a Bankruptcy Court may vacate or modify an order while on appeal") (citations omitted); Buesgens v. Bergman (In re Bergman), 397 B.R. 348, 351 (Bankr. E.D.Va. 2008) (quoting Ingersoll-Rand Fin. Corp. v. Kendrick Equip. Corp. (In re Kendrick Equip. Corp.), 60 B.R. 356, 358 (Bankr. W.D. Va. 1986)) ("[T]he taking of an appeal transfers jurisdiction from the Bankruptcy Court to the Appellate Court with regard to any matter involved in the appeal and divests the Bankruptcy Court of jurisdiction to proceed further with such matters. . . . [I]t is imperative that the lower court take no action which might in any way interfere with the jurisdiction of the appeal court.").

24 Winimo Realty, 270 B.R. at 106 (citation and quotations omitted).

15. For instance, in Whispering Pines, the debtor appealed the confirmation order which provided for a scheduled sale of property and that the secured creditor would be entitled to relief from the automatic stay if the property was not sold by the scheduled date.[25] During the appeal, the Bankruptcy Court granted the secured lender relief from the automatic stay to foreclose the property.[26] The appellate court held that the Bankruptcy Court was divested of jurisdiction to enter such an order which was an impermissible modification of the confirmation order on appeal.[27] The appellate court noted that "once an appeal is pending, it is imperative that a lower court not exercise jurisdiction over those issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process."[28]

16. The admonition of the Whispering Pines Court, that Bankruptcy Courts cannot act on those matters directly on appeal or "issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process," has been followed by a number of other jurisdictions.[29] In In re Demarco, the Bankruptcy Court delayed confirmation of the debtor's plan pending resolution of an appeal in an adversary proceeding instituted by a creditor whose claim would have been disallowed under the plan.[30] The debtor moved the Bankruptcy Court for an order determining that he did not

---

25 369 B.R. at 759.

26 Id.

27 Id. at 759-60.

28 Id. at 759 (citations omitted).

29 Whispering Pines, 369 B.R. at 758 (citations omitted).

30 In re Demarco, 258 B.R. 30 (Bankr. M.D.Fla. 2000).

qualify as a "responsible person" within the meaning of the United States Tax Code.[31] The Court ruled for the debtor and found that he had no tax liability as a "responsible person."[32] Shortly thereafter, the government appealed the Bankruptcy Court's decision to the District Court on the question of the debtor's liability under the Tax Code.[33] Subsequent to the government's filing of the appeal, the debtor amended the plan to disallow the government's claim and to require that, effective upon confirmation, the government release its lien and any future cause of action against the debtor.[34] In its objection to confirmation of the debtor's plan, the government contended that the act of filing an appeal with the district court divested the Bankruptcy Court of jurisdiction to consider confirmation of the plan, because an order confirming the plan would have an "impact directly or indirectly on the appeal."[35] Over an objection by the debtor, the Bankruptcy Court adopted the government's rationale and stayed confirmation, finding that "confirmation of the Debtor's plan would preclude any effective judicial relief for the [government] in the event it prevails on its appeal."[36]

17. The Plan seeks an Order from this Court providing for: 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 were unnecessary and/or irrelevant during summary judgment proceedings on the TPS Litigation); and

---

[31] Id. at 31.

[32] Id.

[33] Id. at 32.

[34] Id.

[35] Id. (citations omitted).

[36] Id. at 34.

b) assumption of the agreements necessary to complete the "conditional exchange" transaction.[37] The Court ruled in the TPS Litigation that these acts were "ministerial" and unnecessary in determining that the exchange of the TPS Securities occurred. The actions contemplated in the Plan are identical to issues that are central in the pending appeal of the TPS Litigation now within the purview of the District Court, and as such are clearly prohibited from the Court's consideration, let alone the confirmation of these portions of the Plan dealing with the transfer of the Trust Preferred Securities to JPMC. Similarly, the pendency of the TPS Litigation appeal divests this Court of jurisdiction to consider any aspect of the Plan's proposed releases or the Settlement Agreement: a) that would affect any of the TPS Consortium's claims against JPMC (or any of its affiliates) related to the Trust Preferred Securities; or b) that would purport to deliver the Trust Preferred Securities to JPMC "free and clear" of the very claims now on appeal before the District Court.

18. Faced with these Debtors' request that this Court interfere with matters currently on appeal before Chief Judge Sleet in the District Court, this Court should following the teachings of Demarco and Whispering Pine avoid any action that "would preclude any effective judicial relief for the [Consortium] in the event it prevails on its appeal."[38] The filing of the appeal to the District Court constituted "an event of jurisdictional significance" that divested the Bankruptcy Court of its jurisdiction to proceed further with matters related to the releases. It is of no consequence that "the Court is not convinced that continued litigation against JPMC and/or the FDIC would" provide equity interest holders with any recovery.[39] Respectfully, it is not this

---

37 The assumption of such agreements, which provide for the issuance of WMI securities, would also clearly violate Bankruptcy Code Section 365(c)(2), which itself would preclude confirmation of the Plan under Bankruptcy Code Sections 1129(a)(1) (also discussed infra).

38 Id.

39 Opinion, pp. 66-67.

Court's decision to make. Rather, the nature of the issues on appeal to the District Court prohibits this Court from interfering with the appellate process.[40]

19. A very reasonable and commonly-employed alternative to a complete stay of this Court's proceedings, and one the Court should employ here, would be to deposit the disputed property (the Trust Preferred Securities) into an escrow account and hold in abeyance any Plan provision that would interfere with the pending appeal of the TPS Litigation pending resolution by the District Court.[41] In that way, the Court may avoid taking any action offensive to the District Court's jurisdiction over the TPS Litigation and preserve the sanctity of the bankruptcy and appellate processes.[42]

---

[40] See In re Emergency Beacon Corp., 58 B.R. 399 at 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).

[41] See, e.g., Premier Entm't Biloxi LLC v. Pacific Mgmt. Co., LLC (In re Premier Entm't Biloxi LLC), No. 08-60349, 2009 WL 1616681 (5th Cir. 2009) (finding that the Bankruptcy Court properly deposited disputed funds into an escrow agreement, with a determination of which party was entitled to those funds to be made through an ordered process and at a later date, for purposes of continuing confirmation process).

[42] Knapp v. Seligson (In re Ira Haupt & Co.), 361 F.2d 164, 168 (2d Cir. 1966) (as Judge Friendly succinctly put it many years ago, the "conduct of bankruptcy proceedings not only should be right but must seem right."

II The Plan Cannot Be Confirmed Because It Inappropriately Allows Post-Petition Interest Claims At The "Contract" Rate.

A. To The Extent Post-Petition Interest Is Payable, The Appropriate Rate Of Interest Is The Federal Judgment Rate.

20. To the extent post-petition interest is payable on allowed unsecured claims in bankruptcy, the rate of interest mandated under Bankruptcy Code Section 726(a)(5) – and incorporated into Chapter 11 through the best interests of creditors' test under Bankruptcy Code Section 1129(a)(7) – is the FJR set forth in 28 U.S.C. § 1961. Notwithstanding, the Plan provides for Postpetition Interest Claims on allowed unsecured claims "calculated at the *contract rate* set forth in any agreement related to such Allowed Claim or, if no such rate or contract exists, at the federal judgment rate."[43]

21. But, to the extent unsecured creditors were to be paid post-petition interest at the FJR as mandated under Bankruptcy Code Sections 1129(a)(7) and 726(a)(5), those classes of unsecured creditors would be unimpaired and not entitled to vote on the Plan. Consequently, the cramdown provisions of Bankruptcy Code Section 1129(b) would never be implicated because Bankruptcy Code Section 1129(a)(8) would be satisfied. But, even if the cramdown principles of Bankruptcy Code Section 1129(b) did have application to the treatment of unsecured creditors here – in other words, the holders of unsecured claims were somehow deemed to be "impaired" (notwithstanding payment in full, plus post-petition interest at "the legal rate") and rejected the Plan – the Debtors would be unable to demonstrate that payment of the higher contract rates of interest would be fair and equitable. The result is that the Plan, as currently constituted, impermissibly diverts to unsecured creditors (including, in large part, the Settlement

---

[43] See Plan, p. 17, § 1.151 (emphasis added).

Noteholders) approximately $700 million in value in excess of their claims and any entitlement to post-petition interest. A significant portion of that misallocated value properly belongs to WMI's preferred equity holders under to the Bankruptcy Code's distribution scheme.[44]

A. The "Legal Rate" Of Interest Under Bankruptcy Code Section 726 Of The Bankruptcy Code Is The Federal Judgment Rate.

22. Bankruptcy Code Section 726(a)(5) provides on allowed unsecured claims a fifth-priority payment "of interest *at the legal rate* from the date of the filing of the petition."[45] Courts have consistently interpreted the reference in Bankruptcy Code Section 726(a)(5) to interest "at the legal rate" to mandate application of the FJR.[46]

23. As set forth in the Initial Objection and expanded upon herein, principles of statutory interpretation compel the conclusion that the phrase "interest at the legal rate" in Bankruptcy Code Section 726(a)(5) means interest at the FJR.[47] When interpreting a section of the Bankruptcy Code, it is the Court's "duty, if possible, to give effect to every clause and word of a statute"[48] and "a court should construe a statute to avoid rendering any element of it superfluous."[49] Further, courts must focus on the "plain meaning" of a statute and can look to

---

44 In its Opinion, the Court reserved the issue of the appropriate rate of post-petition interest on allowed unsecured claims. See Opinion, p. 94.

45 11 U.S.C. § 726(a)(5) (emphasis added).

46 See, e.g., Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Assoc. (In re Premier Entm't Biloxi LLC), No. 06-50975, 2010 Bankr. LEXIS 2994, at *167-74 (Bankr. S.D. Miss. Sept. 3, 2010) (finding that the FJR provides the appropriate measure of interest in a solvent debtor case); Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231, 1234 (9th Cir. 2002); In re Country Manor of Kenton, Inc., 254 B.R. 179 (Bankr. N.D. Ohio 2000); In re Dow Corning Corp., 237 B.R. 380, 412 (Bankr. E.D. Mich. 1999) ("Dow I"); In re Melenyzer, 143 B.R. 829, 832-33 (Bankr. W.D. Tex. 1992).

47 See Cardelucci, 285 F.3d at 1234-36; In re Country Manor of Kenton, 254 B.R. at 182; Dow I, 237 B.R. at 400-11.

48 In re Anderson, 348 B.R. 652, 657 (Bankr. D. Del. 2006) (Walrath, J.) (citations omitted) (rejecting creditor's argument that the phrase "allowed claim" in Section 521(a)(6) should be read to mean merely "claim," since the "Court cannot ignore [Congress's] choice of words").

49 First Bank Nat'l Assoc. v. F.D.I.C., 79 F.3d 362, 367 (3d Cir. 1996).

the dictionary definition of a term to understand the statute's meaning.[50] When the plain meaning of the statute is not clear on its face, the Court may then consider the legislative history to assist its interpretation.[51] Where the legislative history is consulted to illuminate the meaning of a statute, the "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill."[52]

24. As noted by the court in Country Manor, the analysis of Bankruptcy Code Section 726(a)(5) and its impact on chapter 11 cases must begin with an examination of the language of the statute itself.[53] As the Dow I court noted, the phrase "interest at the legal rate" had a commonly understood meaning when Congress enacted the Bankruptcy Code in 1978 which "was, and is, commonly understood to mean a rate of interest fixed by statute, and not by contract."[54] The Dow I court found that Bankruptcy Act cases "achieve[d] uniformity" in using the term "the legal rate" to mean a rate of interest fixed by statute[55] and that "[f]or over 100 years

---

[50] See In re Charter Behavioral Health Sys., LLC, 292 B.R. 36, 44-45 (Bankr. D. Del. 2003).

[51] In re Continental Airlines, Inc., 257 B.R. 658 (Bankr. D. Del. 2000) (Walrath, J.) (resolving to rely on (i) the plain meaning of the term "employee," (ii) the "scant legislative history" of the relevant Bankruptcy Code section, and (iii) other courts' interpretations to determine the meaning of "employees" under Bankruptcy Code Section 502(b)(7)); In re Washington Mut., Inc., 419 B.R. 271, 277 (Bankr. D. Del. 2009) ("Generally, legislative history should not be relied upon where the language of the statute or rule is clear.") (citations omitted).

[52] In re Paret, 347 B.R. 12, 16 (Bankr. D. Del. 2006) (Walrath, J.) (quoting Garcia v. United States, 469 U.S. 70, 76 (1984)).

[53] See 254 B.R. at 181.

[54] 237 B.R. at 400-05.

[55] Id. at 401 (See, e.g., Dayton v. Stanard, 241 U.S. 588, 590 (1916); Dower v. Bomar, 313 F.2d 596, 597 (5th Cir. 1963); Delatour v. Prudence Realization Corp., 167 F.2d 621, 622 (2d Cir. 1948); In re Realty Assocs. Sec. Corp. 163 F.2d 387, 389 (2d Cir. 1947); Imperial '400' National Inc., 374 F. Supp. 949, 954 (D.N.J. 1974) (contrasting contract rate with "the governing legal rate"); In re Maryvale Community Hosp., Inc., 307 F. Supp. 304 (D. Ariz. 1969); In re Norcor Mfg., 36 F. Supp. 978 (E.D. Wis. 1941); Rollins v. Repper, 69 F. Supp. 976, (E.D. Mich. 1947); In re Jones, 2 B.R. 46 (Bankr. N.D. Ala. 1979)).

courts have consistently used the term to mean a rate of interest fixed by statute."[56] The Cardelucci court also recognized that "the commonly understood meaning of 'at the legal rate' at the time the Bankruptcy Code was enacted was a rate fixed by statute."[57]

25. As the Dow I court reasoned, Congress "intended for the term to carry this commonly understood meaning."[58] First, Congress chose the language "interest at the legal rate" when it could simply have said "interest" when it enacted, "for the first time, a statute requiring

---

56 Id. at 402. See also City of New York v. Saper, 336 U.S. 328, 336 (1949) (referring to rate fixed by statute as "interest at the legal rate"); Louisville & N. R. Co. v. Holloway, 246 U.S. 525, 528 (1918) (referring to a rate fixed by Kentucky statute as that state's legal rate of interest); Dayton v. Stanard, 241 U.S. 588, 590 (1916) (observing that "the ordinary legal rate" is the statutorily-fixed rate of interest that will apply when there is no contract); American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U.S. 261 (1914) (referring to "legal interest" as the applicable state statutory rate in situation where contract did not specify an interest rate); Mohamed v. UNUM Life Ins. Co., 129 F.3d 478, 481 (8th Cir. 1997); In re M/V Nicole Trahan, 10 F.3d 1190, 1192 (5th Cir. 1994) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 269 (2nd Cir. 1989) (same); U.S. v. Griffin, 782 F.2d 1393, 1395 (7th Cir. 1986) (same); Colegrove, 771 F.2d at 123 (distinguishing between "interest [at] the legal rate," which is fixed by statute, and "the rate provided for in the original loan agreement"); Memphis Sheraton Corp. v. Kirkley, 640 F.2d 14, 19 (6th Cir. 1981) (observing that "interest at the legal rate" is a rate fixed by statute); Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 568 (10th Cir. 1978) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); National Packing Co. v. Century Provision Co., 354 F.2d 7, 9 (7th Cir. 1965) (equating "legal rate" with a Kansas statutory rate); Dower v. Bomar, 313 F.2d 596, 597 (5th Cir. 1963) (noting Florida statute establishing the maximum "legal rate of interest" for loans to a corporation); E.I. Du Pont De Nemours & Co. v. Lyles & Lang Constr. Co., 227 F.2d 517 (4th Cir. 1955) (referring to "interest at the legal rate [as a] rate fixed by statute"); Delatour v. Prudence Realization Corp., 167 F.2d 621 (2d Cir. 1948) (calling the statutorily-created rate of interest imposed on debts overdue in New York as "the legal rate of interest"); In re Realty Associates Securities Corp., 163 F.2d 387, 389 (2d Cir. 1947) (equating "interest at the legal rate" with the statutory judgment rate); Bins v. Artison, 764 F. Supp. 129, 132 (E.D. Wis. 1991) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); Reid v. Prudential Ins. Co. of America, 755 F. Supp. 372, 377 (M.D. Fla. 1990) (same); Burston v. Commonwealth of Virginia, 595 F. Supp. 644, 652 (E.D. Va. 1984) (same); In re Maryvale Cmty. Hosp., Inc., 307 F. Supp. 304, 309 (D. Ariz. 1969) (referring to rate of interest in an Arizona statute as 'The Arizona legal rate of interest"); In re Norcor Mfg. Co., 36 F. Supp. 978, 980 (E.D. Wis. 1941) (equating "the legal rate" with a Wisconsin statutory rate); Rollins v. Repper, 69 F. Supp. 976, 979 (E.D. Mich. 1947) (referring to interest rate established by Michigan statute as "the legal rate of interest"); Fitch v. Remer, 1860 U.S. App. LEXIS 453 (D. Mich. July 1860) (observing that in Michigan the legal rate of interest was a rate fixed by statute); City of Danville v. Chesapeake & O. Ry., 34 F. Supp. 620, 637 (W.D. Va. 1940) ("The legal rate of interest, generally speaking, is a rate fixed by statute ...."); Family Fed. Sav. & Loan v. Davis (In re Davis), 172 B.R. 437, 457 (Bankr. D.C. 1994) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); In re Goldblatt Bros., 61 B.R. 459, 465 (Bankr. N.D. Ill. 1986) (same); In re Jones, 2 B.R. 46, 49 (Bankr. N.D. Ala. 1979) (awarding interest on judgment at "the legal rate" as established by Alabama statute)).

57 285 F.3d at 1234-35.

58 Dow I, 237 B.R. at 403.

the payment of post-petition interest to unsecured creditors in solvent estates."[59] Moreover, the language originally proposed for Bankruptcy Code Section 726(a)(5) was "interest on allowed claims," as set forth in the 1973 *Report of the Commission on the Bankruptcy Laws of the United States*, which explained "the rate of interest is to be determined by other applicable law."[60] The fact that Congress rejected the phrase "interest on allowed claims" in favor of "interest at the legal rate" is significant: "'other applicable law' is a broad, general term …[c]onversely, 'interest at the legal rate" carries a much more definite meaning, a rate of interest fixed by statute."[61] The Dow I court relied on several cornerstone rules of statutory construction to reach its conclusion: (1) "a rejected proposition 'strongly militates' against a judgment that Congress intended a result that it expressly declined to enact," (2) "a court must assume that Congress carefully selects and intentionally adopts the language that it chooses to employ in a statute," and (3) "where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[62]

26. Moreover, use of the definite article "the" as a modifier for "legal rate" demonstrates that Congress "meant for a single source to be used to calculate post-petition

---

59 Id.

60 Id. (H.R. Doc. No. 93-137, 93d Cong., 1st Sess., § 4-405(a)(8) reprinted in Volume B Collier on Bankruptcy App. Pt. 4(c) (Alan N. Resnick & Henry J. Sommer eds., 15th ed. Rev., at 4-679; Note 6 reprinted at id. at 4-681).

61 Id.

62 Id. (citations omitted); see also Cardelucci, 285 F.3d at 1234 (assuming that Congress carefully selects and adopts the language used in a statute and recognizing that "instead of a general statement allowing for awards of interest, Congress modified what type and amount of interest could be awarded with a specific phrasing 'at the legal rate.'").

interest, as opposed to using whatever rate of interest happened to be in a contract."[63] This rationale is widely accepted and continues to be applied by courts around the country.[64] Moreover, outside of the instant context, federal courts have consistently interpreted statutes that use the definite article "the" to mean a specific or particular person, object, or idea.[65] The definite article "the" necessarily restricts the scope of the clause it modifies and, in this instance, specifies the FJR as *the* legal rate for calculating post-petition interest on claims in bankruptcy cases.

27. The use of the phrase "at the legal rate" would also make little sense had Congress intended the term simply to mean any legally permissible rate of interest fixed by contract.[66] It would be entirely unnecessary for Congress to have to instruct Bankruptcy Courts not to allow post-petition interest at illegal or usurious rates, "but had Congress felt such instruction necessary, it presumably would have used 'legal' in a similar manner throughout the

---

[63] Dow I, 237 B.R. at 404; Cardelucci, 285 F.3d at 1234; Melenyzer, 143 B.R. at 831 n.2; In re Country Manor of Kenton, Inc., 254 B.R. 179, 182 (Bankr. N.D. Ohio 2000).

[64] See, e.g., In re Smith, 431 B.R. 607, 610 (Bankr. E.D.N.C. 2010) (explaining and adopting the Cardelucci distinction between Congress's purposeful use of "the" instead of "a" or "an"); see also Garriock v. McDowell (In re Garriock), 373 B.R. 814, 816 (E.D.Va. 2007) (same).

[65] See e.g., Freytag v. C.I.R., 501 U.S. 868, 902 (1991) (noting that "[t]he definite article 'the' obviously narrows" the scope of any clause that follows); Flandreau Santee Sioux Tribe v. United States, 197 F.3d 949 (8th Cir. 1999) (interpreting "the statute's use of the definite article 'the' instead of the indefinite article 'a'" to refer to a specific person or object) (citations omitted); St. Clair Intellectual Prop. Consultants, Inc. v. Matsushita Elecs. Indus. Co., Ltd., 691 F.Supp.2d 538, 553 (D. Del. 2009) (noting that "an indefinite article 'a' or 'an'. . .carries the meaning of 'one or more'") (citations omitted); O'Sullivan v. Loy (In re Loy), 432 B.R. 551, 559 n.9 (E.D.Va. 2010) ("'An estate' is not a reference to a specific foreign proceeding. The indefinite article signals that the phrase refers to a hypothetical estate. If Congress had meant to reference a specific, existing estate, it would likely have used the definite article."); see also Black's Law Dictionary 1324 (5th ed. 1979) ("Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the'. The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object."); Chicago Manual of Style 116 (15th ed. 2003) ("An article is a limiting adjective . . .The definite article points to a definite object . . . And indefinite article points to nonspecific objects . . .").

[66] Dow I, 237 B.R. at 404.

Bankruptcy Code. But Congress did not do this."[67]

28. Moreover, any post-petition interest required to be paid pursuant to Bankruptcy Code Section 726(a)(5) accrues because of the delay caused by the administration of the federal bankruptcy law. Accordingly, post-petition interest, which is akin to post-judgment interest, is procedural and governed by federal law and the allowance of a claim is akin to a "money judgment," therefore, Bankruptcy Courts are required to calculate post-petition interest in accordance with 28 U.S.C. § 1961(a).[68] Moreover, "federal courts have long referred to the rate of interest calculated pursuant to §1961(a) as 'the legal rate' or 'the federal legal rate.'"[69]

29. Leading commentators on bankruptcy law also recognize that proper statutory analysis leads to the conclusion that Bankruptcy Code Section 726(a)(5) must refer to the FJR:

> The reference in the statute to the 'legal rate' suggests that Congress envisioned a single rate, probably the federal statutory rate for interest on judgments set by 28 U.S.C. § 1961. . . . Had Congress intended contract rates to apply, it presumably would have used language other than 'the legal rate,' a term that typically refers to a statutory rate.[70]

30. Significantly, had Congress intended to provide interest under Bankruptcy Code Section 726(a)(5) at state judgment rates or contractual rates of interest, it certainly knew how to specify such an arrangement. For instance, Bankruptcy Code Section 506(b) provides that an allowed secured claim (secured by property with value greater than the amount of the claim) is permitted "interest on such claim, and any reasonable fees, costs, or charges provided for *under the agreement* or State statute under which such claim arose." 11 U.S.C. § 506(b) (emphasis added). As expressed by the Country Manor court, the distinction between Bankruptcy Code

---

[67] Id. at 404-05.

[68] Id. at 406; Country Manor, 254 B.R. at 183.

[69] Dow I, 237 B.R. at 407.

[70] 6 Collier on Bankruptcy ¶ 726.02[5] (16th ed. rev. 2010).

Section 726(a)(5) ("interest at the legal rate") and Bankruptcy Code Section 506(b) (which explicitly uses the term "agreement") "beg[s] the question, if both §§ 506(b) and 726(a)(5) were intended to refer to the agreed upon interest rate, why is the term 'agreement' specified in one section and not the other."[71] Other examples of Congress distinguishing between rights provided under the Bankruptcy Code versus those provided by contract or non-Bankruptcy law abound. For example, Bankruptcy Code Section 365(d)(5) incorporates both concepts in the same statutory provision (providing for satisfaction of contractual obligations pursuant to Bankruptcy Code Section 503(b)(1) for the first sixty days following commencement of the case and pursuant to the terms of the underlying agreement thereafter). Clearly, where Congress wanted rights to be determined pursuant to contract, it knew how to effect that treatment. That it chose not to do so with respect to calculation of post-petition interest on unsecured claims leaves the FJR as the only logical alternative, as discussed above.

31. In addition to statutory construction, several other factors support application of the FJR to the payment of post-petition interest under Bankruptcy Code Section 726(a)(5). Application of the FJR to post-petition interest claims promotes uniformity within federal law.[72] Applying the FJR, a single, easily determined interest rate to all unsecured claims for post-petition interest ensures equitable treatment of creditors and is the most practical, judicially-efficient method of allocating distributions.[73]

---

71 254 B.R. at 182.

72 See Cardelucci, 285 F.3d at 1235; Dow I, 237 B.R. at 400 n.14; see also Beguelin v Volcano Vision Inc. (In re Beguelin), 220 B.R. 94, 100-01 (B.A.P. 9th Cir. 1998) (citing Godsey, 134 B.R. 865, 867 (Bankr. M.D. Tenn. 1991)).

73 Cardelucci, 285 F.3d at 1235-36 ("By using a uniform interest rate, no single creditor will be eligible for a disproportionate share of any remaining assets to the detriment of other unsecured creditors. … Calculating the appropriate rate and amount of interest to be paid to a myriad of investors has the potential to overwhelm what could otherwise be a relatively simply process pursuant to 11 U.S.C. § 726(a)(5).") (citations omitted); Country Manor, 254 B.R. at 182.

32. Thus, principles of statutory construction and other considerations make it plain that Bankruptcy Code Section 726(a)(5) mandates FJR as the appropriate rate of interest. The "guiding principle" with respect to statutory construction is that "the expression of one thing [in a statute] is the exclusion of others."[74] Therefore, if "interest at the legal rate" in Bankruptcy Code Section 726(a)(5) means the FJR, courts do not have discretion to provide another rate under the provision.[75]

B. Bankruptcy Code Section 1129(a)(7)'s "Best Interest" Test Makes The FJR Applicable To Post-Petition Interest Claims Under A Chapter 11 Plan.

33. Bankruptcy Code Section 726(a)(5) (and its requirement to pay post-petition interest "at the legal rate") is not directly applicable to cases under chapter 11. See Bankruptcy Code Section 103(b). Rather, Bankruptcy Code Section 726(a)(5)'s application in chapter 11 is a product of the "best interests" test imposed under Bankruptcy Code Section 1129(a)(7). This section requires that, under a chapter 11 plan, with respect to **each** class under the plan, dissenting members must receive as much as they would if the case had been administered under chapter 7.[76] In applying the "best interests" test, this Court must give consideration to not only what creditors would receive in a chapter 7 case (post-petition interest "at the legal rate") but also what junior impaired classes (e.g., WMI preferred equity holders) would receive in a chapter 7 liquidation – all residual value after payment of claims and post-petition interest "at the legal rate." Here, payment of anything beyond the FJR would result in an impermissible diversion of

---

[74] Acme Metals Inc. v. Raytheon Eng'rs & Constructors (In re Acme Metals, Inc.), 257 B.R. 714, 719 (Bankr. D. Del. 2000) (Walrath, J.) (quoting Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 206 (1928)).

[75] Cardelucci, 285 F.3d at 1236 ("Nonetheless, 'interest at the legal rate' is a statutory term with a definitive meaning that cannot shift depending on the interests invoked by the specific factual circumstances before the court.") (citation omitted); Dow I, 237 B.R. at 409 ("[A]lthough, it is frequently described as a 'court of equity, a Bankruptcy Court is not empowered to ignore the actual provisions of the Bankruptcy Code in order to reach a result that it finds more palatable.").

[76] See Bankruptcy Code Section 1129(a)(7)(A)(ii).

value to unsecured creditors in excess of their entitlement under Bankruptcy Code Section 1129(a)(7) – value that is required to flow to dissenting WMI preferred equity holders (per Bankruptcy Code Section 1129(a)(7)'s application to Classes 19 and 20 – also impaired Classes under the Plan).

34. Of the cases cited in the Opinion to suggest payment of interest at the contract rate under a chapter 11 plan might be appropriate, only one – In re Schoeneberg – held that Bankruptcy Code Section 726(a)(5) allowed for the payment of post-petition interest on unsecured claims at the contract rate.[77] The Schoeneberg court, however, reached its decision considering: a) case law concerning post-petition interest on secured claims under Bankruptcy Code Section 506(b), which as discussed above are explicitly allowed interest "provided for *under the agreement* or State statute under which such claim arose;" and b) case law under the Bankruptcy Act prior to enactment of the Bankruptcy Code Section 726(a)(5).[78] Of further note, the "contractual rate" to which the creditor in Schoeneberg was deemed to be entitled was a rate established by a Federal statute for agricultural lenders.[79]

35. Two of the other cases cited in the Opinion, In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company[80] and Southland Corp. v. Toronto-Dominion (In re Southland Corp.)[81] addressed post-petition interest under the Bankruptcy Act and under Bankruptcy Code Section 506(b) for an oversecured claim, respectively – not Bankruptcy Code Section 726(a)(5).

---

[77] 156 B.R. 963, 972 (Bankr. W.D. Tex. 1993).

[78] Id. at 970-72 (analyzing case law determining the rate of post-petition interest in "an analogous § 506(b) situation" and cases finding that secured creditors are to be awarded interest at the contract rate).

[79] Id. (setting the post-petition interest rate at the rate determined by 12 U.S.C. § 2205).

[80] 791 F.2d 524 (7th Cir. 1986) (the railroad filed its petition for reorganization in 1977 under section 77 of the Bankruptcy Act, which while since appealed remained applicable to its proceedings).

[81] 160 F.3d 1054 (5th Cir. 1998).

Relying on pre-Code cases here would constitute error because, under the Bankruptcy Act, the award of interest on unsecured claims was discretionary and was based on equitable principles.[82] Under the Bankruptcy Code, however, the award of post-petition interest is now statutorily-provided under Bankruptcy Code Section 726(a)(5) at the "legal rate."

36. In addition, the Court cited to two Dow Corning cases in the Opinion for the propositions that: a) some courts have concluded there is a presumption the contract rate of interest should be applied in solvent debtor cases;[83] and b) the FJR is only a minimum for post-petition interest to unsecured creditors and courts have within their discretion to allow interest at some other rate.[84] But, both cases provide such propositions in the context of the "fair and equitable" test, which is only applicable to classes that do not accept the plan – not to Bankruptcy Code Section 726(a)(5) and Bankruptcy Code Section 1129(a)(7)'s "best interests" test. In fact, the Dow II court explicitly held that post-petition interest is provided at the FJR under the best interests of creditors' test pursuant to Bankruptcy Code Section 726(a)(5).[85] Similarly, this Court in In re Coram Healthcare Corp. addressed post-petition interest under the "fair and equitable" test and appeared to have accepted that post-petition interest under the "best interests" test and Bankruptcy Code Section 726(a)(5) was to be paid only at the FJR.[86]

C. Bankruptcy Code Section 1129(b)'s "Fair And Equitable" Test Does Not Justify Payment Of Post-Petition Interest At Anything Other Than The FJR.

37. Pursuant to Bankruptcy Code Section 1124(1), a claim is unimpaired if treatment

---

[82] See e.g., Vanston Bond Holders Protective Committee v. Green, 329 U.S. 156, 163, (1946).

[83] In re Dow Corning Corp., 456 F.3d 668, 677-80 (6th Cir. 2006) ("Dow Corning").

[84] In re Dow Corning Corp., 244 B.R. 678, 694-96 (Bankr. E.D. Mich. 1999) ("Dow II").

[85] Id. at 686.

[86] 315 B.R. 321, 346-47 (Bankr. D. Del. 2004).

under a plan "leaves unaltered the legal, equitable and contractual rights to which such claim or interest entitles the holder of such claim or interest." Courts, including this Court, have held that to the extent *the Bankruptcy Code* defines or alters the rights of creditors, a claim is not "impaired" by a plan merely because it provides treatment in accordance with those Bankruptcy Code provisions.[87] This Court, in Coram Healthcare, applied this very concept to the payment of post-petition interest on unsecured claims, and held that application of the FJR did not render such claims "impaired" pursuant to Bankruptcy Code Section 1124(a). As the Court noted in Coram:

> It is not the Equity Committee's Plan which limits the rights of [unsecured creditors receiving the FJR]. Instead, if their rights are altered at all, it is because of the Code and decisional law under the Code.[88]

38. In this case, like the Coram case, if the Plan were to be modified to provide for payment of post-petition interest at the FJR (as mandated by Bankruptcy Code Sections 1129(a)(7) and 726(a)(5)), the Plan would not alter contractual, legal or equitable rights of unsecured creditors. Rather, the Plan would simply reflect application of Bankruptcy Code provisions in respect of treatment of unsecured claims.

39. Where it is the Bankruptcy Code that defines the rights of unsecured creditors, and not the Plan, such creditors would not be impaired by application of the FJR. As such, to the extent unsecured creditors were to be paid post-petition interest at the FJR, as mandated under

---

87 See In re Mirant Corp., No. 03-46590-DML-11, 2005 Bankr. LEXIS 909, at *15 (Bankr. N.D. Tex. May 24, 2005) (noting that "the court also must distinguish between an effect of the Plan and an effect brought about by operation of the Code"); In re PPI Enterprises (U.S), Inc., 324 F.3d 197, 205 (3d Cir. 2003) ("PPI Enterprises") (finding claim held by debtor's former landlord unimpaired where plan allowed landlord's damages up to cap established by Bankruptcy Code Section 502(b)(6)); In re American Solar King Corp., 90 B.R. 808, 819-820 (Bankr. W.D. Tex 1988) ("Solar King") (finding creditor unimpaired under a plan where it was treated as a subordinated creditor pursuant to Bankruptcy Code Section 510(b)).

88 Id.

Bankruptcy Code Sections 1129(a)(7) and 726(a)(5), those classes of unsecured creditors would be unimpaired and not entitled to vote on the Plan. Pursuant to Bankruptcy Code Section 1126(f), "*a class that is not impaired under a plan*, and each holder of a claim or interest of such class, are *conclusively presumed to have accepted the plan*, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required."[89]

40. Bankruptcy Code Section 1129(a)(8) requires only that each class of claims or interests accept the Plan *or* not be impaired under the Plan.[90] The cramdown provisions of Bankruptcy Code Section 1129(b), including the "fair and equitable" requirements, are only implicated when the alternative requirements of Bankruptcy Code Section 1129(a)(8) are not met.[91] Consequently, if the Plan provided for payment of unsecured claims in full, plus interest at the FJR, such Classes would be unimpaired and the cramdown provisions of Bankruptcy Code Section 1129(b) would never come into play.

41. But, assuming arguendo, Bankruptcy Code Section 1129(b)'s "fair and equitable" standard were implicated by payment of unsecured claims in full, plus interest at the FJR, it would still not provide a basis for payment of post-petition interest at anything above the FJR. In Coram Healthcare, this Court held that in a cramdown, "the specific facts of each case will determine what rate of [post-petition] interest is fair and equitable."[92] The Court further noted that "actions of [creditors] are relevant" in making that determination.[93] And, in Coram

---

89 11 U.S.C. § 1126(f) (emphasis added).

90 11 U.S.C. § 1129(a)(8).

91 11 U.S.C. §1129(b).

92 315 B.R. at 347.

93 Id. at 346 (finding the FJR of interest fair and equitable because conduct of certain creditors ultimately resulted in delay in cases); see also In re Dow Corning Corp., 244 B.R. 678, 695 (Bankr. E.D. Mich. 1999) ("[t]he touchstone of each decision on allowance of interest in bankruptcy . . . and reorganization has been

Healthcare, this Court correctly declined to award interest beyond the FJR because, among other things, the noteholders in that case generally had "acted as a group in th[e] case in advancing their interests and opposing the Equity Committee."[94]

42. First, it must be noted that here, unlike in Coram Heathcare or Dow, in which the courts considered the general equitable principles of Chapter 11 in addition to the plain language of Bankruptcy Code Sections 1129(a)(7) and 726(a)(5) (so-called "solvent debtor" interest), the "Plan" in this case is essentially a settlement and liquidation. For all practical purposes, there is no reorganized debtor that will continue to operate as a going concern and that would have received the "benefit" of the Chapter 11 process without affording creditors of their contractual rights.[95] Rather, the "reorganization" here is a sham based on the emergence of a shell reinsurance company already in "run-off" mode. Accordingly, the "fairness" concerns implicit in a Court's analysis of a reorganizing plan under Chapter 11 have little (if any) application here, where there is no concern that an entity's restructuring is occurring at the expense of creditors with contractual rights to payment of interest at particular rates. The only "concern" here is the potential right to so-called solvent-debtor interest under Bankruptcy Code Section 1129(a)(7) and 726(a)(5) – interest that, as set forth herein, plainly would accrue (if at all) at the FJR.

43. Moreover, even if the fairness concerns implicit in Coram Healthcare were applicable here, the circumstances of these cases demonstrate that, if post-petition interest is to be afforded to unsecured creditors, payment of interest at the FJR is more than fair and equitable. Stated differently, the payment of post-petition interest to creditors beyond the FJR would not be

---

a balance of equities between creditor and creditor or between creditors and the debtor") (citations omitted).

[94] 315 B.R. at 347.

[95] See, e.g., In re Dow, 244 B.R. at 695, *rev'd on other grounds* 456 F.3d. 668 (6th Cir. 2006) (drawing distinction between FJR interest to be paid as a "floor" by a solvent debtor pursuant to § 1129(a)(7), and the "fairness" concerns implicit in § 1129(b)).

fair and equitable to the members of Class 19, because it would result in an effective windfall to, in large part, the very creditors who gifted away significant estate value to JPMC once they had negotiated for full payment of their own interests and who now stand accused of violating securities laws by trading on non-public information obtained during those negotiations. Moreover, the Debtors have not demonstrated that unsecured creditors have suffered any unique or particular harm or delay that would justify post-petition interest at a rate other than the FJR. And, in fact, as in Coram Healthcare, the unsecured creditors in these cases, led by the Settlement Noteholders, have largely acted as a group in advancing their own interests at the expense of other estate constituents and opposing interests advanced by both the TPS Consortium and the Equity Committee.

44. Finally, the Plan voting results are not available as of the filing of this Objection. But, to the extent Classes reject the Plan, the Debtors will have the burden of demonstrating the Plan is fair and equitable with respect to **each** rejecting Class (including Class 19, which, by the Debtors' own design, has been deemed to reject this current Plan based on votes submitted with respect Sixth Amended Plan).[96] In light of the circumstances giving rise to the Plan (the economic terms of which were negotiated by holders of unsecured claims to provide for their recovery in full (plus interest), with all other value shunted away to JPMC rather than distributed to WMI preferred equity), and in balancing the equities between unsecured creditors and the members of Class 19, the Debtors simply cannot meet their burden to demonstrate that payment of post-petition interest at the contract rate would be: a) necessary to satisfy Bankruptcy Code Section 1129(b) with respect to rejecting unsecured Classes (if any); or b) permissible with

[96] See, e.g., United States v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654-55 (B.A.P. 9th Cir. 1994); 266 Washington Associates v. Citibank, N.A. (In re Washington Associates), 147 B.R. 827, 830 (E.D.N.Y. 1992) (burden of proof on confirmation "rests squarely on the plan's proponent").

respect to application of Bankruptcy Code Section 1129(b) to WMI preferred equity holders who would be directly harmed by the overpayment of value to senior classes.[97] As such, the Plan cannot be confirmed.

III The Plan Cannot Be Confirmed Because It Continues To Provide Non-Consensual Releases to Third Parties.

45. A primary reason the Sixth Amended Plan was denied confirmation by this Court was its inclusion of aggressive and illegal third-party releases. As this Court has correctly noted on multiple occasions, third-party releases are permissible only when the releasing party consents and receives compensation.[98] While that was made clear to the Debtors again in the Opinion,[99] the current Plan continues to include releases (some overt, and some disguised) that violate this Court's specific rulings on this topic.

46. For example:

- Section 43.6 provides that "each entity that has elected not to grant the releases set forth in this Section 43.6 … shall not be entitled to, and shall not receive, any payment, distribution or other satisfaction of its claim pursuant to the Plan." Moreover, Section 43.6 grants third-party releases from *each Entity* that elects to grant releases. Importantly, this provision fails to explicitly preserve the rights of non-electing holders to pursue claims against non-debtor third parties *notwithstanding any other provision of the Plan*. Also, while this provision sets out the punishment the Debtors would exact on non-consenting stakeholders, it does nothing to limit the applicability of the Plan's illegal releases to the third-party claims of those punished holders.

---

97 See 11 U.S.C. § 1129(a)(7); see also Genesis Health, 266 B.R. at 612 ("A corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims."); In re MCorp Fin. Inc., 137 B.R. 219, 235 (Bankr. S.D. Tex. 1992) ("[A] dissenting class should be assured that no senior class receives more than 100 percent of the amount of its claims."); see also 7 Collier on Bankruptcy ¶ 1129.04[4][a][i] (15th ed. rev. 2004) ("'[F]air and equitable' can be seen to have two key components: the absolute priority rule; and the rule that no creditor be paid more than it is owed.").

98 See Opinion, at pp. 74-77; Coram, 315 B.R. at 335 (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," rather, any such release must be based on consent of the releasing party (by contract or the mechanism of voting in favor of the plan); In re Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999) (plan could not be confirmed where it required non-consensual release of third-party claims).

99 See Opinion, at pp. 74-87.

- Section 43.1 contemplates entry of an Order transferring certain assets and properties, including the Trust Preferred Securities, "free and clear" of Liens (defined to mean "any charge against or interest in property to secure payment of a debt or performance of an obligation") and in accordance with Bankruptcy Code Sections 363 and 1141. This provision is overbroad and impermissible to the extent the "free and clear" language would deprive non-electing holders of the ability to seek recovery from assets delivered to JPMC, including the Trust Preferred Securities and the value of Washington Mutual Preferred Funding LLC which are being transferred to JPMC under the Plan.

- Section 43.2 discharges and releases Debtors and Reorganized Debtors from any and all Claims and suits whether or not the holder of a Claim based upon such debt voted to accept the Plan. This provision is overbroad and impermissible to the extent it fails to carve out the pending appeal of the TPS Litigation, the subject matter of which is now before the District Court.

- Section 43.3 provides injunctive protection to all of the Released Parties (which includes JPMC and its Related Persons) and with respect to their assets. This provision is overbroad and impermissible to the extent such injunction applies to non-electing holders or purports to affect the appeal of the TPS Litigation.

- Section 43.10 deems consent to the Global Third-party Releases set forth in Section 43.6 for *each holder* of a Claim or Equity Interest that does not elect to withhold consent. This provision should explicitly limit deemed consent with respect to *each* Claim or Equity Interest for which the election is made, as discussed above, so that holders are able to elect whether to grant such release with respect to each Claim or Equity Interest held.

47. As such, the Plan cannot be confirmed.

IV The Plan Cannot Be Confirmed Because It Violates Bankruptcy Code Sections 1129(a)(1) And 1129(a)(3).

48. Bankruptcy Code Section 1129(a)(1) makes it a confirmation requirement that a plan comply with all applicable provisions of Title 11 of the United States Code. See 11 U.S.C. § 1129(a)(1). Bankruptcy Code Section 1129(a)(3) requires that, for a plan to be confirmed, it have been "proposed in good faith and not by any means prohibited by law." See 11 U.S.C. § 1129(a)(3). This "good faith" standard requires that "the plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent

with the objectives and purposes of the Bankruptcy Code."[100] Notably, a plan must not only comply with the provisions of the Code, but must comply with any other applicable non-bankruptcy law.[101] Furthermore, under Bankruptcy Code Section 1129(a)(3), the Court must find that the "plan will *fairly achieve a result consistent with the objectives and purposes* of the Bankruptcy Code."[102]

A. Assumption Of The Trust Preferred Securities Exchange Agreements Clearly Would Violate Bankruptcy Code Sections 365(c)(2) And 1129(a)(1), And Must Not Be Approved.

49. As set forth in detail in the Initial Objection,[103] the Plan's proposed assumption of the Trust Preferred Securities exchange agreements (each calling for the issuance of the WMI preferred stock that was to have been "exchanged" for the Trust Preferred Securities) violates the complete prohibition against assumption of agreements "to issue a security of the debtor" set forth in Bankruptcy Code Section 365(c)(2) (thereby causing the Plan to fail to satisfy Bankruptcy Code Section 1129(a)(1)).

B. To The Extent The Settlement Noteholders Have Acted Illegally With Information Obtained During Confidential Plan Negotiations, The Debtors Are Incapable Of Satisfying The "Good Faith" Requirement.

50. When assessing the good faith of a plan, courts must consider the "totality of the circumstances" surrounding the negotiation and filing of the plan.[104] As this Court has noted, "the ultimate fairness of the *process* in bankruptcy is a paramount principle to be protected by

---

100 In re Zenith Elecs. Corp., 241 B.R. 92, 107 (Bankr. D. Del. 1999) (citations and quotations omitted).

101 See Zenith Elecs. Corp., 241 B.R. at 108 (incorporating Delaware corporate law in section 1129(a)(3) analysis, the court evaluated whether the transaction between a controlling shareholder and its corporation was "entirely fair").

102 In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004) (quoting In re PWS Holding Corp., 228 F.3d 224 (3d Cir. 2000)) (emphasis added).

103 See Initial Objection, at § III.

104 Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.), 324 F.3d 197, 211 (3d Cir. 2003).

the Bankruptcy Court."[105] Given the court's duty to safeguard the process from inequities, the court is granted "considerable judicial discretion" to inquire into the "fundamental fairness" of that process.[106]

51. In Coram, this Court denied confirmation of the debtor's plan on good faith grounds where it found that the continuing conflict of interest and breach of fiduciary duty by the debtor's chief executive officer "tainted" the debtors' negotiations of its plan and, ultimately, the plan itself.[107] Without the debtors' knowledge, the debtors' chief executive was receiving nearly $1 million in annual payments pursuant to an employment contract signed with one of the debtor's largest creditors.[108] Because the chief executive officer had an actual conflict of interest with the interests of the debtor, and because the creditor paying him was able to exert undue influence on the process, by virtue of a provision in the employment contract "requir[ing] that [the chief executive officer] obey the instructions" of the creditor, the Court denied confirmation of the plan because it had not been proposed in good faith pursuant to Bankruptcy Code Section 1129(a)(3).[109]

52. Similarly, leading commentators on bankruptcy law recognize that activity forbidden by law that corrupts the plan negotiation process will cause the plan not to comply with Bankruptcy Code Section 1129(a)(3), even if the plan otherwise technically complies with title 11:

> Given the wide range of possible plan proponents, it is possible that a plan could

---

105 In re Coram Healthcare, 271 B.R. 228, 232 (Bankr. D. Del. 2001) (emphasis added).

106 In re Am. Family Enters., 256 B.R. 377, 401 (D.N.J. 2000) (citations and internal quotations omitted).

107 Coram, 271 B.R. at 232.

108 Id. at 231-32.

109 Id. at 234-35.

> be part of a scheme that technically complies with title 11, but violates other law. For example, a plan proponent could have bribed another to take actions that would ease confirmation in the proponent's favor. If done knowingly and fraudulently, such activity is a bankruptcy crime. That is clearly something 'forbidden by law' and thus, if discovered, would preclude confirmation even if no provision of title 11 was violated.[110]

53. In this case, the Court must once again safeguard the "paramount principle" of "ultimate fairness of the process in bankruptcy" to find that the Plan is unconfirmable because of the circumstances surrounding its negotiation. As the Court is well aware, there are pending allegations that the benefits the Settlement Noteholders received from trading on the information and provisions of the Plan were unreasonable and, frankly, illegal. If proven to have occurred, the insider trading activities of the Settlement Noteholders facilitated by the Settlement will constitute the very type of illegality that precludes a finding of good faith and should be found to have "tainted" the entire negotiation process.[111] As such, the Plan cannot be confirmed.

C. The Plan Cannot Be Confirmed Because It Would Effect Prohibited Discrimination Against Certain Members Of Class 19.

54. A plan may not unfairly discriminate against or amongst like creditors. Bankruptcy Code Section 1123(a)(4), which requires that a plan "provide the same treatment for each claim or interest of a particular class" unless the holder of such claim or interest agrees to less favorable treatment,[112] "restates the cardinal principal of bankruptcy law, namely that creditors of the same class have a right to equality of treatment."[113] Similarly, Bankruptcy Code Section 1129(b)(1) requires that, within the context of a cram down, the plan "does not

---

110 7 Collier on Bankruptcy ¶ 1129.02[3][b][ii] (16th ed. rev. 2010).

111 See In re Frascella Enters., Inc., 360 B.R. 435, 445 (Bankr. E.D. Pa. 2007) ("[S]ome illegalities might indeed undermine the *bona fides* of the plan's proposal, or be part of an illegal means of proposal.").

112 11 U.S.C. § 1123(a)(4).

113 7 Collier on Bankruptcy ¶ 1123.01[4][a] (16th ed. rev. 2010).

discriminate unfairly" between impaired classes of claims that have not accepted the plan.[114] Although the two sections contemplate separate forms of unfair discrimination—1123(a)(4) prohibiting unfair discrimination within a single class and 1129(b)(1) prohibiting unfair discrimination between different classes of claimants with similar rights—the diagnostics used to determine whether the plan provides for such discrimination are often intertwined.[115] That is because the purpose of the prohibition against unfair discrimination is to ensure fairness in the bankruptcy process. Indeed, equality of treatment of and amongst creditors is a fundamental precept of bankruptcy law.[116]

55. The Plan, on its face, effects prohibited discrimination in two ways. First, by providing unequal treatment to members within Class 19, based on their votes on the prior Sixth Amended Plan, the Plan violates Bankruptcy Code Section 1123(a)(4) and, as a result, Bankruptcy Code Section 1129(a)(1). Next, while Class 19 is the only Class not allowed to vote, Class 20 (comprised of other WMI preferred equity holders with rights *pari passu* to those held by members of Class 19) is allowed to vote and members are allowed to retain their rights to estate distributions. As noted above, members of Class 19 who voted against the prior Sixth Amended Plan were deemed to have rejected the current Plan and to have forfeited their right

---

114 11 U.S.C. § 1129(b)(1). Although not explicitly defined by legislative history or case law, the prohibition against unfair discrimination "ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes." In re Armstrong World Indus., Inc., 348 B.R. at 121 (quoting In re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986); see H.R. Rep. No. 595, at 416-17 (1977), reprinted in U.S. Code Cong. & Admin. News 1978, pp. 6372, 6373 (explaining the rule against unfair discrimination as one "which demands that a class not be unfairly discriminated against with respect to equal classes" and which "preserves just treatment of a dissenting class from the class's own perspective").

115 See e.g., Armstrong v. Rushton (In re Armstrong), 294 B.R. 344, n.4 (B.A.P. 10th Cir 2003).

116 See Begier v. IRS, 496 U.S. 53, 58 (1990); Am. United Mut. Life Ins. Co. v. City of Avon Park, Fla., 311 U.S. 138, 147 (1940) ("[A] composition would not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others, whether that consideration moved from the debtor or from another . . . . That rule of compositions is but part of the general rule of 'equality between creditors' applicable in all bankruptcy proceedings.") (internal citations omitted).

even to the estate value to which they would be entitled as a result of their position in WMI's capital structure. As a result, the Plan effects prohibited discrimination as between Class 19 (at least with respect to those holders who were automatically deprived of their entitlement to Plan value) and Class 20, in violation of Bankruptcy Code Section 1129(b).

56. The Debtors bear the burden of proof to show the Plan does not unfairly discriminate.[117] While the prohibition against unfair discrimination does not require a plan to provide for identical treatment between dissenting and accepting classes, assuming that different treatment is based upon some rational basis,[118] the plan "may not provide harsher treatment for members of a class who reject the plan; each member of a class must receive the same treatment."[119] Bankruptcy Code Section 1123(a)(4) requires that the Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest *agrees* to a less favorable treatment of such particular claim or interest."[120] Where a plan provides for the disparate treatment of members of the same class, it is unconfirmable as a matter of law.[121]

57. Respectfully, the Court's reliance on In re Dana Corp. for the proposition that Section 1123(a)(4) does not require equal treatment among members of a class, but merely the

---

117 See Educ. Credit Mgmt. Corp. v. Coleman (In re Coleman), 560 F.3d 1000, 1011 (9th Cir. 2009).

118 In re Drexel Burnham Lambert Grp., Inc., 138 B.R. 714, 715-16 (Bankr. S.D.N.Y. 1992).

119 7 Collier on Bankruptcy ¶ 1129.03[3][b][vii], n.44 (16th ed. rev. 2010) (citing 11 U.S.C. § 1123(a)(4)); Combustion Eng'g Inc., 391 F.3d at 239 ("The Bankruptcy Code furthers the policy of 'equality of distribution among creditors' by requiring that a plan of reorganization provide similar treatment to similarly situated claims.").

120 11 U.S.C. § 1123(a)(4) (emphasis added).

121 See In re AOV Indust., Inc., 792 F.2d 1140, 1152 (D.C. Cir. 1986) (finding plan unconfirmable where it required creditors to release any claims against non-debtor plan funders in order to participate in the plan); In re Union Meeting Partners, 165 B.R. 553, 567 (Bankr. E.D. Pa. 1994) aff'd 52 F.3d 317 (3d Cir. 1995) (finding plan unconfirmable and violative of Section 1123(a) where it required members of the same class to tender different consideration in exchange for the same percentage recovery).

opportunity for equal treatment, is misplaced.[122] In Dana Corp., a portion of the approximately 133,000 members of the Ad Hoc Committee of Asbestos Personal Injury Claimants (the "Ad Hoc Committee") entered into a number of settlement agreements with the Debtor wherein the settling members of the Ad Hoc Committee were to receive under the Debtor's plan approximately $267 per member in satisfaction of each member's personal injury claim against the Debtor.[123] Since all personal injury claimants were grouped together into one class, those members who chose not to settle would receive nothing through the Plan, but their claims would "pass through the bankruptcy and [be] reinstated" against the Debtor post-bankruptcy.[124] So, while the Court did correctly cite Dana Corp. for the proposition that "[w]hat is important is that each claimant within a class have the same opportunity to receive equal treatment," the "equal opportunity" afforded dissenting class members in Dana Corp. is not akin to the opportunity afforded dissenting class members in the present case.[125] In Dana Corp., the members of the class who chose not to settle with the Debtor had their claims preserved, to be reinstated after the bankruptcy, and "thus ha[d] the opportunity to settle their claims or litigate them—the same options given to the participants in the settlement agreements."[126]

58. Here, dissenting members of Class 19 have no such opportunity. Instead, the claims held by members of Class 19 who voted against the Plan and, in so doing, rejected the settlement offer from JPMC, are to be discharged and released "regardless of whether any

---

[122] See Opinion, pp. 85-86.

[123] Ad Hoc Comm. of Pers. Injury Asbestos Claimants v. Dana Corp. (In re Dana Corp.), 412 B.R. 53, 57 (S.D.N.Y. 2008).

[124] Id.

[125] Opinion, p. 86.

[126] Dana Corp., 412 B.R. at 62.

property will have been distributed or retained pursuant to the Plan on account of such Claims."[127] Thus, far from the "equal opportunity" afforded claimants in Dana Corp., the dissenting members of Class 19 are unfairly discriminated against by the Plan not only because they do not receive their equal distribution of residual estate value under the Plan, but also because they purportedly lose their rights to litigate their claims against JPMC and the FDIC post-bankruptcy.

59. Putting aside, for the moment, the multiple instances of illegal discrimination against members of Class 19 who rejected the Sixth Amended Plan, the Plan illegally deprives dissenting members of Class 19 of *any* recovery, including estate distribution rights in which those members hold a vested property interest. Assuming the Court adopts the FJR as the proper standard for post-petition interest, as it should for the aforementioned reasons, approximately $700 million in additional value would be available for distribution to stakeholders, a large portion of which would be allocable to holders of WMI preferred equity under the Bankruptcy Code's distribution scheme. Because the members of Class 19 retain a property interest in any potential estate distribution to Class 19,[128] confirmation of the Plan (depriving them of that recovery) by the Court would amount to an unconstitutional taking of the dissenting members' property interests, insofar as it would involuntarily transfer the property interests of one set of private parties—the dissenting members of Class 19—to another set of private parties (other members of Class 19 and members of Class 20). Although a Bankruptcy Court, in applying the provisions of the Bankruptcy Code, will likely affect contractual obligations and potentially

---

[127] Plan, § 43.2.

[128] A property interest held by a party-in-interest to a bankruptcy "is afforded in federal bankruptcy court the same protection [it] would have under state law if no bankruptcy had ensued." Butner v. United States, 440 U.S. 48, 55-56 (1979). This protection extends to an equity holder's right to receive an estate distribution after all Allowed Claims and post-petition interest have been paid in full. See In re Introgen Therapeutics, Inc., 429 B.R. 570 (Bankr. W.D. Tex. 2010).

sanction the diminution of some party's property rights, the Court must consider whether "the interference goes so far as to constitute 'total destruction' of the value in the property held by a creditor," and, where such action does, recognize that "it violates the Fifth Amendment and may not stand."[129] Here, where the Plan seeks to transfer the property interests of Class 19's dissenting members to the accepting members of Class 19 and members of Class 20, confirming the Plan would result in the "total destruction" of one private party's property rights through the enrichment of another private party.[130] Accordingly, the Plan authorizes an unconstitutional taking an cannot be confirmed.

60. In addition to the unequal distributions to members of Class 19 based on their votes on the prior Sixth Amended Plan and the potential for an unconstitutional taking that would be effected by the Plan's redistribution of property from one private party to another, the Plan further discriminates against Class 19 as a whole by eliminating the Class members' right to vote on the latest Plan. Unlike the members of Class 19, those in Class 20—who hold similar interests to the members in Class 19—have been afforded the opportunity to revote and reclassify themselves as accepting members of the class, which entitles them to a potential estate

---

[129] Americredit Fin. Servs., Inc. v. Nichols (In re Nichols), 440 F.3d 850, 854 (6th Cir. 2006) (finding that a modification to the debtor's plan did not constitute 'total destruction' of the creditor's right to payment was merely delayed, not extinguished) (citations omitted).

[130] The Plan offends the Fifth Amendment Takings Clause in two respects. First, there is no conceivable public purpose for the Court to endorse the "total destruction" of dissenting Class 19 members' property interests in the estate. Such a result, however, is unavoidable if the Plan is confirmed, since the Plan involuntarily transfers the property interests of those members to other creditors in the distribution scheme. Without any conceivable purpose other than the redistribution of property from one private party to another, the Plan sanctions a transfer that "is unlawful regardless of the compensation paid." Theodorou v. Measel, 53 F. App'x. 640, 642 (3d Cir. 2002). Furthermore, even if the Court could fashion some "public use" for which the transfer was to be made—such as the efficient administration of the Debtors' estate through the judicial system—the involuntary transfer still violates the Fifth Amendment since the dissenting members do not receive "just compensation" for their loss. Not only do the dissenting members of Class 19 fail to receive "just compensation," they do not even receive one cent of compensation for the loss of their property interests in the Debtors' estate. Thus, because the Plan provides for the involuntary transfer of property from one private party to another, or, in the alternative, the taking of property for "public use" without just compensation, the Court's approval of the Plan would be tantamount to a unconstitutional regulatory taking.

distribution. Because these classes hold similarly-situated interests, but are treated differently with respect to their right to vote, the Plan unfairly discriminates against Class 19.

61. "Courts have developed several methods" to determine whether a plan unfairly discriminates against or amongst like creditors.[131] Recently, a number of courts, in evaluating a plan's treatment of impaired, dissenting classes, have adopted the rebuttable presumption test derived from an influential article written by former professor, now Bankruptcy Judge, Bruce A. Markell.[132] Under the so-called Markell Test, there is a rebuttable presumption of unfair discrimination whenever there is: (a) a dissenting class; (b) another class of the same priority; and (c) a difference in the plan's treatment of the two classes that results in either (i) a materially lower percentage recovery for the dissenting class, or (ii) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.[133] Where there is a materially lower percentage recovery, "the presumption [of unfair discrimination] can be rebutted 'by showing that, outside of bankruptcy, the dissenting class would similarly receive less than the class receiving a greater recovery. . . .'"[134]

62. Thus, under the Markell Test, a rebuttable presumption arises that the Plan unfairly discriminates against Class 19 since the members of Class 19, unlike those in Class 20 who hold similar interests, were not entitled to vote on the Plan or receive their allocable share of

---

[131] Armstrong World Indus., Inc., 348 B.R. at 121.

[132] See, e.g., Id.; In re Quay Corp., Inc., 372 B.R. 378, 386 (Bankr. N.D. Ill. 2007); In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 231 (Bankr. D.N.J. 2000); see also Bruce A. Markell, A New Perspective on Unfair Discrimination in Chapter 11, 72 Am. Bankr. L. J. 227 (1998).

[133] Armstrong World Indust., Inc., 348 B.R. at 121 (citing In re Dow Corning Corp., 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999)).

[134] Id.

distributable estate value. Furthermore, the Debtors are unable to rebut this presumption of illegality. Outside of bankruptcy, members of Class 19 would be treated equally, both with respect to one another and in regards to members of Class 20. That is to say, it is only through the Plan that accepting members of Class 19 are awarded a higher percentage of recovery than their dissenting counterparts. And it is only through the Plan that members of Class 20 (who are presumed to hold rights of equal priority to estate value as members of Class 19) are able to leapfrog the members of Class 19 who voted against the Sixth Amended Plan. As such, the Debtors will be unable to overcome this rebuttable assumption of unfair discrimination that arises under the Markell Test.

63. Finally, by eliminating Class 19 members' right to vote, the modified Plan violates Bankruptcy Code Section 1127 (and by extension, Bankruptcy Code Section 1129(a)(1)) because the Plan provision removing the right to revote "fails to meet the requirements of sections 1122 and 1123 of this title."[135] The Debtors are barred from modifying a plan if such modification violates another provision of the Bankruptcy Code, specifically, and as mentioned, the provisions that require equal treatment both against and amongst creditors. Moreover, regardless of the effect a modified plan has on those Bankruptcy Code Sections, pursuant to Bankruptcy Rule 3019, any modification must be voted on by the members of an impaired class unless (i) the modification does not "adversely change" a member's treatment and (ii) the member "<u>previously accepted the plan</u>."[136] This Court has recognized the importance of safeguarding the right to vote, within the context of a debtor who filed a modified plan, since a party "must be given an opportunity to change its prior election . . . [because a party] must know

---

[135] 11 U.S.C. § 1127(a).

[136] F.R.B.P. 3019(a) (emphasis added).

the prospects of its treatment under the plan before it can intelligently determine its rights. . ."[137]

64. As is clear from the spirit and text of Bankruptcy Code Section 1127 and Bankruptcy Rule 3019, the Debtors were obligated, per Bankruptcy Code Section 1126(a),[138] to provide Class 19 (or at least the members thereof who voted against the Sixth Amended Plan) an opportunity to vote on the current Plan. They chose not to do so, and this Court specifically preserved the issue of whether that decision would have an effect on confirmation of the Plan. It does; and the Plan cannot be confirmed.

RESERVATION OF RIGHTS

65. The TPS Consortium reserves the right to amend, modify or supplement this Objection prior to the conclusion of the hearing on confirmation of the Plan and to review and object to any amended or revised version of the Settlement or Plan. The TPS Consortium also reserves the right to object to any documents contained in the Plan Supplement and any amendments, modifications or supplements thereto prior to the conclusion of the hearing on confirmation of the Plan. The TPS Consortium reserves the right to assert additional objections at the hearing on confirmation of the Plan. Moreover, any failure to respond herein to a specific statement or omission contained in the Settlement, Plan, or Plan Supplement shall not be deemed acceptance thereof.

---

137 In re Century Glove, Inc., 74 B.R. 958, 961 (Bankr. D. Del. 1987); see In re Frontier Airlines, Inc., 93 B.R. 1014 (Bankr. D. Colo. 1998) (holding that where the modification of a chapter 11 plan adversely affects a party, that party is entitled to reconsider and change its vote).

138 See 11 U.S.C. 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan.").

WHEREFORE, the TPS Consortium respectfully requests that the Court (a) deny confirmation of the Plan, and (b) grant such other and further relief as it deems just and proper.

Dated: Wilmington, Delaware
May 13, 2011

Respectfully submitted,

CAMPBELL & LEVINE LLC

/s/ Kathleen Campbell Davis ________________
Marla Rosoff Eskin, Esq. (DE 2989)
Bernard G. Conaway, Esq. (DE 2856)
Kathleen Campbell Davis, Esq. (DE 4229)
800 North King Street, Suite 300
Wilmington, DE 19809
(302) 426-1900
(302) 426-9947 (fax)

– and –

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Sigmund Wissner-Gross, Esq.
Seven Times Square
New York, NY 10036
(212) 209-4800
(212) 209-4801 (fax)

– and –

Jeremy B. Coffey, Esq.
Timothy J. Durken, Esq.
Jonathan D. Marshall, Esq.
One Financial Center
Boston, MA 02111
(617) 856-8200
(617) 856-8201 (fax)

Counsel for the TPS Consortium

1828526v7

EXHIBIT C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

SECOND SUPPLEMENTAL OBJECTION OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS TO CONFIRMATION OF THE MODIFIED SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

The consortium of holders of interests subject to treatment under Class 19 of the Plan (the "TPS Consortium"), by and through its undersigned counsel, hereby files this second supplemental objection (the "Objection")[1] to confirmation of the Modified Sixth Amended Joint Plan of Washington Mutual Inc. ("WMI") and WMI Investment Corp. ("WMI Investment" and, together with WMI, the "Debtors"), filed on February 7, 2011, as modified on March 16, 2011 and March 25, 2011 (the "Plan") [Docket Nos. 6696, 6964, and 7038]. In support of this Objection, the TPS Consortium respectfully represents as follows:

PRELIMINARY STATEMENT

1. Two significant recent court rulings, each occurring after the TPS Consortium's May 13, 2011 Plan objection deadline, compel the filing of this second supplemental Objection

[1] The TPS Consortium expressly incorporates by reference herein each of the arguments set forth in the *Objection Of The TPS Consortium To Confirmation Of The Sixth Amended Joint Plan Of Affiliated Debtors Pursuant To Chapter 11 Of The United States Bankruptcy Code* [Docket No. 6020] (the "Initial Objection") and the *Supplemental Objection of the Consortium of Trust Preferred Security Holders to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 7480] (the "First Supplemental Objection").

to confirmation. First, on June 23, 2011, the Supreme Court of the United States issued its seminal opinion in the Stern v. Marshall[2] matter, clarifying Constitutional limitations on the adjudicatory powers of Bankruptcy Courts. Second, on June 24, 2011, the United States Court of Appeals for the District of Columbia Circuit, in American National Insurance Co. v. Federal Deposit Insurance Co. (the "ANICO Decision"),[3] reversed a lower Court's dismissal, on jurisdictional grounds, of a lawsuit asserting, inter alia, numerous claims against JPMorgan Chase Bank, N.A. ("JPMC") for its actions in connection with the September 2008 seizure and sale of the Washington Mutual Bank ("WMB"), the Debtors' primary operating subsidiary. Both of the foregoing recently-delivered decisions have a direct bearing on this Court's ability to approve the "global settlement" underlying the Plan (the "Settlement"), and, ultimately, render approval of that Settlement and the Plan inappropriate.

2. In Stern, the Supreme Court issued guidance as to the restrictions imposed on a Bankruptcy Court's ability to adjudicate matters reserved under the Constitution to Article III Courts. The relief sought by the Debtors through the Plan and the Settlement (asking this Court to resolve and/or adjudicate on a final basis issues reserved to Article III Courts) exceeds the permissible bounds of the adjudicatory power of this Court, as clarified by Stern. This Court has, in the past, correctly declined to take actions beyond its adjudicatory authority (e.g.,

---

2 See Stern v. Marshall, No. 10-179 (U.S. June 23, 2011), slip opinion attached hereto at Exhibit A.

3 See Am. Nat'l Ins. Co. v. Fed. Deposit Ins. Co., No. 10-5245 (D.C. Cir. June 24, 2011), slip opinion attached hereto at Exhibit B.

declining, on jurisdictional grounds, to grant illegal third-party releases). Given the recent guidance provided by the Supreme Court through Stern, the Court should do no less here.[4]

3. Second, in its January 7, 2011 opinion denying confirmation of the Plan, this Court discussed certain of the potential claims and actions proposed to be resolved or released pursuant to the Settlement. Among the matters proposed to be compromised are potential claims arising from serious allegations regarding misconduct by JPMC at or around the time of the FDIC's seizure and sale of WMB to JPMC (the "JPMC Business Torts"). The Court concluded the likelihood of success on such claims was "not high" because: (a) a lawsuit by third-parties asserting similar claims against JPMC had, at that time, been dismissed on the basis of limitations imposed under the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"); and (b) Debtors' counsel's possible failure to preserve the right to pursue such claims in connection with the WMB receivership proceedings. As the ANICO Decision makes clear, FIRREA does not serve to protect JPMC for wrongful conduct in connection with its purchase of WMB. Rather, to the extent JPMC acted wrongfully, direct claims against JPMC exist (making irrelevant, for purposes of estate recoveries, any failure by the Debtors to properly preserve such claims in the WMB receivership). Given the potential value to the estates of such claims, and the broad release proposed for JPMC under the Plan (going so far as to provide a release from liability for even JPMC's "gross negligence" and "willful misconduct"), the Court should carefully reconsider the propriety of the Settlement, which remains incapable of approval on the existing record before the Court.

---

[4] By this Objection, the TPS Consortium addresses the impact of the Supreme Court's decision in Stern only with respect to the proposed compromise of non-core claims (many of which are not pending before this Court) in the context of Plan confirmation.

4. In sum, the Supreme Court's decision in Stern underscores that the relief sought through the Plan and the Settlement Agreement is beyond this Court's ability to grant. As such, confirmation of the Plan and approval of the Settlement should be denied. But, even if the Court were to find that it had the power to adjudicate the fairness of the Settlement, the recent ANICO Decision compels reconsideration and disapproval of the Settlement in light of the potentially valuable claims against JPMC that would be sacrificed for little (or no) value thereunder.

BACKGROUND

I. Prior Proceedings Concerning The Plan And Settlement.

5. As this Court is aware, the Plan is premised upon approval and implementation of a "global" Settlement that would resolve or release, on a final basis, numerous separate issues, claims and pieces of litigation. Certain of these matters are pending before this Court in the context of adversary proceedings, counterclaims and otherwise. Certain of the matters are pending before other Courts. Certain of the matters are based on rights created under the Bankruptcy Code. Certain of the matters are based on non-bankruptcy statutes (state and federal). Certain of the matters are based entirely on state common law. Certain of the actions were commenced against the Debtors, and certain were commenced by the Debtors against non-Debtors.

6. Just as an example of the diverse and wide-ranging matters with respect to which the Debtors ask this Court to exercise jurisdiction and enter final Orders (to implement the Settlement and confirm the Plan), the Debtors would have this Court resolve or release claims by the Debtors, including, inter alia:[5]

---

[5] In addition to the specific multi-party litigations noted herein that are to be finally resolved under the Settlement, the Plan and Settlement also have sweeping implications on numerous other rights of third parties.

- Litigation in the District Court for the District of Columbia seeking review of WMI's claim in the WMB receivership pursuant to 12 U.S.C. § 1821(d)(6)(A);
- Litigation in the District Court for the District of Columbia, pursuant to 12 U.S.C. § 1821(d)(13)(E)(i), seeking recovery from the FDIC for a breach of its statutory duty to maximize the value received for WMB;
- Litigation in the District Court for the District of Columbia seeking compensation from the FDIC pursuant to the Takings Clause of the United States Constitution;
- Litigation in the District Court for the District of Columbia regarding claims sounding in conversion against the FDIC pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80;
- Claims against JPMC for recovery of fraudulent transfers of approximately $6.5 billion and Trust Preferred Securities with a value of $4 billion, pursuant to Washington state law and 11 U.S.C. §§ 544 and 548;
- Claims against JPMC for recovery of preferential transfers, pursuant to Washington state law and 11 U.S.C. §§ 544 and 547;
- Claims for avoidance of the sale of WMB to JPMC, pursuant to Washington and Nevada state avoidance laws;
- Claims for unjust enrichment, constructive trust and equitable liens, presumably under state law;
- Claims for trademark infringement, pursuant to 15 U.S.C. § 1114;
- Claims for common law trademark infringement;
- Claims against JPMC for patent infringement, pursuant to 35 U.S.C. § 271; and
- Claims against JPMC for copyright infringement, pursuant to 17 U.S.C. § 501.[6]

7. On December 2, 2010, this Court began a four-day contested evidentiary hearing on confirmation of a prior iteration of the Plan. In response to the TPS Consortium's objections that the Debtors were incapable of proving the reasonableness of the Settlement, the Debtors at the last minute scrambled to introduce numerous pleadings related to the issues, claims and litigations to be compromised pursuant to the Settlement. But, the Debtors continued to expressly refuse to provide any legal analysis performed as to the merits of the estates' rights

---

6 The table attached hereto at Exhibit C sets forth a more detailed description of the various claims and causes of action the Debtors ask the Court to release or resolve through the Plan and Settlement.

with respect to any of the underlying claims or why the Debtors chose to compromise estate claims and rights. That record is now closed, and the Debtors must live with the evidence (or lack thereof) they chose to provide.

8. On January 7, 2011, this Court issued its Order and Opinion denying confirmation of that version of the Plan (the "Confirmation Opinion"). [Docket Nos. 6528 and 6529]. Among the bases cited in the confirmation Opinion for the proposition that the matters decided thereby were within the Court's "core" jurisdiction was 28 U.S.C. § 157(b)(2)(C) (dealing with "counterclaims by the estate against persons filing claims against the estate"). The Constitutionality of this subsection was, in particular, the primary focus of the Stern decision.[7]

9. In the Confirmation Opinion, the Court indicated it was favorably inclined to approve the Settlement, if certain other critical defects in the Plan were remedied. As set forth in the TPS Consortium's First Supplemental Objection, numerous of those defects remain extant, leaving the Plan still incapable of confirmation.

10. Following the Court's delivery of the Confirmation Opinion, the Official Committee of Equity Security Holders (the "Equity Committee") appealed and sought direct certification to the Third Circuit Court of Appeals of the portion of the Confirmation Opinion finding the Settlement to be "fair and reasonable." [Docket No. 6575]. In opposing the Equity Committee's efforts to obtain appellate review of the portion of the Confirmation Opinion dealing with the Settlement, the Debtors and JPMC argued there was not a final confirmation Order or a final Order approving the Settlement capable of appellate review. See JPMC's Objection to the Equity Committee's Petition for Certification of Direct Appeal, at ¶ 4 [Docket No. 6656] ("As of now, there is no confirmation order, no final plan … and no final settlement

[7] See Slip Op. at 4-5.

for an appellate court to review …. the Equity Committee's appeal therefore is premature"); see also Debtors' Objection to the Equity Committee's Petition for Certification of Direct Appeal, at ¶ 2 [Docket No. 6653] ("Any appeal of the Court's findings regarding the Global Settlement Agreement must await entry of an order confirming a plan."). The Debtors, through the revised Plan, now ask this Court to grant final approval of the Settlement and confirmation of the Plan.

II. The Confirmation Opinion's Treatment Of Business Tort Claims Against JPMC.

11. In the Confirmation Opinion, the Court spent considerable time discussing certain pieces of litigation that were proposed to be resolved pursuant to the Settlement. Among them was litigation commenced by the ANICO Plaintiffs (as defined in the Confirmation Opinion, p. 53) against JPMC. Through that litigation, the ANICO Plaintiffs seek recovery from JPMC for alleged misconduct in connection with the FDIC's September 2008 seizure and sale to JPMC of the Debtor's primary operating subsidiary, WMB. That alleged misconduct included misuse of access to government regulators to gain non-public information about WMB, misuse of confidential information obtained from WMB during "sham" negotiations, efforts to distort market and regulatory perceptions of WMB's financial condition, and exertion of improper influence over government regulators to force the premature seizure and sale of WMB to JPMC. See ANICO Decision, at 4.

12. Early in these cases, the Debtors themselves commenced an investigation into estate claims against JPMC for much of this same alleged misconduct. See Confirmation Opinion, at 54. Indeed, in seeking authority to conduct discovery into these claims, the Debtors claimed a fiduciary duty to the estates to determine whether "myriad meritorious and highly valuable claims" existed. See Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004.1 Directing the Examination of JPMorgan Chase Bank, N.A., at 2, 3

[Docket No. 974] (emphasis added). By the requested discovery, the Debtors claimed to be seeking to uncover facts that would allow them to assess the merit of various allegations against JPMC, including unfair competition, tortious interference, interference with prospective economic advantage, breach of contract, misappropriation of confidential information and trade secrets, and conversion, among others. Id. at 8, 10. Upon information and belief, that discovery was not conducted before the Debtors decided to compromise the JPMC Business Torts, and has not been conducted since.

13. At the time the Confirmation Opinion was issued, the ANICO Plaintiffs' lawsuit against JPMC had been dismissed on the basis that, under FIRREA, the WMB receivership was the exclusive claims process for claims relating to the sale of WMB. See Confirmation Opinion, at 54. The Court went on to note, inter alia, that JPMC and FDIC contended FIRREA similarly prevented the estates from pursuing the JPMC Business Torts as well (in the Confirmation Opinion, the Court also noted the possibility that Debtors' counsel had failed to properly preserve such rights in connection with the WMB receivership). See id. at 54-55. Ultimately, the Court concluded that, at the time of the Confirmation Opinion, "the Debtors' likelihood of success on the Business Tort Claims [was] not high" first citing to the then-current status of the ANICO litigation. Id. at 56.

14. On June 24, 2011, United States Court of Appeals for the District of Columbia entered the ANICO Decision, which reversed and remanded the lower Court's dismissal of the ANICO litigation on FIRREA grounds. In ruling, the ANICO appellate Court held that FIRREA did not deprive an appropriate Court of jurisdiction to consider claims against JPMC for its wrongdoing. See ANICO Decision, at 8. More specifically, claims against JPMC for its role in WMB's collapse were determined not to constitute "claims" subject to FIRREA. See id.

ARGUMENT

I. The Court Is Prohibited From Entering Final Orders Approving The Settlement Incorporated Into The Plan.

A. The Objection Is Timely.

15. A Bankruptcy Court's Constitutional authority to adjudicate a particular matter is of paramount importance, and can be raised/challenged at any time. See Lindsey v. Ipock, 732 F.2d 619, 622 n.2 (8th Cir. 1984) ("The challenge of the bankruptcy court's contempt power is in essence a challenge to the court's subject matter jurisdiction for contempt. We find [Appellant] is not estopped from challenging the constitutionality of this jurisdiction."); accord Int'l. Longshoremen's Assoc. v. Davis, 476 U.S. 380, 399 (1986) (challenge to Court's power to adjudicate matter on preemption grounds was jurisdictional, and amenable to challenge at any time); B & P Holdings I, LLC v. Grand Sasso Inc., 114 Fed. Appx. 461, 465 (3d Cir. 2004) (citing Kontrick v. Ryan, 540 U.S. 443 (2004) (holding that a court's jurisdiction may be raised initially by either party, or sua sponte by the Court, at any stage of litigation, including appeal) (citations omitted)). Where a question exists as to whether a Court has the power to act with respect to particular matter, the burden lies with the party seeking relief or with the Court itself. See Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995) ("A party who invokes the jurisdiction of the federal courts has the burden of demonstrating the court's jurisdiction."); Howery v. Allstate Ins. Co., 243 F.3d 912, 916 (5th Cir. 2001) ("Federal courts are courts of limited jurisdiction. We must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum."); see also In re Geauga Trenching Corp., 110 B.R. 638, 642-43 (Bankr. E.D.N.Y. 1990) ("[A] Bankruptcy Court has the independent responsibility to make a 28 USC § 157(b)(3)

determination that this proceeding is or is not a 'core' matter or otherwise 'related to' the pending Title 11 case.").

16. This Court previously recognized the critical importance of honoring the limits of its power to grant requested relief. See In re Coram Healthcare Corp., 315 B.R. 321, 335-36 (Bankr. D. Del. 2004) (citing In re Digital Impact, Inc., 223 B.R. 1, 14 (Bankr. N.D. Okla. 1998) (Bankruptcy Court does not have jurisdiction to approve non-debtor releases by third parties) and In re Davis Broad., 176 B.R. 290, 292 (M.D. Ga. 1994) (holding that Bankruptcy Court erred in not vacating confirmation order because Court did not have jurisdiction to grant releases of third party claims, even though no creditor had objected).

17. Since the TPS Consortium is entitled to raise objections predicated on this Court's Constitutional authority to act at any time (including at the appellate level), this Objection is timely as a matter of law. The Court must, therefore, closely consider the arguments raised herein.

B. In *Stern*, The Supreme Court Announced Principles Of Law That Render Approval Of The Settlement (And, In Turn, The Plan) Beyond This Court's Constitutional Authority.

1. *Stern*'s Holding As To Whether An Estate Cause Of Action May Be Resolved By A Non-Article III Court.

18. Since the enactment of the Bankruptcy Act of 1978, courts and scholars have wrestled with the permissible scope of matters that may be adjudicated on a final basis by Bankruptcy Courts – Courts created under Article I of the Constitution – versus those matters that must be reserved for final adjudication by Courts created under Article III of the Constitution. See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Halper v. Halper, 164 F.3d 830, 835 (3d Cir. 1999) ("Bankruptcy Court jurisdiction has been the subject of heated controversy in

recent decades."); In re Guild & Gallery Plus, Inc., 72 F.3d 1171, 1176-79 (3d Cir. 1996) (discussing Bankruptcy Courts' history); Radha A. Pathak, Breaking the "Unbreakable Rule": Federal Courts, Article I, and the Problem of "Related To" Bankruptcy Jurisdiction, 85 Or. L. Rev. 59 (2006); Frank J. Kennedy, The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction, 55 Am. Bankr. L.J. 63 (1981). On June 23, 2011, the Supreme Court issued its decision clarifying which matters a Bankruptcy Court is empowered to adjudicate and which matters must be reserved for adjudication by Article III Courts. See Stern v. Marshall, Slip Op. No. 10-179 (June 23, 2011).

19. Initially, the Supreme Court's decision in Stern makes clear that the determination of whether a Bankruptcy Court can adjudicate a particular matter requires two inquiries: first, whether the matter falls within the authority ***granted*** to Bankruptcy Courts by statute in 28 U.S.C. 157; and second, whether the matter falls within the exercise of jurisdiction ***allowed*** non-Article III Courts under the Constitution. See Stern, Slip Op. at 16. And, it is on this second inquiry – what is allowed under the Constitution – that this Court must focus when considering the relief sought by the Debtors through the Plan and Settlement.

20. This second inquiry is critical here because Congress may not, through this Court's actions, "'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" Stern, Slip Op. at 18 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856)). "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." Id. (quoting Northern Pipeline, 458 U.S. at 90 (Rehnquist, J. concurring)) (emphasis added).

21. In Northern Pipeline, a plurality of the Supreme Court did recognize an exception to the foregoing general rule where the matter at issue implicated "public rights" that Congress could Constitutionally assign to non-Article III Courts or agencies for final resolution. See Northern Pipeline, 458 U.S. at 67-68 (plurality determining the "public rights" exception applied to matters arising between individuals and the government in connection with the performance of Constitutional functions of the Executive and Legislative branches that, historically, could have been determined exclusively by those branches). While the Supreme Court has since clarified the "public rights" exception is not limited just to suits to which the government is a party, the exception is still limited only to claims deriving from a federal regulatory scheme or for which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within that agency's authority. See Stern, Slip Op. at 25.

22. In determining whether a particular action or claim not involving the government should nonetheless fall within the "public rights" exception to Article III adjudication, inquiry must be made as to whether: (a) the claim and some related matter within an agency's proper exercise of authority concern a single "dispute"; (b) the non-Article III tribunal's assertion of authority would involve only a "narrow class of common law claims" in a "particularized area of law"; (c) the area of law in question is governed by "a specific and limited federal regulatory scheme" as to which the non-Article III tribunal has "obvious expertise"; (d) the decision rendered by the non-Article III tribunal would be enforceable only by order of an Article III Court; and[8] (e) the parties had freely consented to resolution of their differences before the non-

[8] Use of the conjunction "and" (rather than the disjunctive "or") indicates the inquiries are to be made conjunctively, rather than disjunctively. See Condrey v. Suntrust Bank of Ga., 431 F.3d 191, 201 (5th Cir. 2005) (statute's use of the conjunctive "and" requires that evidence on *all* elements be presented); In re Grantsville Hotel Assocs., L.P., 103 B.R. 509, 510 (Bankr. D. Del. 1989) (same).

Article III tribunal.[9] See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844, 852-855 (1986) (quoting Northern Pipeline, 458 U.S., at 85). Another consideration is whether "Congress devised an 'expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.'" Stern, Slip Op. at 28 (citation omitted) (holding that "[t]he 'experts' in the federal system at resolving common law counterclaims such as [debtor's] are the Article III courts, and it is with those courts that [debtor's] claim must stay").

23. Where a claim or action is based on statute, if the "statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." Stern, Slip Op. at 26; Northern Pipeline, 492 U.S. at 54-55 (rejecting argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a non-creditor fell within the "public rights" exception).

24. And, in considering the bounds of its authority to approve the Settlement, the Court should be mindful of the Supreme Court's decision in Celotex Corp. v. Edwards, where it was

---

[9] While a party may consent to personal jurisdiction, it is not possible for parties to bestow on the Bankruptcy Court by agreement (e.g., the Settlement) the authority to adjudicate on a final basis matters reserved to Article III Courts under the Constitution. Accord Stern, Slip Op. at 30 (rejecting the filing of a claim in bankruptcy as a basis for ignoring Constitutional limitations on the Bankruptcy Court's power to act, noting "it is hard to see why [Respondent]'s decision to file a claim should make any difference with respect to the characterization of [Petitioner]'s counterclaim"); see also Okereke v. United States, 307 F.3d 117, 120 n.1 (3d Cir. 2002) (citing Pa. v. Union Gas Co., 491 U.S. 1, 26, (1989) (Stevens, J., concurring) ("[T]he cases are legion holding that a party may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent.")); Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 293-94 (3d Cir. 1998) ("[I]t is axiomatic that a party may not confer or defeat jurisdiction by mere pleading."). Moreover, given the coercive nature of bankruptcy law's centralization of disputes in the Bankruptcy Court, the concept of "consent" should be viewed differently in applying this test to questions of a Bankruptcy Court's Constitutional authority to act. See Stern, Slip Op. at 28 and n. 8; Granfinanciera, 492 U.S. at 59 n. 14.

noted that a Bankruptcy Court's authority is even more circumscribed in the context of a liquidation (in that case, under chapter 7) than when the Court has before it a bona fide reorganization. See 514 U.S. 300, 310 (1995). Here, while the Plan has been presented as "reorganization," it simply effects a liquidation under Chapter 11.

25. In sum, the Court does not have the Constitutional authority to resolve on a final basis non-core estate causes of action based on non-bankruptcy law. Such matters fall outside of the "public rights" doctrine and, therefore, must be left for adjudication by Article III Courts.

2. Settlement Approval Is Claims Resolution That Must Be Reserved For Article III Courts.

a. Approval Of A Settlement Is Dispositive Adjudication, As A Matter Of Law.

26. A Bankruptcy Court's approval of a settlement is, in effect, a final adjudication of the compromised claims. See Rosenberg v. XO Commc'ns., Inc. (In re XO Commc'ns., Inc.), 330 B.R. 394, 450 (Bankr. S.D.N.Y. 2005) (citing Adam v. Itech Oil Co. (In re Gibraltar Res., Inc.), 210 F.3d 573, 576 (5th Cir. 2000) ("A bankruptcy court's approval of a settlement order that brings to an end litigation between parties is a 'final' order.")); Martin v. Pahiakos (In re Martin), 490 F.3d 1272, 1276-77 (11th Cir. 2007) (noting that a "bankruptcy court's order approving the settlement agreement is sufficiently final such that it is entitled to preclusive effect . . . [and] [f]or purposes of res judicata, the order approving the settlement agreement provides a final determination on the merits"); Beaulac v. Tomsic (In re Beaulac), 294 B.R. 815, 818 (1st Cir. B.A.P 2003) (noting that a bankruptcy order approving the stipulation of a settlement is a final Order from which jurisdiction exists to hear an appeal); In re Drexel Burnham Lambert Grp., 960 F.2d 285 (2d Cir. 1992) (finding a District Court's Order approving a settlement agreement as final for purposes of appeal).

27. When a Court issues a ruling on a settlement agreement, it has the same effect as adjudicating the settled claims at trial. See In re XO Commc'ns., Inc., 330 B.R. at 451 (quoting In re Joint E. and S. Dist. Asbestos Litig., 129 B.R. 710 (E.D.N.Y. & S.D.N.Y. 1991), vacated on other grounds by 982 F.2d 721 (2d Cir. 1992) ("Once approved by the Bankruptcy Court, a compromise takes the form of an order of the court and has the effect of a final judgment.")); In re Dominelli, 820 F.2d 313, 316 (9th Cir. 1987) (Order approving settlement considered final judgment for res judicata purposes); 10 Collier on Bankruptcy ¶ 9019.01[3] (15th ed. rev. 2004) ("An order approving a settlement will be reversed only if the lower court has been guilty of an abuse of discretion. Once it has become final, an order approving a settlement has the same res judicata effect as any other order of a court"); In re Pac. Gas & Elec. Co., 304 B.R. 395, 414-15 (Bankr. N.D. Ca. 2004) (explaining that a party's "rights under the Settlement Agreement will vest pursuant to applicable state and federal law, and this court's determinations will become binding under principles of res judicata, law of the case, etc. . . . Thereafter, any attempt to alter (other than by mutual consent) or obtain a determination contrary to this court's present determinations will be barred by those same principles") (citations omitted); In re Mal Dun Assocs., Inc., 406 B.R. 622 (Bankr. S.D.N.Y. 2009) (finding releases of causes of action against the debtor in the settlement agreement, plan, and confirmation order to enjoin creditors from pursuing claims in state Court); United States v. Kellogg (In re West Texas Mktg. Corp.), 12 F.3d 497, 499 (5th Cir. 1994) ("[S]ettlement agreement approved and embodied in a judgment by a Court is 'entitled to full res judicata effect,' . . . . preclud[ing] subsequent litigation of issues which arise out of claims which were conclusively decided in the prior decision.") (citations omitted).

28. Clearly, once a Bankruptcy Court resolves litigation through the approval of a settlement, the matter has been "withdraw[n] from judicial cognizance" of Article III Courts with only the limited appellate review from an Article III Court available thereafter. See Stern, Slip Op. at 21-22 (noting the Northern Pipeline Court's concern with the "marked deference" to be afforded a Bankruptcy Court's findings of fact pursuant to 28 U.S.C. § 158(a) and Fed. R. Bankr. P. 8013).

29. For this reason, final Settlement approval (to the extent involving non-core estate claims) is beyond the Constitutional authority of the non-Article III Bankruptcy Courts. Accord 28 U.S.C. § 636(b)(1)(A) & (B) (magistrate judges may not adjudicate dispositive motions, such as involuntary case dismissal or class action settlements, but may submit proposed findings of fact and recommendations to the District Court pursuant to Federal Rule of Civil Procedure 72(b)(1)); see also Beazer East, Inc. v. The Mead Corp., 412 F.3d 429, 437 (3d Cir. 2005) (referral to non-Article III court of determination of liability allocations exceeded Constitutional bounds of that Court's authority); Prudential Ins. Co. of Am. V. U.S. Gypsum Co., 991 F.2d 1080, 1088 (3d Cir. 1993) (same). This Court, therefore, may not make the necessary final determinations and/or adjudications underlying approval of the Settlement or, in turn, the Plan.

b. Settlement Approval Requires Final Factual And Legal Determinations Exceeding The Constitutional Authority Of Bankruptcy Courts.

30. The Supreme Court, in a decision pre-dating Stern, Northern Pipeline and even the enactment of 28 U.S.C. § 157, provided the following admonishment to Courts considering whether to approve settlements:

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success

> should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968); see also Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996) (recognizing four criteria a Bankruptcy Court should consider in making the judicial determinations called for under TMT Trailer: (a) the probability of success in litigation; (b) the likely difficulties in collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors).

31. The Court's affirmative decision to enter a final Order to approve and enforce a compromise is not to be a thoughtless, fait accompli upon the filing of a request for such approval. Rather, the caselaw mandates careful consideration and determinations by the approving Court. While a "mini-trial" on each component of the proposed settlement is not required, the approving Court's conclusions must still be "well-reasoned" and supported by its own determination as to the facts and an analysis of the law. See TMT Trailer, 390 U.S. at 434. The opinions of the parties that a settlement is fair and equitable may be considered; but it is the approving Court that must ultimately make its own, independent, determination before approving a settlement. See In re Millennium Multiple Emp'r. Welfare Benefit Plan, No. 10-13528, 2011 Bankr. LEXIS 1973 (Bankr. W.D. Okla. Feb. 18, 2011); In re Albrecht, 245 B.R. 666 (B.A.P. 10th Cir. 2000); see also In re WorldCom, Inc., 347 B.R. 123 (Bankr. S.D.N.Y. 2006) (citing TMT Trailer, 390 U.S. at 424 ("While the bankruptcy court may consider the objections lodged by parties in interest, such objections are not controlling. Similarly, although weight should be

given to the opinions of counsel for the debtors and any creditors' committees on the reasonableness of the proposed settlement, the bankruptcy court must still make an informed and independent judgment. The Court must consider whether the proposed compromise is fair and equitable by apprising itself of all the factors relevant to an assessment of the wisdom of the proposed compromise.")). It is not necessary to be convinced the compromise is the best possible result; but it is the approving Court that must nonetheless make the final determination the settlement is within the reasonable range of litigation outcomes on the claims to be compromised. See In re Spansion, Inc., No. 09-10690, 2009 LEXIS.Bankr. 1283, at *13-14 (Bankr. D. Del. June 2, 2009). Finally, the determination as to whether the compromise is preferable to continued litigation must be based on the approving court's "reasoned judgment as to the probable outcome of [such] litigation." TMT Trailer, 390 U.S. at 434; In re Boston & Providence R.R. Corp., 673 F.2d 11, 12 (1st Cir. 1982) ("Bankruptcy proceedings, by definition, coerce the bankrupt's creditors into a compromise of their interests. Therefore [in "approving a compromise in reorganization"]… the supervising court must play a quasi-inquisitorial role, ensuring that all aspects of the reorganization are 'fair and equitable'") (citation omitted).

32. Making the foregoing determinations with respect to each claim the Court is being asked to resolve or release pursuant to the Settlement and/or Plan (as the Court must do), it appears, in light of Stern, that a significant portion of the matters proposed to be resolved or released fall outside of this Court's Constitutional authority to adjudicate on a final basis. The Supreme Court's decision in Stern instructs that it is beyond the Constitutional authority of this Court to make "final" determinations with respect to, and Order resolution or release of, any of: a) the common law claims asserted by WMI; b) the claims asserted by WMI under the statutes of the States of Washington and/or Nevada; c) the claims asserted by WMI under Title 12 of the

United States Code; d) the claims asserted by WMI under the Federal Tort Claims Act; e) the claims asserted by WMI under Title 15 of the United States Code; f) the claims asserted by WMI under Title 17 of the United States Code; and g) the claims asserted by WMI under Title 35 of the United States Code. Each of the foregoing claims is capable of final adjudication in the federal Court system only by an Article III Court, and none of the various "public rights" exceptions apply.

33. Approval of a settlement (particularly one, such as in this case, that would result in final determinations as to the ultimate allocation of billions of dollars in estate value and the extinguishment of litigation claims that could otherwise result in estate recoveries of many more billions of dollars) is not a matter to be taken lightly. Indeed, this Court presided over a four-day evidentiary hearing on confirmation in December 2010. A significant portion of those proceedings consisted of the Debtors' attempts to present sufficient bases for this Court to make the requisite determinations concerning the numerous claims and causes of action subsumed in the Settlement to support a final Order approving the compromise of such claims. Not only did the Plan proponents fail, as a matter of fact, to provide sufficient evidence of the Settlement's fairness and reasonableness, this Court is nonetheless precluded, as a matter of law, from making the final determinations with respect to, and Ordering the resolution or release of, the majority of the various litigations (as discussed herein).

3. Expected Cries For Expediency And Efficiency Are Not Relevant To The Paramount Issue Of Whether This Court Has The Constitutional Authority To Approve The Settlement.

34. As discussed above, the Settlement and Plan are contingent on this Court's Ordered final resolution or release of claims and litigation – an act in excess of this Court's Constitutional authority. Accordingly, the Settlement and Plan must fail. The TPS Consortium understands

this Court's inability to Order final resolutions and/or releases of claims in excess of its Constitutional authority will be inconvenient to the Debtors, JPMC and others who would ask this Court to ignore the Stern Court's guidance.[10] The fact that Stern was issued only days ago is of no moment. It is the law of the land, and it must be followed by this Court. Nor is the anticipated response that it would be more efficient for this Court to adjudicate the proposed Settlement an appropriate response. Indeed, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution." Stern, Slip Op. at 36; INS v. Chadha, 462 U.S. 919, 944 (1983).

II. The Court Must Deny The Settlement In Light Of The ANICO Decision.

35. Because the Debtors have withheld any analysis of the various estate claims against third-parties, such as JPMC, it is unclear why the Debtors have not more vigorously pursued a recovery from JPMC on the JPMC Business Torts.[11] Assuming the Debtors have taken steps

---

[10] Although even Debtors' counsel concedes that, because of the Supreme Court's decision in Stern, "the jurisdictional issue will, in some instances, be difficult for the bankruptcy court to determine at the outset of a case, and there may be cases where it becomes apparent that jurisdiction is lacking after substantial investment in the litigation by the parties." Sara Coelho, Stern Views on Bankruptcy Court Jurisdiction – United States Supreme Court Addresses Bankruptcy Court Jurisdiction in the Anna Nicole Smith Case, Weil Bankr. Blog (July 6, 2011), http://business-finance-restructuring.weil.com/claims/stern-views-on-bankruptcy-court-jurisdiction-%e2%80%93-united-states-supreme-court-addresses-bankruptcy-court-jurisdiction-in-the-anna-nicole-smith-case/, attached hereto as Exhibit D.

[11] In the Initial Objection, and during the December 2010 confirmation hearing, the TPS Consortium objected to approval of the Settlement on numerous bases, including, inter alia, that its propriety could not be established given the lack of evidence presented by its proponents and that pleadings alone could not support approval of the Settlement. See also Will v. Northwestern Univ. (In re Nutraquest, Inc.), 434 F.3d 639, 645 (3d Cir. N.J. 2006) (citing In re Boston & Providence R.R. Corp., 673 F.2d 11, 13 (1st Cir. 1982) (noting that a court cannot rely on the objections, or the absence thereof, in evaluating a proposed settlement, but rather "the court must act independently, out of its own initiative, for the benefit of all creditors. This obligation prevails even where the creditors

necessary to preserve the estate's rights in this regard (as the Confirmation Opinion noted, it has been alleged that the Debtors failed to properly preserve the estates' ability to pursue such claims in connection with the WMB receivership), with the FIRREA bar removed, unconflicted counsel for the Debtors could commence such litigation directly against JPMC. To the extent the Court's favorable view of the Settlement Agreement was based on the assumption that FIRREA would stand in the way of such direct litigation by the estates,[12] the Court must reconsider the Debtors' continuing attempt to compromise this potentially significant source of estate value in light of the D.C. Circuit Court's ruling in the ANICO Decision (particularly in light of JPMC's insistence that, before it will return billions of dollars in estate value it has been holding for nearly three years, it receive a sweeping release of all liability – even for acts that would constitute "gross negligence" or "willful misconduct" such as those comprising the JPMC Business Torts). Given the potential value to the estates of even a partial recovery on the JPMC Business Torts, the Settlement must be rejected.

---

are silent . . . .")); In re WorldCom, Inc., 347 B.R. 123 (Bankr. S.D.N.Y. 2006) (citing TMT Trailer, 390 U.S. at 424 ("While the bankruptcy court may consider the objections lodged by parties in interest, such objections are not controlling. Similarly, although weight should be given to the opinions of counsel for the debtors and any creditors' committees on the reasonableness of the proposed settlement, the bankruptcy court must still make informed and independent judgment.")). As such, this is not a new objection to confirmation; but rather intended to apprise the Court of certain developments pertinent to the Court's consideration of the Settlement underlying the Plan.

[12] In Myers v. Martin, the Third Circuit set out four factors to be considered in connection with a request to approve a settlement of litigation. See 91 F.3d 389, 393 (3d Cir. 1996). At least two of these (the probability of success in the litigation and the likely difficulties in collection) must be reevaluated in light of the ANICO Decision.

WHEREFORE, the TPS Consortium respectfully requests that the Court (a) deny confirmation of the Plan, and (b) grant such other and further relief as it deems just and proper.

Dated: Wilmington, Delaware
July 7, 2011

Respectfully submitted,

CAMPBELL & LEVINE LLC

/s/ Kathleen Campbell Davis ________________
Marla Rosoff Eskin, Esq. (DE 2989)
Bernard G. Conaway, Esq. (DE 2856)
Kathleen Campbell Davis, Esq. (DE 4229)
800 North King Street, Suite 300
Wilmington, DE 19809
(302) 426-1900
(302) 426-9947 (fax)

– and –

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Martin S. Siegel, Esq.
Seven Times Square
New York, NY 10036
(212) 209-4800
(212) 209-4801 (fax)

– and –

Jeremy B. Coffey, Esq.
Daniel J. Brown, Esq.
One Financial Center
Boston, MA 02111
(617) 856-8200
(617) 856-8201 (fax)

Counsel for the TPS Consortium

EXHIBIT A

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

STERN, EXECUTOR OF THE ESTATE OF MARSHALL *v.* MARSHALL, EXECUTRIX OF THE ESTATE OF MARSHALL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10–179. Argued January 18, 2011—Decided June 23, 2011

Article III, §1, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that the judges of those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services[ ] a Compensation[ ] [that] shall not be diminished" during their tenure. The questions presented in this case are whether a bankruptcy court judge who did not enjoy such tenure and salary protections had the authority under 28 U. S. C. §157 and Article III to enter final judgment on a counterclaim filed by Vickie Lynn Marshall (whose estate is the petitioner) against Pierce Marshall (whose estate is the respondent) in Vickie's bankruptcy proceedings.

Vickie married J. Howard Marshall II, Pierce's father, approximately a year before his death. Shortly before J. Howard died, Vickie filed a suit against Pierce in Texas state court, asserting that J. Howard meant to provide for Vickie through a trust, and Pierce tortiously interfered with that gift. After J. Howard died, Vickie filed for bankruptcy in federal court. Pierce filed a proof of claim in that proceeding, asserting that he should be able to recover damages from Vickie's bankruptcy estate because Vickie had defamed him by inducing her lawyers to tell the press that he had engaged in fraud in controlling his father's assets. Vickie responded by filing a counterclaim for tortious interference with the gift she expected from J. Howard.

The Bankruptcy Court granted Vickie summary judgment on the defamation claim and eventually awarded her hundreds of millions of dollars in damages on her counterclaim. Pierce objected that the

Bankruptcy Court lacked jurisdiction to enter a final judgment on that counterclaim because it was not a "core proceeding" as defined by 28 U. S. C. §157(b)(2)(C). As set forth in §157(a), Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are "related to a case under title 11." District courts may refer all such proceedings to the bankruptcy judges of their district, and bankruptcy courts may enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." §§157(a), (b)(1). In non-core proceedings, by contrast, a bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court." §157(c)(1). Section 157(b)(2) lists 16 categories of core proceedings, including "counterclaims by the estate against persons filing claims against the estate." §157(b)(2)(C).

The Bankruptcy Court concluded that Vickie's counterclaim was a core proceeding. The District Court reversed, reading this Court's precedent in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, to "suggest[ ] that it would be unconstitutional to hold that any and all counterclaims are core." The court held that Vickie's counterclaim was not core because it was only somewhat related to Pierce's claim, and it accordingly treated the Bankruptcy Court's judgment as proposed, not final. Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court went on to decide the matter itself, in Vickie's favor. The Court of Appeals ultimately reversed. It held that the Bankruptcy Court lacked authority to enter final judgment on Vickie's counterclaim because the claim was not "so closely related to [Pierce's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." Because that holding made the Texas probate court's judgment the earliest final judgment on matters relevant to the case, the Court of Appeals held that the District Court should have given the state judgment preclusive effect.

Held: Although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so. Pp. 6–38.

1. Section 157(b) authorized the Bankruptcy Court to enter final judgment on Vickie's counterclaim. Pp. 8–16.

(a) The Bankruptcy Court had the statutory authority to enter final judgment on Vickie's counterclaim as a core proceeding under §157(b)(2)(C). Pierce argues that §157(b) authorizes bankruptcy courts to enter final judgments only in those proceedings that are both core and either arise in a Title 11 case or arise under Title 11 it-

self. But that reading necessarily assumes that there is a category of core proceedings that do not arise in a bankruptcy case or under bankruptcy law, and the structure of §157 makes clear that no such category exists. Pp. 8–11.

(b) In the alternative, Pierce argues that the Bankruptcy Court lacked jurisdiction to resolve Vickie's counterclaim because his defamation claim is a "personal injury tort" that the Bankruptcy Court lacked jurisdiction to hear under §157(b)(5). The Court agrees with Vickie that §157(b)(5) is not jurisdictional, and Pierce consented to the Bankruptcy Court's resolution of the defamation claim. The Court is not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such. See generally *Henderson* v. *Shinseki*, 562 U. S. ___; *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500. Section 157(b)(5) does not have the hallmarks of a jurisdictional decree, and the statutory context belies Pierce's claim that it is jurisdictional. Pierce consented to the Bankruptcy Court's resolution of the defamation claim by repeatedly advising that court that he was happy to litigate his claim there. Pp. 12–16.

2. Although §157 allowed the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution did not. Pp. 16–38.

(a) Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline*, 458 U. S., at 58 (plurality opinion). Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges to protect the integrity of judicial decisionmaking.

This is not the first time the Court has faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline,* the Court considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—who also lacked the tenure and salary guarantees of Article III—could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. *Id.,* at 53, 87, n. 40 (plurality opinion). The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. A full majority of the Court, while not agreeing on the scope of that exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case, and rejected the debtor's argument that the Bankruptcy Court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals.

Id., at 69–72; see *id.,* at 90–91 (Rehnquist, J., concurring in judgment). After the decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. With respect to the "core" proceedings listed in §157(b)(2), however, the bankruptcy courts under the Bankruptcy Amendments and Federal Judgeship Act of 1984 exercise the same powers they wielded under the 1978 Act. The authority exercised by the newly constituted courts over a counterclaim such as Vickie's exceeds the bounds of Article III. Pp. 16–22.

(b) Vickie's counterclaim does not fall within the public rights exception, however defined. The Court has long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284. The Court has also recognized that "[a]t the same time there are matters, involving public rights, . . . which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Ibid.* Several previous decisions have contrasted cases within the reach of the public rights exception—those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—and those that are instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S. 22, 50, 51.

Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular Federal Government action. See *United States* v. *Jicarilla Apache Nation*, 564 U. S. ___, ___–___ (slip op., at 10–11); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 584; *Commodity Futures Trading Commission* v. *Schor*, 478 U. S. 833, 844, 856.

In *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, the most recent case considering the public rights exception, the Court rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the exception. Vickie's counter-

claim is similar. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, 18 How., at 284; it does not flow from a federal statutory scheme, as in *Thomas*, 473 U. S., at 584–585; and it is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor*, 478 U. S., at 856. This case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers the Court has long recognized into mere wishful thinking. Pp. 22–29.

(c) The fact that Pierce filed a proof of claim in the bankruptcy proceedings did not give the Bankruptcy Court the authority to adjudicate Vickie's counterclaim. Initially, Pierce's defamation claim does not affect the nature of Vickie's tortious interference counterclaim as one at common law that simply attempts to augment the bankruptcy estate—the type of claim that, under *Northern Pipeline* and *Granfinanciera*, must be decided by an Article III court. The cases on which Vickie relies, *Katchen* v. *Landy*, 382 U. S. 323, and *Langenkamp* v. *Culp*, 498 U. S. 42 (*per curiam*), are inapposite. *Katchen* permitted a bankruptcy referee to exercise jurisdiction over a trustee's voidable preference claim against a creditor only where there was no question that the referee was required to decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. The *Katchen* Court "intimate[d] no opinion concerning whether" the bankruptcy referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." 382 U. S., at 333, n. 9. The *per curiam* opinion in *Langenkamp* is to the same effect. In this case, by contrast, the Bankruptcy Court—in order to resolve Vickie's counterclaim—was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim. In both *Katchen* and *Langenkamp*, moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. Vickie's claim is instead a state tort action that exists without regard to any bankruptcy proceeding. Pp. 29–34.

(d) The bankruptcy courts under the 1984 Act are not "adjuncts" of the district courts. The new bankruptcy courts, like the courts

considered in *Northern Pipeline*, do not "ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law" or engage in "statutorily channeled factfinding functions." 458 U. S., at 85 (plurality opinion). Whereas the adjunct agency in *Crowell* v. *Benson* "possessed only a limited power to issue compensation orders . . . [that] could be enforced only by order of the district court," *ibid.*, a bankruptcy court resolving a counterclaim under §157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§157(b)(1), 158(a)–(b). Such a court is an adjunct of no one. Pp. 34–36.

(e) Finally, Vickie and her *amici* predict that restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the bankruptcy process. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U. S. 919, 944. In addition, the Court is not convinced that the practical consequences of such limitations are as significant as Vickie suggests. The framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by state courts and district courts, see §§157(c), 1334(c), and the Court does not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the statute. Pp. 36–38.

600 F. 3d 1037, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–179

HOWARD K. STERN, EXECUTOR OF THE ESTATE OF VICKIE LYNN MARSHALL, PETITIONER *v.* ELAINE T. MARSHALL, EXECUTRIX OF THE ESTATE OF E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2011]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This "suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."

Those words were not written about this case, see C. Dickens, Bleak House, in 1 Works of Charles Dickens 4–5 (1891), but they could have been. This is the second time we have had occasion to weigh in on this long-running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas. The Marshalls' litigation has worked its way

through state and federal courts in Louisiana, Texas, and California, and two of those courts—a Texas state probate court and the Bankruptcy Court for the Central District of California—have reached contrary decisions on its merits. The Court of Appeals below held that the Texas state decision controlled, after concluding that the Bankruptcy Court lacked the authority to enter final judgment on a counterclaim that Vickie brought against Pierce in her bankruptcy proceeding.[1] To determine whether the Court of Appeals was correct in that regard, we must resolve two issues: (1) whether the Bankruptcy Court had the statutory authority under 28 U. S. C. §157(b) to issue a final judgment on Vickie's counterclaim; and (2) if so, whether conferring that authority on the Bankruptcy Court is constitutional.

Although the history of this litigation is complicated, its resolution ultimately turns on very basic principles. Article III, §1, of the Constitution commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. *Ibid.* Those requirements of Article III were not honored here. The Bankruptcy Court in this case exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection. We conclude that, although the Bankruptcy Court had the statutory authority to enter judgment on Vickie's counterclaim, it lacked the constitutional authority to do so.

---

[1] Because both Vickie and Pierce passed away during this litigation, the parties in this case are Vickie's estate and Pierce's estate. We continue to refer to them as "Vickie" and "Pierce."

I

Because we have already recounted the facts and procedural history of this case in detail, see *Marshall* v. *Marshall*, 547 U. S. 293, 300–305 (2006), we do not repeat them in full here. Of current relevance are two claims Vickie filed in an attempt to secure half of J. Howard's fortune. Known to the public as Anna Nicole Smith, Vickie was J. Howard's third wife and married him about a year before his death. *Id.,* at 300; see *In re Marshall*, 392 F. 3d 1118, 1122 (CA9 2004). Although J. Howard bestowed on Vickie many monetary and other gifts during their courtship and marriage, he did not include her in his will. 547 U. S., at 300. Before J. Howard passed away, Vickie filed suit in Texas state probate court, asserting that Pierce—J. Howard's younger son—fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half his property. Pierce denied any fraudulent activity and defended the validity of J. Howard's trust and, eventually, his will. 392 F. 3d, at 1122–1123, 1125.

After J. Howard's death, Vickie filed a petition for bankruptcy in the Central District of California. Pierce filed a complaint in that bankruptcy proceeding, contending that Vickie had defamed him by inducing her lawyers to tell members of the press that he had engaged in fraud to gain control of his father's assets. 547 U. S., at 300–301; *In re Marshall*, 600 F. 3d 1037, 1043–1044 (CA9 2010). The complaint sought a declaration that Pierce's defamation claim was not dischargeable in the bankruptcy proceedings. *Ibid.*; see 11 U. S. C. §523(a). Pierce subsequently filed a proof of claim for the defamation action, meaning that he sought to recover damages for it from Vickie's bankruptcy estate. See §501(a). Vickie responded to Pierce's initial complaint by asserting truth as a defense to the alleged defamation and by filing a counterclaim for tortious interference with the gift she expected from J.

Howard. As she had in state court, Vickie alleged that Pierce had wrongfully prevented J. Howard from taking the legal steps necessary to provide her with half his property. 547 U. S., at 301.

On November 5, 1999, the Bankruptcy Court issued an order granting Vickie summary judgment on Pierce's claim for defamation. On September 27, 2000, after a bench trial, the Bankruptcy Court issued a judgment on Vickie's counterclaim in her favor. The court later awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages. 600 F. 3d, at 1045; see 253 B. R. 550, 561–562 (Bkrtcy. Ct. CD Cal. 2000); 257 B. R. 35, 39–40 (Bkrtcy. Ct. CD Cal. 2000).

In post-trial proceedings, Pierce argued that the Bankruptcy Court lacked jurisdiction over Vickie's counterclaim. In particular, Pierce renewed a claim he had made earlier in the litigation, asserting that the Bankruptcy Court's authority over the counterclaim was limited because Vickie's counterclaim was not a "core proceeding" under 28 U. S. C. §157(b)(2)(C). See 257 B. R., at 39. As explained below, bankruptcy courts may hear and enter final judgments in "core proceedings" in a bankruptcy case. In non-core proceedings, the bankruptcy courts instead submit proposed findings of fact and conclusions of law to the district court, for that court's review and issuance of final judgment. The Bankruptcy Court in this case concluded that Vickie's counterclaim was "a core proceeding" under §157(b)(2)(C), and the court therefore had the "power to enter judgment" on the counterclaim under §157(b)(1). *Id.*, at 40.

The District Court disagreed. It recognized that "Vickie's counterclaim for tortious interference falls within the literal language" of the statute designating certain proceedings as "core," see §157(b)(2)(C), but understood this Court's precedent to "suggest[] that it would be unconstitutional to hold that any and all counterclaims are

core." 264 B. R. 609, 629–630 (CD Cal. 2001) (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 79, n. 31 (1982) (plurality opinion)). The District Court accordingly concluded that a "counterclaim should not be characterized as core" when it "is only somewhat related to the claim against which it is asserted, and when the unique characteristics and context of the counterclaim place it outside of the normal type of set-off or other counterclaims that customarily arise." 264 B. R., at 632.

Because the District Court concluded that Vickie's counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court's judgment as "proposed[,] rather than final," and engage in an "independent review" of the record. *Id.,* at 633; see 28 U. S. C. §157(c)(1). Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court declined to give that judgment preclusive effect and went on to decide the matter itself. 271 B. R. 858, 862–867 (CD Cal. 2001); see 275 B. R. 5, 56–58 (CD Cal. 2002). Like the Bankruptcy Court, the District Court found that Pierce had tortiously interfered with Vickie's expectancy of a gift from J. Howard. The District Court awarded Vickie compensatory and punitive damages, each in the amount of $44,292,767.33. *Id.,* at 58.

The Court of Appeals reversed the District Court on a different ground, 392 F. 3d, at 1137, and we—in the first visit of the case to this Court—reversed the Court of Appeals on that issue. 547 U. S., at 314–315. On remand from this Court, the Court of Appeals held that §157 mandated "a two-step approach" under which a bankruptcy judge may issue a final judgment in a proceeding only if the matter both "meets Congress' definition of a core proceeding *and* arises under or arises in title 11," the Bankruptcy Code. 600 F. 3d, at 1055. The court also

reasoned that allowing a bankruptcy judge to enter final judgments on all counterclaims raised in bankruptcy proceedings "would certainly run afoul" of this Court's decision in *Northern Pipeline*. 600 F. 3d, at 1057. With those concerns in mind, the court concluded that "a counterclaim under §157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the [Bankruptcy] Code only if the counterclaim is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself." *Id.,* at 1058 (internal quotation marks omitted; second brackets added). The court ruled that Vickie's counterclaim did not meet that test. *Id.,* at 1059. That holding made "the Texas probate court's judgment . . . the earliest final judgment entered on matters relevant to this proceeding," and therefore the Court of Appeals concluded that the District Court should have "afford[ed] preclusive effect" to the Texas "court's determination of relevant legal and factual issues." *Id.,* at 1064–1065.[2]

We again granted certiorari. 561 U. S. __ (2010).

II

A

With certain exceptions not relevant here, the district courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U. S. C. §1334(a). Congress has divided bankruptcy proceedings into three categories: those that "aris[e] under title 11"; those that "aris[e] in" a Title 11 case; and those that are

---

[2] One judge wrote a separate concurring opinion. He concluded that "Vickie's counterclaim . . . [wa]s not a core proceeding, so the Texas probate court judgment preceded the district court judgment and controls." 600 F. 3d, at 1065 (Kleinfeld, J.). The concurring judge also "offer[ed] additional grounds" that he believed required judgment in Pierce's favor. *Ibid.* Pierce presses only one of those additional grounds here; it is discussed below, in Part II–C.

"related to a case under title 11." §157(a). District courts may refer any or all such proceedings to the bankruptcy judges of their district, *ibid.*, which is how the Bankruptcy Court in this case came to preside over Vickie's bankruptcy proceedings. District courts also may withdraw a case or proceeding referred to the bankruptcy court "for cause shown." §157(d). Since Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Act), bankruptcy judges for each district have been appointed to 14-year terms by the courts of appeals for the circuits in which their district is located. §152(a)(1).

The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved. Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." §157(b)(1). "Core proceedings include, but are not limited to" 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing claims against the estate." §157(b)(2)(C).[3] Parties may appeal final judgments of a

---

[3] In full, §§157(b)(1)–(2) provides:

"(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

"(2) Core proceedings include, but are not limited to—

"(A) matters concerning the administration of the estate;

"(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

"(C) counterclaims by the estate against persons filing claims against the estate;

"(D) orders in respect to obtaining credit;

bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. See §158(a); Fed. Rule Bkrtcy. Proc. 8013.

When a bankruptcy judge determines that a referred "proceeding . . . is not a core proceeding but . . . is otherwise related to a case under title 11," the judge may only "submit proposed findings of fact and conclusions of law to the district court." §157(c)(1). It is the district court that enters final judgment in such cases after reviewing *de novo* any matter to which a party objects. *Ibid.*

B

Vickie's counterclaim against Pierce for tortious interference is a "core proceeding" under the plain text of §157(b)(2)(C). That provision specifies that core proceedings include "counterclaims by the estate against persons filing claims against the estate." In past cases, we have suggested that a proceeding's "core" status alone authorizes a bankruptcy judge, as a statutory matter, to enter

---

"(E) orders to turn over property of the estate;

"(F) proceedings to determine, avoid, or recover preferences;

"(G) motions to terminate, annul, or modify the automatic stay;

"(H) proceedings to determine, avoid, or recover fraudulent conveyances;

"(I) determinations as to the dischargeability of particular debts;

"(J) objections to discharges;

"(K) determinations of the validity, extent, or priority of liens;

"(L) confirmations of plans;

"(M) orders approving the use or lease of property, including the use of cash collateral;

"(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

"(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

"(P) recognition of foreign proceedings and other matters under chapter 15 of title 11."

final judgment in the proceeding. See, *e.g., Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 50 (1989) (explaining that Congress had designated certain actions as "'core proceedings,' which bankruptcy judges may adjudicate and in which they may issue final judgments, if a district court has referred the matter to them" (citations omitted)). We have not directly addressed the question, however, and Pierce argues that a bankruptcy judge may enter final judgment on a core proceeding only if that proceeding also "aris[es] in" a Title 11 case or "aris[es] under" Title 11 itself. Brief for Respondent 51 (internal quotation marks omitted).

Section 157(b)(1) authorizes bankruptcy courts to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." As written, §157(b)(1) is ambiguous. The "arising under" and "arising in" phrases might, as Pierce suggests, be read as referring to a limited category of those core proceedings that are addressed in that section. On the other hand, the phrases might be read as simply describing what core proceedings are: matters arising under Title 11 or in a Title 11 case. In this case the structure and context of §157 contradict Pierce's interpretation of §157(b)(1).

As an initial matter, Pierce's reading of the statute necessarily assumes that there is a category of core proceedings that neither arise under Title 11 nor arise in a Title 11 case. The manner in which the statute delineates the bankruptcy courts' authority, however, makes plain that no such category exists. Section 157(b)(1) authorizes bankruptcy judges to enter final judgments in "core proceedings arising under title 11, or arising in a case under title 11." Section 157(c)(1) instructs bankruptcy judges to instead submit proposed findings in "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." Nowhere does §157 specify what

bankruptcy courts are to do with respect to the category of matters that Pierce posits—core proceedings that do *not* arise under Title 11 or in a Title 11 case. To the contrary, §157(b)(3) only instructs a bankruptcy judge to "determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11." Two options. The statute does not suggest that any other distinctions need be made.

Under our reading of the statute, core proceedings are those that arise in a bankruptcy case or under Title 11. The detailed list of core proceedings in §157(b)(2) provides courts with ready examples of such matters. Pierce's reading of §157, in contrast, supposes that some core proceedings will arise in a Title 11 case or under Title 11 and some will not. Under that reading, the statute provides no guidance on how to tell which are which.

We think it significant that Congress failed to provide any framework for identifying or adjudicating the asserted category of core but not "arising" proceedings, given the otherwise detailed provisions governing bankruptcy court authority. It is hard to believe that Congress would go to the trouble of cataloging 16 different types of proceedings that should receive "core" treatment, but then fail to specify how to determine whether those matters arise under Title 11 or in a bankruptcy case if—as Pierce asserts—the latter inquiry is determinative of the bankruptcy court's authority.

Pierce argues that we should treat core matters that arise neither under Title 11 nor in a Title 11 case as proceedings "related to" a Title 11 case. Brief for Respondent 60 (internal quotation marks omitted). We think that a contradiction in terms. It does not make sense to describe a "core" bankruptcy proceeding as merely "related to" the bankruptcy case; oxymoron is not a typical feature of congressional drafting. See *Northern Pipeline*, 458 U. S.,

at 71 (plurality opinion) (distinguishing "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, . . . from the adjudication of state-created private rights"); Collier on Bankruptcy ¶3.02[2], p. 3–26, n. 5 (16th ed. 2010) ("The terms 'non-core' and 'related' are synonymous"); see also *id.,* at 3–26, ("The phraseology of section 157 leads to the conclusion that there is no such thing as a core matter that is 'related to' a case under title 11. Core proceedings are, at most, those that arise in title 11 cases or arise under title 11" (footnote omitted)). And, as already discussed, the statute simply does not provide for a proceeding that is simultaneously core and yet only related to the bankruptcy case. See §157(c)(1) (providing only for "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11").

As we explain in Part III, we agree with Pierce that designating all counterclaims as "core" proceedings raises serious constitutional concerns. Pierce is also correct that we will, where possible, construe federal statutes so as "to avoid serious doubt of their constitutionality." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986) (internal quotation marks omitted). But that "canon of construction does not give [us] the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Ibid.* In this case, we do not think the plain text of §157(b)(2)(C) leaves any room for the canon of avoidance. We would have to "rewrit[e]" the statute, not interpret it, to bypass the constitutional issue §157(b)(2)(C) presents. *Id.*, at 841 (internal quotation marks omitted). That we may not do. We agree with Vickie that §157(b)(2)(C) permits the bankruptcy court to enter a final judgment on her tortious interference counterclaim.

C

Pierce argues, as another alternative to reaching the constitutional question, that the Bankruptcy Court lacked jurisdiction to enter final judgment on his defamation claim. Section 157(b)(5) provides that "[t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose." Pierce asserts that his defamation claim is a "personal injury tort," that the Bankruptcy Court therefore had no jurisdiction over that claim, and that the court therefore necessarily lacked jurisdiction over Vickie's counterclaim as well. Brief for Respondent 65–66.

Vickie objects to Pierce's statutory analysis across the board. To begin, Vickie contends that §157(b)(5) does not address subject matter jurisdiction at all, but simply specifies the venue in which "personal injury tort and wrongful death claims" should be tried. See Reply Brief for Petitioner 16–17, 19; see also Tr. of Oral Arg. 23 (Deputy Solicitor General) (Section "157(b)(5) is in [the United States'] view not jurisdictional"). Given the limited scope of that provision, Vickie argues, a party may waive or forfeit any objections under §157(b)(5), in the same way that a party may waive or forfeit an objection to the bankruptcy court finally resolving a non-core claim. Reply Brief for Petitioner 17–20; see §157(c)(2) (authorizing the district court, "with the consent of all the parties to the proceeding," to refer a "related to" matter to the bankruptcy court for final judgment). Vickie asserts that in this case Pierce consented to the Bankruptcy Court's adjudication of his defamation claim, and forfeited any argument to the contrary, by failing to seek withdrawal of the claim until he had litigated it before the Bankruptcy Court for 27 months. *Id.,* at 20–23. On the merits, Vickie contends that the statutory phrase "personal injury tort

and wrongful death claims" does not include non-physical torts such as defamation. *Id.,* at 25–26.

We need not determine what constitutes a "personal injury tort" in this case because we agree with Vickie that §157(b)(5) is not jurisdictional, and that Pierce consented to the Bankruptcy Court's resolution of his defamation claim.[4] Because "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system," *Henderson* v. *Shinseki*, 562 U. S. ___, ___–___ (2011) (slip op., at 4–5), we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such. See generally *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 516 (2006) ("when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character").

———————

[4] Although Pierce suggests that consideration of "the 157(b)(5) issue" would facilitate an "easy" resolution of the case, Tr. of Oral Arg. 47–48, he is mistaken. Had Pierce preserved his argument under that provision, we would have been confronted with several questions on which there is little consensus or precedent. Those issues include: (1) the scope of the phrase "personal injury tort"—a question over which there is at least a three-way divide, see *In re Arnold*, 407 B. R. 849, 851–853 (Bkrtcy. Ct. MDNC 2009); (2) whether, as Vickie argued in the Court of Appeals, the requirement that a personal injury tort claim be "tried" in the district court nonetheless permits the bankruptcy court to resolve the claim short of trial, see Appellee's/Cross-Appellant's Supplemental Brief in No. 02–56002 etc. (CA9), p. 24; see also *In re Dow Corning Corp.*, 215 B. R. 346, 349–351 (Bkrtcy. Ct. ED Mich. 1997) (noting divide over whether, and on what grounds, a bankruptcy court may resolve a claim pretrial); and (3) even if Pierce's defamation claim could be considered only by the District Court, whether the Bankruptcy Court might retain jurisdiction over the counterclaim, cf. *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006) ("when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U. S. C. §1367, over pendent state-law claims"). We express no opinion on any of these issues and simply note that the §157(b)(5) question is not as straightforward as Pierce would have it.

Section 157(b)(5) does not have the hallmarks of a jurisdictional decree. To begin, the statutory text does not refer to either district court or bankruptcy court "jurisdiction," instead addressing only where personal injury tort claims "shall be tried."

The statutory context also belies Pierce's jurisdictional claim. Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. See §§157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See §157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in non-core case). By the same token, §157(b)(5) simply specifies where a particular category of cases should be tried. Pierce does not explain why that statutory limitation may not be similarly waived.

We agree with Vickie that Pierce not only could but did consent to the Bankruptcy Court's resolution of his defamation claim. Before the Bankruptcy Court, Vickie objected to Pierce's proof of claim for defamation, arguing that Pierce's claim was unenforceable and that Pierce should not receive any amount for it. See 29 Court of Appeals Supplemental Excerpts of Record 6031, 6035 (hereinafter Supplemental Record). Vickie also noted that the Bankruptcy Court could defer ruling on her objection, given the litigation posture of Pierce's claim before the Bankruptcy Court. See *id.,* at 6031. Vickie's filing prompted Pierce to advise the Bankruptcy Court that "[a]ll parties are in agreement that the amount of the contingent Proof of Claim filed by [Pierce] shall be determined by the adversary proceedings" that had been commenced in the Bankruptcy Court. 31 Supplemental Record 6801. Pierce asserted that Vickie's objection should be overruled or, alternatively, that any ruling on the objection "should be continued until the resolution of the pending adversary proceeding litigation." *Ibid.* Pierce identifies no point in the record where he argued to the Bankruptcy Court that

it lacked the authority to adjudicate his proof of claim because the claim sought recompense for a personal injury tort.

Indeed, Pierce apparently did not object to any court that §157(b)(5) prohibited the Bankruptcy Court from resolving his defamation claim until over two years—and several adverse discovery rulings—after he filed that claim in June 1996. The first filing Pierce cites as raising that objection is his September 22, 1998 motion to the District Court to withdraw the reference of the case to the Bankruptcy Court. See Brief for Respondent 26–27. The District Court did initially withdraw the reference as requested, but it then returned the proceeding to the Bankruptcy Court, observing that Pierce "implicated the jurisdiction of that bankruptcy court. He chose to be a party to that litigation." App. 129. Although Pierce had objected in July 1996 to the Bankruptcy Court's exercise of jurisdiction over Vickie's counterclaim, he advised the court at that time that he was "happy to litigate [his] claim" there. 29 Supplemental Record 6101. Counsel stated that even though Pierce thought it was "probably cheaper for th[e] estate if [Pierce's claim] were sent back or joined back with the State Court litigation," Pierce "did choose" the Bankruptcy Court forum and "would be more than pleased to do it [t]here." *Id.,* at 6101–6102; see also App. to Pet. for Cert. 266, n. 17 (District Court referring to these statements).

Given Pierce's course of conduct before the Bankruptcy Court, we conclude that he consented to that court's resolution of his defamation claim (and forfeited any argument to the contrary). We have recognized "the value of waiver and forfeiture rules" in "complex" cases, *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 487–488, n. 6 (2008), and this case is no exception. In such cases, as here, the consequences of "a litigant . . . 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor,"

Puckett v. *United States*, 556 U. S. ___, ___ (2009) (slip op., at 5) (some internal quotation marks omitted)—can be particularly severe. If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so—and said so promptly. See *United States* v. *Olano*, 507 U. S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it'" (quoting *Yakus* v. *United States*, 321 U. S. 414, 444 (1944))). Instead, Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.

III

Although we conclude that §157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.

A

Article III, §1, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The same section provides that the judges of those constitutional courts "shall hold their Offices during good Behaviour" and "receive for their Services[] a Compensation[] [that] shall not be diminished" during their tenure.

As its text and our precedent confirm, Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline*, 458 U. S., at 58 (plurality opinion). Under "the basic concept of separation of powers . . . that flow[s] from the

scheme of a tripartite government" adopted in the Constitution, "the 'judicial Power of the United States' . . . can no more be shared" with another branch than "the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States* v. *Nixon*, 418 U. S. 683, 704 (1974) (quoting U. S. Const., Art. III, §1).

In establishing the system of divided power in the Constitution, the Framers considered it essential that "the judiciary remain[] truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton put it, quoting Montesquieu, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Ibid.* (quoting 1 Montesquieu, Spirit of Laws 181).

We have recognized that the three branches are not hermetically sealed from one another, see *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977), but it remains true that Article III imposes some basic limitations that the other branches may not transgress. Those limitations serve two related purposes. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond* v. *United States*, 564 U. S. ___, ___ (2011) (slip op., at 10).

Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges

dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence ¶11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges." 1 Works of James Wilson 363 (J. Andrews ed. 1896).

Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Northern Pipeline*, 458 U. S., at 90 (Rehnquist, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law"—to the Judiciary. *Id.,* at 86–87, n. 39 (plurality opinion).

B

This is not the first time we have faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit. In *Northern Pipeline,* we considered whether bankruptcy judges serving under the Bankruptcy Act of 1978—appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III—could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. 458 U. S., at 53, 87, n. 40 (plurality opinion); see *id.,* at 89–92 (Rehnquist, J., concurring in judgment). The Court concluded that assignment of such state law claims for resolution by those judges "violates Art. III of the Constitution." *Id.,* at 52, 87 (plurality opinion); *id.,* at 91 (Rehnquist, J., concurring in judgment).

The plurality in *Northern Pipeline* recognized that there was a category of cases involving "public rights" that Congress could constitutionally assign to "legislative" courts for resolution. That opinion concluded that this "public rights" exception extended "only to matters arising between" individuals and the Government "in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those" branches. *Id.,* at 67–68 (internal quotation marks omitted). A full majority of the Court, while not agreeing on the scope of the exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case. *Id.,* at 69–72; see *id.,* at 90–91 (Rehnquist, J., concurring in judgment) ("None of the [previous cases addressing Article III power] has gone so far as to sanction the type of adjudication to which Marathon will be subjected . . . . To whatever extent different powers granted under [the 1978] Act might be sustained under the 'public rights' doctrine of *Murray's Lessee* . . . and succeeding

cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained").[5]

A full majority of Justices in *Northern Pipeline* also rejected the debtor's argument that the bankruptcy court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals. *Id.,* at 71–72, 81–86 (plurality opinion); *id.,* at 91 (Rehnquist, J., concurring in judgment) ("the bankruptcy court is not an 'adjunct' of either the district court or the court of appeals").

After our decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. In the 1984 Act, Congress provided that the judges of the new bankruptcy courts would be appointed by the courts of appeals for the circuits in which their districts are located. 28 U. S. C. §152(a). And, as we have explained, Congress permitted the newly constituted bankruptcy courts to enter final judgments only in "core" proceedings. See *supra,* at 7–8.

With respect to such "core" matters, however, the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978 (1978 Act), 92 Stat. 2549. As in *Northern Pipeline,* for example, the newly constituted bankruptcy courts are charged under §157(b)(2)(C) with resolving "[a]ll matters of fact and law in whatever domains of the law to which" a counterclaim may lead. 458 U. S., at 91 (Rehnquist, J., concurring in judgment); see, *e.g.,* 275 B. R., at 50–51 (noting that Vickie's counterclaim required the bankruptcy court to determine whether Texas recognized a cause of action for tortious interference with an *inter vivos* gift—something the Supreme Court of Texas had yet to do). As

---

[5] The dissent is thus wrong in suggesting that less than a full Court agreed on the points pertinent to this case. *Post,* at 2 (opinion of BREYER, J.).

in *Northern Pipeline*, the new courts in core proceedings "issue final judgments, which are binding and enforceable even in the absence of an appeal." 458 U. S., at 85–86 (plurality opinion). And, as in *Northern Pipeline*, the district courts review the judgments of the bankruptcy courts in core proceedings only under the usual limited appellate standards. That requires marked deference to, among other things, the bankruptcy judges' findings of fact. See §158(a); Fed. Rule Bkrtcy. Proc. 8013 (findings of fact "shall not be set aside unless clearly erroneous").

C

Vickie and the dissent argue that the Bankruptcy Court's entry of final judgment on her state common law counterclaim was constitutional, despite the similarities between the bankruptcy courts under the 1978 Act and those exercising core jurisdiction under the 1984 Act. We disagree. It is clear that the Bankruptcy Court in this case exercised the "judicial Power of the United States" in purporting to resolve and enter final judgment on a state common law claim, just as the court did in *Northern Pipeline*. No "public right" exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline*. Vickie argues that this case is different because the defendant is a creditor in the bankruptcy. But the debtors' claims in the cases on which she relies were themselves federal claims under bankruptcy law, which would be completely resolved in the bankruptcy process of allowing or disallowing claims. Here Vickie's claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy. *Northern Pipeline* and our subsequent decision in *Granfinanciera,* 492 U. S. 33, rejected the application of the "public rights" exception in such cases.

Nor can the bankruptcy courts under the 1984 Act be

dismissed as mere adjuncts of Article III courts, any more than could the bankruptcy courts under the 1978 Act. The judicial powers the courts exercise in cases such as this remain the same, and a court exercising such broad powers is no mere adjunct of anyone.

1

Vickie's counterclaim cannot be deemed a matter of "public right" that can be decided outside the Judicial Branch. As explained above, in *Northern Pipeline* we rejected the argument that the public rights doctrine permitted a bankruptcy court to adjudicate a state law suit brought by a debtor against a company that had not filed a claim against the estate. See 458 U. S., at 69–72 (plurality opinion); *id.,* at 90–91 (Rehnquist, J., concurring in judgment). Although our discussion of the public rights exception since that time has not been entirely consistent, and the exception has been the subject of some debate, this case does not fall within any of the various formulations of the concept that appear in this Court's opinions.

We first recognized the category of public rights in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856). That case involved the Treasury Department's sale of property belonging to a customs collector who had failed to transfer payments to the Federal Government that he had collected on its behalf. *Id.,* at 274, 275. The plaintiff, who claimed title to the same land through a different transfer, objected that the Treasury Department's calculation of the deficiency and sale of the property was void, because it was a judicial act that could not be assigned to the Executive under Article III. *Id.,* at 274–275, 282–283.

"To avoid misconstruction upon so grave a subject," the Court laid out the principles guiding its analysis. *Id.,* at 284. It confirmed that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is

the subject of a suit at the common law, or in equity, or admiralty." *Ibid.* The Court also recognized that "[a]t the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Ibid.*

As an example of such matters, the Court referred to "[e]quitable claims to land by the inhabitants of ceded territories" and cited cases in which land issues were conclusively resolved by Executive Branch officials. *Ibid.* (citing *Foley* v. *Harrison*, 15 How. 433 (1854); *Burgess* v. *Gray*, 16 How. 48 (1854)). In those cases "it depends upon the will of congress whether a remedy in the courts shall be allowed at all," so Congress could limit the extent to which a judicial forum was available. *Murray's Lessee*, 18 How., at 284. The challenge in *Murray's Lessee* to the Treasury Department's sale of the collector's land likewise fell within the "public rights" category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity. *Id.,* at 283–284. The point of *Murray's Lessee* was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.

Subsequent decisions from this Court contrasted cases within the reach of the public rights exception—those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—and those that were instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S. 22, 50, 51 (1932).[6] See *Atlas Roofing Co.* v. *Occupa-*

---

[6] Although the Court in *Crowell* went on to decide that the facts of the

tional Safety and Health Review Comm'n, 430 U. S. 442, 458 (1977) (Exception extends to cases "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights," while "[w]holly private tort, contract, and property cases, as well as a vast range of other cases . . . are not at all implicated"); *Ex parte Bakelite Corp.*, 279 U. S. 438, 451–452 (1929). See also *Northern Pipeline*, *supra,* at 68 (plurality opinion) (citing *Ex parte Bakelite Corp.* for the proposition that the doctrine extended "only to matters that historically could have been determined exclusively by" the Executive and Legislative Branches).

Shortly after *Northern Pipeline*, the Court rejected the

---

private dispute before it could be determined by a non-Article III tribunal in the first instance, subject to judicial review, the Court did so only after observing that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court. 285 U. S., at 38, 44–45, 54; see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 78 (1982) (plurality opinion). In other words, the agency in *Crowell* functioned as a true "adjunct" of the District Court. That is not the case here. See *infra*, at 34–36.

Although the dissent suggests that we understate the import of *Crowell* in this regard, the dissent itself recognizes—repeatedly—that *Crowell* by its terms addresses the determination of *facts* outside Article III. See *post*, at 4 (*Crowell* "upheld Congress' delegation of primary factfinding authority to the agency"); *post,* at 12 (quoting *Crowell*, 285 U. S., at 51, for the proposition that "'there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges'"). *Crowell* may well have additional significance in the context of expert administrative agencies that oversee particular substantive federal regimes, but we have no occasion to and do not address those issues today. See *infra,* at 29. The United States apparently agrees that any broader significance of *Crowell* is not pertinent in this case, citing to *Crowell* in its brief only once, in the last footnote, again for the limited proposition discussed above. Brief for United States as *Amicus Curiae* 32, n. 5.

limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, it is still the case that what makes a right "public" rather than private is that the right is integrally related to particular federal government action. See *United States* v. *Jicarilla Apache Nation*, 564 U. S. ___, ___–___ (2011) (slip op., at 10–11) ("The distinction between 'public rights' against the Government and 'private rights' between private parties is well established," citing *Murray's Lessee* and *Crowell*).

Our decision in *Thomas* v. *Union Carbide Agricultural Products Co.*, for example, involved a data-sharing arrangement between companies under a federal statute providing that disputes about compensation between the companies would be decided by binding arbitration. 473 U. S. 568, 571–575 (1985). This Court held that the scheme did not violate Article III, explaining that "[a]ny right to compensation . . . results from [the statute] and does not depend on or replace a right to such compensation under state law." *Id.,* at 584.

Commodity Futures Trading Commission v. *Schor* concerned a statutory scheme that created a procedure for customers injured by a broker's violation of the federal commodities law to seek reparations from the broker before the Commodity Futures Trading Commission (CFTC). 478 U. S. 833, 836 (1986). A customer filed such a claim to recover a debit balance in his account, while the broker filed a lawsuit in Federal District Court to recover the same amount as lawfully due from the customer. The broker later submitted its claim to the CFTC, but after that agency ruled against the customer, the customer

argued that agency jurisdiction over the broker's counterclaim violated Article III. *Id.,* at 837–838. This Court disagreed, but only after observing that (1) the claim and the counterclaim concerned a "single dispute"—the same account balance; (2) the CFTC's assertion of authority involved only "a narrow class of common law claims" in a "'particularized area of law'"; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise"; (4) the parties had freely elected to resolve their differences before the CFTC; and (5) CFTC orders were "enforceable only by order of the district court." *Id.,* at 844, 852–855 (quoting *Northern Pipeline*, 458 U. S., at 85); see 478 U. S., at 843–844; 849–857. Most significantly, given that the customer's reparations claim before the agency and the broker's counterclaim were competing claims to the same amount, the Court repeatedly emphasized that it was "necessary" to allow the agency to exercise jurisdiction over the broker's claim, or else "the reparations procedure would have been confounded." *Id.,* at 856.

The most recent case in which we considered application of the public rights exception—and the only case in which we have considered that doctrine in the bankruptcy context since *Northern Pipeline*—is *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989). In *Granfinanciera* we rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the "public rights" exception. We explained that, "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Id.,* at 54–55. We reasoned that fraudulent conveyance suits were "quintessentially suits at com-

mon law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.,* at 56. As a consequence, we concluded that fraudulent conveyance actions were "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.,* at 55.[7]

Vickie's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by grace of the other branches, as in *Murray's Lessee*, 18 How., at 284, or one that "historically could have been determined exclusively by" those branches, *Northern Pipeline*, *supra,* at 68 (citing *Ex parte Bakelite Corp.*, 279 U. S., at 458). The claim is instead one under state common law between two private parties. It does not "depend[] on the will of congress," *Murray's Lessee*, *supra,* at 284; Congress has nothing to do with it.

In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme, as in *Thomas*, 473 U. S., at 584–585, or *Atlas Roofing*, 430 U. S., at 458. It is not "completely dependent upon" adjudication of a claim created by federal law, as in *Schor*, 478 U. S., at 856. And in contrast to the objecting party in *Schor*, *id.,* at 855–856, Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate. See

---

[7] We noted that we did not mean to "suggest that the restructuring of debtor-creditor relations is in fact a public right." 492 U. S., at 56, n. 11. Our conclusion was that, "even if one accepts this thesis," Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court. *Ibid.* Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here.

Granfinanciera, *supra,* at 59, n. 14 (noting that "[p]arallel reasoning [to *Schor*] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims").[8]

Furthermore, the asserted authority to decide Vickie's claim is not limited to a "particularized area of the law," as in *Crowell*, *Thomas*, and *Schor*. *Northern Pipeline*, 458 U. S., at 85 (plurality opinion). We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*. See *ibid.*; *id.,* at 91 (Rehnquist, J., concurring in judgment). This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell*, 285 U. S., at 46; see *Schor*, *supra,* at 855–856. The "experts" in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay.

The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as "'establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of

---

[8] Contrary to the claims of the dissent, see *post,* at 12–13, Pierce did not have another forum in which to pursue his claim to recover from Vickie's pre-bankruptcy assets, rather than take his chances with whatever funds might remain after the Title 11 proceedings. Creditors who possess claims that do not satisfy the requirements for nondischargeability under 11 U. S. C. §523 have no choice but to file their claims in bankruptcy proceedings if they want to pursue the claims at all. That is why, as we recognized in *Granfinanciera*, the notion of "consent" does not apply in bankruptcy proceedings as it might in other contexts.

the litigants, and subject only to ordinary appellate review.'" *Post,* at 6 (quoting *Thomas*, *supra*, at 584). Just so: Substitute "tort" for "contract," and that statement directly covers this case.

We recognize that there may be instances in which the distinction between public and private rights—at least as framed by some of our recent cases—fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme. Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.

What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

2

Vickie and the dissent next attempt to distinguish *Northern Pipeline* and *Granfinanciera* on the ground that Pierce, unlike the defendants in those cases, had filed a proof of claim in the bankruptcy proceedings. Given Pierce's participation in those proceedings, Vickie argues, the Bankruptcy Court had the authority to adjudicate her counterclaim under our decisions in *Katchen* v. *Landy*, 382 U. S. 323 (1966), and *Langenkamp* v. *Culp*, 498 U. S. 42 (1990) (*per curiam*).

We do not agree. As an initial matter, it is hard to see why Pierce's decision to file a claim should make any difference with respect to the characterization of Vickie's counterclaim. "'[P]roperty interests are created and defined by state law,' and '[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 451 (2007) (quoting *Butner* v. *United States*, 440 U. S. 48, 55 (1979)). Pierce's claim for defamation in no way affects the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court.

Contrary to Vickie's contention, moreover, our decisions in *Katchen* and *Langenkamp* do not suggest a different result. *Katchen* permitted a bankruptcy referee acting under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as "summary jurisdiction" over a voidable preference claim brought by the bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding. See 382 U. S., at 325, 327–328. A voidable preference claim asserts that a debtor made a payment to a particular creditor in anticipation of bankruptcy, to in effect increase that creditor's proportionate share of the estate. The preferred creditor's claim in bankruptcy can be disallowed as a result of the preference, and the amounts paid to that creditor can be recovered by the trustee. See *id.,* at 330; see also 11 U. S. C. §§502(d), 547(b).

Although the creditor in *Katchen* objected that the preference issue should be resolved through a "plenary suit" in an Article III court, this Court concluded that summary adjudication in bankruptcy was appropriate,

because it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue. 382 U. S., at 329–330, 332–333, and n. 9, 334. There was no question that the bankruptcy referee could decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. Once the referee did that, "nothing remains for adjudication in a plenary suit"; such a suit "would be a meaningless gesture." *Id.,* at 334. The plenary proceeding the creditor sought could be brought into the bankruptcy court because "the same issue [arose] as part of the process of allowance and disallowance of claims." *Id.,* at 336.

It was in that sense that the Court stated that "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure." *Id.,* at 333, n. 9. In *Katchen* one of those consequences was resolution of the preference issue as part of the process of allowing or disallowing claims, and accordingly there was no basis for the creditor to insist that the issue be resolved in an Article III court. See *id.,* at 334. Indeed, the *Katchen* Court expressly noted that it "intimate[d] no opinion concerning whether" the bankruptcy referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." *Id.,* at 333, n. 9.

Our *per curiam* opinion in *Langenkamp* is to the same effect. We explained there that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because *then* "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship." 498 U. S., at 44. If, in contrast, the creditor has not filed a

proof of claim, the trustee's preference action does *not* "become[] part of the claims-allowance process" subject to resolution by the bankruptcy court. *Ibid.*; see *id.,* at 45.

In ruling on Vickie's counterclaim, the Bankruptcy Court was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim for defamation, which the court had denied almost a year earlier. *Katchen*, *supra,* at 332, n. 9. There was some overlap between Vickie's counterclaim and Pierce's defamation claim that led the courts below to conclude that the counterclaim was compulsory, 600 F. 3d, at 1057, or at least in an "attenuated" sense related to Pierce's claim, 264 B. R., at 631. But there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim. See *id.,* at 631, 632 (explaining that "the primary facts at issue on Pierce's claim were the relationship between Vickie and her attorneys and her knowledge or approval of their statements," and "the counterclaim raises issues of law entirely different from those raise[d] on the defamation claim"). The United States acknowledges the point. See Brief for United States as *Amicus Curiae,* p. (I) (question presented concerns authority of a bankruptcy court to enter final judgment on a compulsory counterclaim "when adjudication of the counterclaim requires resolution of issues that are not implicated by the claim against the estate"); *id.,* at 26.

The only overlap between the two claims in this case was the question whether Pierce had in fact tortiously taken control of his father's estate in the manner alleged by Vickie in her counterclaim and described in the allegedly defamatory statements. From the outset, it was clear that, even assuming the Bankruptcy Court would (as it did) rule in Vickie's favor on that question, the court could not enter judgment for Vickie unless the court additionally

ruled on the questions whether Texas recognized tortious interference with an expected gift as a valid cause of action, what the elements of that action were, and whether those elements were met in this case. 275 B. R., at 50–53. Assuming Texas accepted the elements adopted by other jurisdictions, that meant Vickie would need to prove, above and beyond Pierce's tortious interference, (1) the existence of an expectancy of a gift; (2) a reasonable certainty that the expectancy would have been realized but for the interference; and (3) damages. *Id.,* at 51; see 253 B. R., at 558–561. Also, because Vickie sought punitive damages in connection with her counterclaim, the Bankruptcy Court could not finally dispose of the case in Vickie's favor without determining whether to subject Pierce to the sort of "retribution," "punishment[,] and deterrence," *Exxon Shipping Co.*, 554 U. S., at 492, 504 (internal quotation marks omitted), those damages are designed to impose. There thus was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim.

In both *Katchen* and *Langenkamp*, moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. In *Langenkamp*, we noted that "the trustee instituted adversary proceedings under 11 U. S. C. §547(b) to recover, as avoidable preferences," payments respondents received from the debtor before the bankruptcy filings. 498 U. S., at 43; see, *e.g.,* §547(b)(1) ("the trustee may avoid any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor"). In *Katchen*, "[t]he Trustee . . . [asserted] that the payments made [to the creditor] were preferences inhibited by Section 60a of the Bankruptcy Act." Memorandum Opinion (Feb. 8, 1963), Tr. of Record in O. T. 1965, No. 28, p. 3; see 382 U. S., at 334 (considering impact of the claims allowance process on "action by the

trustee under §60 to recover the preference"); 11 U. S. C. §96(b) (1964 ed.) (§60(b) of the then-applicable Bankruptcy Act) ("preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby . . . has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent"). Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.

In light of all the foregoing, we disagree with the dissent that there are no "relevant distinction[s]" between Pierce's claim in this case and the claim at issue in *Langenkamp*. *Post*, at 14. We see no reason to treat Vickie's counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*. 492 U. S., at 56. *Granfinanciera*'s distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res," *ibid.*, reaffirms that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. Vickie has failed to demonstrate that her counterclaim falls within one of the "limited circumstances" covered by the public rights exception, particularly given our conclusion that, "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." *Northern Pipeline,* 458 U. S., at 69, n. 23, 77, n. 29 (plurality opinion).

3

Vickie additionally argues that the Bankruptcy Court's final judgment was constitutional because bankruptcy courts under the 1984 Act are properly deemed "adjuncts" of the district courts. Brief for Petitioner 61–64. We

rejected a similar argument in *Northern Pipeline*, see 458 U. S., at 84–86 (plurality opinion); *id.,* at 91 (Rehnquist, J., concurring in judgment), and our reasoning there holds true today.

To begin, as explained above, it is still the bankruptcy court itself that exercises the essential attributes of judicial power over a matter such as Vickie's counterclaim. See *supra,* at 20. The new bankruptcy courts, like the old, do not "ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law" or engage in "statutorily channeled factfinding functions." *Northern Pipeline*, 458 U. S., at 85 (plurality opinion). Instead, bankruptcy courts under the 1984 Act resolve "[a]ll matters of fact and law in whatever domains of the law to which" the parties' counterclaims might lead. *Id.,* at 91 (Rehnquist, J., concurring in judgment).

In addition, whereas the adjunct agency in *Crowell* v. *Benson* "possessed only a limited power to issue compensation orders . . . [that] could be enforced only by order of the district court," *Northern Pipeline, supra,* at 85, a bankruptcy court resolving a counterclaim under 28 U. S. C. §157(b)(2)(C) has the power to enter "appropriate orders and judgments"—including final judgments—subject to review only if a party chooses to appeal, see §§157(b)(1), 158(a)–(b). It is thus no less the case here than it was in *Northern Pipeline* that "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with" the bankruptcy judge, not the district court. 458 U. S., at 81 (plurality opinion) (internal quotation marks omitted). Given that authority, a bankruptcy court can no more be deemed a mere "adjunct" of the district court than a district court can be deemed such an "adjunct" of the court of appeals. We certainly cannot accept the dissent's notion that judges who have the power to enter final, binding orders are the "functional[]" equivalent of "law clerks[] and the Judiciary's administrative

officials." *Post*, at 11. And even were we wrong in this regard, that would only confirm that such judges should not be in the business of entering final judgments in the first place.

It does not affect our analysis that, as Vickie notes, bankruptcy judges under the current Act are appointed by the Article III courts, rather than the President. See Brief for Petitioner 59. If—as we have concluded—the bankruptcy court itself exercises "the essential attributes of judicial power [that] are reserved to Article III courts," *Schor*, 478 U. S., at 851 (internal quotation marks omitted), it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains. See The Federalist No. 78, at 471 ("Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [a judge's] necessary independence").

D

Finally, Vickie and her *amici* predict as a practical matter that restrictions on a bankruptcy court's ability to hear and finally resolve compulsory counterclaims will create significant delays and impose additional costs on the bankruptcy process. See, *e.g.,* Brief for Petitioner 34–36, 57–58; Brief for United States as *Amicus Curiae* 29–30. It goes without saying that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U. S. 919, 944 (1983).

In addition, we are not convinced that the practical consequences of such limitations on the authority of bankruptcy courts to enter final judgments are as significant as Vickie and the dissent suggest. See *post*, at 16–17. The dissent asserts that it is important that counterclaims such as Vickie's be resolved "in a bankruptcy court," and

that, "to be effective, a single tribunal must have broad authority to restructure [debtor-creditor] relations." *Post*, at 14, 15 (emphasis deleted). But the framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts. Section 1334(c)(2), for example, requires that bankruptcy courts abstain from hearing specified non-core, state law claims that "can be timely adjudicated[] in a State forum of appropriate jurisdiction." Section 1334(c)(1) similarly provides that bankruptcy courts may abstain from hearing any proceeding, including core matters, "in the interest of comity with State courts or respect for State law."

As described above, the current bankruptcy system also requires the district court to review *de novo* and enter final judgment on any matters that are "related to" the bankruptcy proceedings, §157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, §157(d). Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide[s]" them. Brief for Respondent 61. We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a "narrow" one. Brief for United States as *Amicus Curiae* 23.

If our decision today does not change all that much, then why the fuss? Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy? The short but emphatic answer is yes. A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.

"Slight encroachments create new boundaries from which legions of power can seek new territory to capture." *Reid* v. *Covert*, 354 U. S. 1, 39 (1957) (plurality opinion). Although "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form," we cannot overlook the intrusion: "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886). We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.

* * *

Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 10–179

HOWARD K. STERN, EXECUTOR OF THE ESTATE OF VICKIE LYNN MARSHALL, PETITIONER *v.* ELAINE T. MARSHALL, EXECUTRIX OF THE ESTATE OF E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2011]

JUSTICE SCALIA, concurring.

I agree with the Court's interpretation of our Article III precedents, and I accordingly join its opinion. I adhere to my view, however, that—our contrary precedents notwithstanding—"a matter of public rights . . . must at a minimum arise between the government and others," *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 65 (1989) (SCALIA, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area. I count at least seven different reasons given in the Court's opinion for concluding that an Article III judge was required to adjudicate this lawsuit: that it was one "under state common law" which was "not a matter that can be pursued only by grace of the other branches," *ante*, at 27; that it was "not 'completely dependent upon' adjudication of a claim created by federal law," *ibid.;* that "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings," *ibid.;* that "the asserted authority to decide Vickie's claim is not limited to a 'particularized area of the law,'" *ante*, at 28; that "there was

never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim," *ante*, at 32; that the trustee was not "asserting a right of recovery created by federal bankruptcy law," *ante*, at 33; and that the Bankruptcy Judge "ha[d] the power to enter 'appropriate orders and judgments'—including final judgments—subject to review only if a party chooses to appeal," *ante*, at 35.

Apart from their sheer numerosity, the more fundamental flaw in the many tests suggested by our jurisprudence is that they have nothing to do with the text or tradition of Article III. For example, Article III gives no indication that state-law claims have preferential entitlement to an Article III judge; nor does it make pertinent the extent to which the area of the law is "particularized." The multifactors relied upon today seem to have entered our jurisprudence almost randomly.

Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell* v. *Benson*, 285 U. S. 22 (1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason—and not because of some intuitive balancing of benefits and harms—I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true "public rights" cases. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 71 (1982) (plurality opinion). Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate, see, *e.g.,* Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr. L. J. 567, 607–609 (1998); the subject has not been briefed, and so I state no position on the matter. But Vickie points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.

SUPREME COURT OF THE UNITED STATES

No. 10–179

HOWARD K. STERN, EXECUTOR OF THE ESTATE OF VICKIE LYNN MARSHALL, PETITIONER *v.* ELAINE T. MARSHALL, EXECUTRIX OF THE ESTATE OF E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2011]

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, join dissenting.

Pierce Marshall filed a claim in Federal Bankruptcy Court against the estate of Vickie Marshall. His claim asserted that Vickie Marshall had, through her lawyers, accused him of trying to prevent her from obtaining money that his father had wanted her to have; that her accusations violated state defamation law; and that she consequently owed Pierce Marshall damages. Vickie Marshall filed a compulsory counterclaim in which she asserted that Pierce Marshall had unlawfully interfered with her husband's efforts to grant her an *inter vivos* gift and that he consequently owed her damages.

The Bankruptcy Court adjudicated the claim and the counterclaim. In doing so, the court followed statutory procedures applicable to "core" bankruptcy proceedings. See 28 U. S. C. §157(b). And ultimately the Bankruptcy Court entered judgment in favor of Vickie Marshall. The question before us is whether the Bankruptcy Court possessed jurisdiction to adjudicate Vickie Marshall's counterclaim. I agree with the Court that the bankruptcy statute, §157(b)(2)(C), authorizes a bankruptcy court to adjudicate the counterclaim. But I do not agree with the

majority about the statute's constitutionality. I believe the statute is consistent with the Constitution's delegation of the "judicial Power of the United States" to the Judicial Branch of Government. Art. III, §1. Consequently, it is constitutional.

I

My disagreement with the majority's conclusion stems in part from my disagreement about the way in which it interprets, or at least emphasizes, certain precedents. In my view, the majority overstates the current relevance of statements this Court made in an 1856 case, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), and it overstates the importance of an analysis that did not command a Court majority in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), and that was subsequently disavowed. At the same time, I fear the Court understates the importance of a watershed opinion widely thought to demonstrate the constitutional basis for the current authority of administrative agencies to adjudicate private disputes, namely, *Crowell* v. *Benson*, 285 U. S. 22 (1932). And it fails to follow the analysis that this Court more recently has held applicable to the evaluation of claims of a kind before us here, namely, claims that a congressional delegation of adjudicatory authority violates separation-of-powers principles derived from Article III. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568 (1985); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986).

I shall describe these cases in some detail in order to explain why I believe we should put less weight than does the majority upon the statement in *Murray's Lessee* and the analysis followed by the *Northern Pipeline* plurality and instead should apply the approach this Court has applied in *Crowell*, *Thomas*, and *Schor*.

A

In *Murray's Lessee*, the Court held that the Constitution permitted an executive official, through summary, nonjudicial proceedings, to attach the assets of a customs collector whose account was deficient. The Court found evidence in common law of "summary method[s] for the recovery of debts due to the crown, and especially those due from receivers of the revenues," 18 How., at 277, and it analogized the Government's summary attachment process to the kind of self-help remedies available to private parties, *id.*, at 283. In the course of its opinion, the Court wrote:

> "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*, at 284.

The majority reads the first part of the statement's first sentence as authoritatively defining the boundaries of Article III. *Ante*, at 18. I would read the statement in a less absolute way. For one thing, the statement is in effect dictum. For another, it is the remainder of the statement, announcing a distinction between "public rights" and "private rights," that has had the more lasting impact. Later Courts have seized on that distinction when *upholding* non-Article III adjudication, not when striking it down. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 451–452

(1929) (Court of Customs Appeals); *Williams* v. *United States*, 289 U. S. 553, 579–580 (1933) (Court of Claims). The one exception is *Northern Pipeline,* where the Court struck down the Bankruptcy Act of 1978. But in that case there was no majority. And a plurality, not a majority, read the statement roughly in the way the Court does today. See 458 U. S., at 67–70.

B

At the same time, I believe the majority places insufficient weight on *Crowell*, a seminal case that clarified the scope of the dictum in *Murray's Lessee*. In that case, the Court considered whether Congress could grant to an Article I administrative agency the power to adjudicate an employee's workers' compensation claim against his employer. The Court assumed that an Article III court would review the agency's decision *de novo* in respect to questions of law but it would conduct a less searching review (looking to see only if the agency's award was "supported by evidence in the record") in respect to questions of fact. *Crowell*, 285 U. S., at 48–50. The Court pointed out that the case involved a dispute between private persons (a matter of "private rights") and (with one exception not relevant here) it upheld Congress' delegation of primary factfinding authority to the agency.

Justice Brandeis, dissenting (from a here-irrelvant portion of the Court's holding), wrote that the adjudicatory scheme raised only a due process question: When does due process require decision by an Article III judge? He answered that question by finding constitutional the statute's delegation of adjudicatory authority to an agency. *Id.*, at 87.

Crowell has been hailed as "the greatest of the cases validating administrative adjudication." Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 251 (1990).

Yet, in a footnote, the majority distinguishes *Crowell* as a case in which the Court upheld the delegation of adjudicatory authority to an administrative agency simply because the agency's power to make the "specialized, narrowly confined factual determinations" at issue arising in a "particularized area of law," made the agency a "true 'adjunct' of the District Court." *Ante*, at 23, n. 6. Were *Crowell's* holding as narrow as the majority suggests, one could question the validity of Congress' delegation of authority to adjudicate disputes among private parties to other agencies such as the National Labor Relations Board, the Commodity Futures Trading Commission, the Surface Transportation Board, and the Department of Housing and Urban Development, thereby resurrecting important legal questions previously thought to have been decided. See 29 U. S. C. §160; 7 U. S. C. §18; 49 U. S. C. §10704; 42 U. S. C. §3612(b).

C

The majority, in my view, overemphasizes the precedential effect of the plurality opinion in *Northern Pipeline*. *Ante*, at 19–21. There, the Court held unconstitutional the jurisdictional provisions of the Bankruptcy Act of 1978 granting adjudicatory authority to bankruptcy judges who lack the protections of tenure and compensation that Article III provides. Four Members of the Court wrote that Congress could grant adjudicatory authority to a non-Article III judge only where (1) the judge sits on a "territorial cour[t]" (2) the judge conducts a "courts-martial," or (3) the case involves a "public right," namely, a "matter" that "at a minimum arise[s] 'between the government and others.'" 458 U. S., at 64–70 (plurality opinion) (quoting *Ex parte Bakelite Corp*., *supra*, at 451). Two other Members of the Court, without accepting these limitations, agreed with the result because the case involved a breach-of-contract claim brought by the bankruptcy trustee on

behalf of the bankruptcy estate against a third party who was not part of the bankruptcy proceeding, and none of the Court's preceding cases (which, the two Members wrote, "do not admit of easy synthesis") had "gone so far as to sanction th[is] type of adjudication." 458 U. S., at 90–91 (Rehnquist, J. concurring in judgment).

Three years later, the Court held that *Northern Pipeline*

> "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas*, 473 U. S., at 584.

D

Rather than leaning so heavily on the approach taken by the plurality in *Northern Pipeline*, I would look to this Court's more recent Article III cases *Thomas* and *Schor*—cases that commanded a clear majority. In both cases the Court took a more pragmatic approach to the constitutional question. It sought to determine whether, in the particular instance, the challenged delegation of adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch.

1

In *Thomas*, the Court focused directly upon the nature of the Article III problem, illustrating how the Court should determine whether a delegation of adjudicatory authority to a non-Article III judge violates the Constitution. The statute in question required pesticide manufacturers to submit to binding arbitration claims for compensation owed for the use by one manufacturer of the data of

another to support its federal pesticide registration. After describing *Northern Pipeline*'s holding in the language I have set forth above, *supra*, at 6, the Court stated that "*practical attention to substance* rather than doctrinaire reliance on formal categories should inform application of Article III." *Thomas*, 473 U. S., at 587 (emphasis added). It indicated that Article III's requirements could not be "determined" by "the identity of the parties alone," *ibid.*, or by the "private rights"/"public rights" distinction, *id.*, at 585–586. And it upheld the arbitration provision of the statute.

The Court pointed out that the right in question was created by a federal statute, it "represent[s] a pragmatic solution to the difficult problem of spreading [certain] costs," and the statute "does not preclude review of the arbitration proceeding by an Article III court." *Id.*, at 589–592. The Court concluded:

> "Given the nature of the right at issue and the concerns motivating the Legislature, we do not think this system threatens the independent role of the Judiciary in our constitutional scheme." *Id.*, at 590.

2

Most recently, in *Schor*, the Court described in greater detail how this Court should analyze this kind of Article III question. The question at issue in *Schor* involved a delegation of authority to an agency to adjudicate a counterclaim. A customer brought before the Commodity Futures Trading Commission (CFTC) a claim for reparations against his commodity futures broker. The customer noted that his brokerage account showed that he owed the broker money, but he said that the broker's unlawful actions had produced that debit balance, and he sought damages. The broker brought a counterclaim seeking the money that the account showed the customer owed. This Court had to decide whether agency adjudication of such a

counterclaim is consistent with Article III.

In doing so, the Court expressly "declined to adopt formalistic and unbending rules." *Schor*, 478 U. S., at 851. Rather, it "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Ibid.* Those relevant factors include (1) "the origins and importance of the right to be adjudicated"; (2) "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; (3) the extent to which the delegation nonetheless reserves judicial power for exercise by Article III courts; (4) the presence or "absence of consent to an initial adjudication before a non-Article III tribunal"; and (5) "the concerns that drove Congress to depart from" adjudication in an Article III court. *Id.*, at 849, 851.

The Court added that where "private rights," rather than "public rights" are involved, the "danger of encroaching on the judicial powers" is greater. *Id.*, at 853–854 (internal quotation marks omitted). Thus, while non-Article III adjudication of "private rights" is not necessarily unconstitutional, the Court's constitutional "examination" of such a scheme must be more "searching." *Ibid.*

Applying this analysis, the Court upheld the agency's authority to adjudicate the counterclaim. The Court conceded that the adjudication might be of a kind traditionally decided by a court and that the rights at issue were "private," not "public." *Id.*, at 853. But, the Court said, the CFTC deals only with a "'particularized area of law'"; the decision to invoke the CFTC forum is "left entirely to the parties"; Article III courts can review the agency's findings of fact under "the same 'weight of the evidence' standard sustained in *Crowell*" and review its "legal determinations . . . *de novo*"; and the agency's "counterclaim jurisdiction" was necessary to make "workable" a

"reparations procedure," which constitutes an important part of a congressionally enacted "regulatory scheme." *Id.*, at 852–856. The Court concluded that for these and other reasons "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." *Id.*, at 856.

II

A

This case law, as applied in *Thomas* and *Schor*, requires us to determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III. That is to say, we must determine through an examination of certain relevant factors whether that delegation constitutes a significant encroachment by the Legislative or Executive Branches of Government upon the realm of authority that Article III reserves for exercise by the Judicial Branch of Government. Those factors include (1) the nature of the claim to be adjudicated; (2) the nature of the non-Article III tribunal; (3) the extent to which Article III courts exercise control over the proceeding; (4) the presence or absence of the parties' consent; and (5) the nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections. The presence of "private rights" does not automatically determine the outcome of the question but requires a more "searching" examination of the relevant factors. *Schor*, *supra*, at 854.

Insofar as the majority would apply more formal standards, it simply disregards recent, controlling precedent. *Thomas*, *supra*, at 587 ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"); *Schor*, *supra*, at 851 ("[T]he Court has declined to adopt formalistic and unbending rules" for deciding Article III cases).

B

Applying *Schor's* approach here, I conclude that the delegation of adjudicatory authority before us is constitutional. A grant of authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III.

First, I concede that *the nature of the claim to be adjudicated* argues against my conclusion. Vickie Marshall's counterclaim—a kind of tort suit—resembles "a suit at the common law." *Murray's Lessee*, 18 How., at 284. Although not determinative of the question, see *Schor*, 478 U. S., at 853, a delegation of authority to a non-Article III judge to adjudicate a claim of that kind poses a heightened risk of encroachment on the Federal Judiciary, *id.*, at 854.

At the same time the significance of this factor is mitigated here by the fact that bankruptcy courts often decide claims that similarly resemble various common-law actions. Suppose, for example, that ownership of 40 acres of land in the bankruptcy debtor's possession is disputed by a creditor. If that creditor brings a claim in the bankruptcy court, resolution of that dispute requires the bankruptcy court to apply the same state property law that would govern in a state court proceeding. This kind of dispute arises with regularity in bankruptcy proceedings.

Of course, in this instance the state-law question is embedded in a debtor's counterclaim, not a creditor's claim. But the counterclaim is "compulsory." It "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. Rule Civ. Proc. 13(a); Fed. Rule Bkrtcy. Proc. 7013. Thus, resolution of the counterclaim will often turn on facts identical to, or at least related to, those at issue in a creditor's claim that is undisputedly proper for the bankruptcy court to decide.

Second, *the nature of the non-Article III tribunal* argues in favor of constitutionality. That is because the tribunal

is made up of judges who enjoy considerable protection from improper political influence. Unlike the 1978 Act which provided for the appointment of bankruptcy judges by the President with the advice and consent of the Senate, 28 U. S. C. §152 (1976 ed., Supp. IV), current law provides that the federal courts of appeals appoint federal bankruptcy judges, §152(a)(1) (2006 ed.). Bankruptcy judges are removable by the circuit judicial counsel (made up of federal court of appeals and district court judges) and only for cause. §152(e). Their salaries are pegged to those of federal district court judges, §153(a), and the cost of their courthouses and other work-related expenses are paid by the Judiciary, §156. Thus, although Congress technically exercised its Article I power when it created bankruptcy courts, functionally, bankruptcy judges can be compared to magistrate judges, law clerks, and the Judiciary's administrative officials, whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch.

Third, *the control exercised by Article III judges over bankruptcy proceedings* argues in favor of constitutionality. Article III judges control and supervise the bankruptcy court's determinations—at least to the same degree that Article III judges supervised the agency's determinations in *Crowell*, if not more so. Any party may appeal those determinations to the federal district court, where the federal judge will review all determinations of fact for clear error and will review all determinations of law *de novo*. Fed. Rule Bkrtcy. Proc. 8013; 10 Collier on Bankruptcy ¶8013.04 (16th ed. 2011). But for the here-irrelevant matter of what *Crowell* considered to be special "constitutional" facts, the standard of review for factual findings here ("clearly erroneous") is more stringent than the standard at issue in *Crowell* (whether the agency's factfinding was "supported by evidence in the record"). 285 U. S., at 48; see *Dickinson* v. *Zurko*, 527 U. S. 150,

152, 153 (1999) ("unsupported by substantial evidence" more deferential than "clearly erroneous" (internal quotation marks omitted)). And, as *Crowell* noted, "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." 285 U. S., at 51.

Moreover, in one important respect Article III judges maintain greater control over the bankruptcy court proceedings at issue here than they did over the relevant proceedings in any of the previous cases in which this Court has upheld a delegation of adjudicatory power. The District Court here may "withdraw, in whole or in part, any case or proceeding referred [to the Bankruptcy Court] . . . on its own motion or on timely motion of any party, for cause shown." 28 U. S. C. §157(d); cf. *Northern Pipeline*, 458 U. S., at 80, n. 31 (plurality opinion) (contrasting pre-1978 law where "power to withdraw the case from the [bankruptcy] referee" gave district courts "control" over case with the unconstitutional 1978 statute, which provided no such district court authority).

Fourth, the fact that *the parties have consented* to Bankruptcy Court jurisdiction argues in favor of constitutionality, and strongly so. Pierce Marshall, the counterclaim defendant, is not a stranger to the litigation, forced to appear in Bankruptcy Court against his will. Cf. *id.*, at 91 (Rehnquist, J., concurring in judgment) (suit was litigated in Bankruptcy Court "over [the defendant's] objection"). Rather, he appeared voluntarily in Bankruptcy Court as one of Vickie Marshall's creditors, seeking a favorable resolution of his claim against Vickie Marshall to the detriment of her other creditors. He need not have filed a claim, perhaps not even at the cost of bringing it in the future, for he says his claim is "nondischargeable," in which case he could have litigated it in a state or federal court after distribution. See 11 U. S. C. §523(a)(6). Thus,

Pierce Marshall likely had "an alternative forum to the bankruptcy court in which to pursue [his] clai[m]." *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 59, n. 14 (1989).

The Court has held, in a highly analogous context, that this type of consent argues strongly in favor of using ordinary bankruptcy court proceedings. In *Granfinanciera,* the Court held that when a bankruptcy trustee seeks to void a transfer of assets from the debtor to an individual on the ground that the transfer to that individual constitutes an unlawful "preference," the question of whether the individual has a right to a jury trial "depends upon whether the creditor has submitted a claim against the estate." *Id.*, at 58. The following year, in *Langenkamp* v. *Culp*, 498 U. S. 42 (1990) *(per curiam)*, the Court emphasized that when the individual files a claim against the estate, that individual has

> "trigger[ed] the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*." *Id.*, at 44 (quoting *Granfinanciera*, 492 U. S., at 58; citations omitted).

As we have recognized, the jury trial question and the Article III question are highly analogous. See *id.,* at 52–53. And to that extent, *Granfinanciera*'s and *Langenkamp*'s basic reasoning and conclusion apply here: Even when private rights are at issue, non-Article III adjudication may be appropriate when both parties consent. Cf. *Northern Pipeline*, *supra*, at 80, n. 31 (plurality opinion)

(noting the importance of consent to bankruptcy jurisdiction). See also *Schor*, 478 U. S., at 849 ("[A]bsence of consent to an initial adjudication before a non-Article III tribunal was relied on [in *Northern Pipeline*] as a significant factor in determining that Article III forbade such adjudication"). The majority argues that Pierce Marshall "did not truly consent" to bankruptcy jurisdiction, *ante*, at 27–28, but filing a proof of claim was sufficient in *Langenkamp* and *Granfinanciera*, and there is no relevant distinction between the claims filed in those cases and the claim filed here.

Fifth, *the nature and importance of the legislative purpose served* by the grant of adjudicatory authority to bankruptcy tribunals argues strongly in favor of constitutionality. Congress' delegation of adjudicatory powers over counterclaims asserted against bankruptcy claimants constitutes an important means of securing a constitutionally authorized end. Article I, §8, of the Constitution explicitly grants Congress the "Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." James Madison wrote in the Federalist Papers that the

> "power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, p. 271 (C. Rossiter ed. 1961).

Congress established the first Bankruptcy Act in 1800. 2 Stat. 19. From the beginning, the "core" of federal bankruptcy proceedings has been "the restructuring of debtor-creditor relations." *Northern Pipeline*, *supra*, at 71 (plurality opinion). And, to be effective, a single tribunal must have broad authority to restructure those relations, "hav-

ing jurisdiction of the parties to controversies brought before them," "decid[ing] all matters in dispute," and "decree[ing] complete relief." *Katchen* v. *Landy*, 382 U. S. 323, 335 (1966) (internal quotation marks omitted).

The restructuring process requires a creditor to file a proof of claim in the bankruptcy court. 11 U. S. C. §501; Fed. Rule Bkrtcy. Proc. 3002(a). In doing so, the creditor "triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp*, *supra*, at 44 (quoting *Granfinanciera*, *supra*, at 58). By filing a proof of claim, the creditor agrees to the bankruptcy court's resolution of that claim, and if the creditor wins, the creditor will receive a share of the distribution of the bankruptcy estate. When the bankruptcy estate has a related claim against that creditor, that counterclaim may offset the creditor's claim, or even yield additional damages that augment the estate and may be distributed to the other creditors.

The consequent importance to the total bankruptcy scheme of permitting the trustee in bankruptcy to assert counterclaims against claimants, *and resolving those counterclaims in a bankruptcy court*, is reflected in the fact that Congress included "counterclaims by the estate against persons filing claims against the estate" on its list of "[c]ore proceedings." 28 U. S. C. §157(b)(2)(C). And it explains the difference, reflected in this Court's opinions, between a claimant's and a nonclaimant's constitutional right to a jury trial. Compare *Granfinanciera*, *supra,* at 58–59 ("Because petitioners . . . have not filed claims against the estate" they retain "their Seventh Amendment right to a trial by jury"), with *Langenkamp*, *supra,* at 45 ("Respondents filed claims against the bankruptcy estate" and "[c]onsequently, they were not entitled to a jury trial").

Consequently a bankruptcy court's determination of

such matters has more than "some bearing on a bankruptcy case." *Ante*, at 34 (emphasis deleted). It plays a critical role in Congress' constitutionally based effort to create an efficient, effective federal bankruptcy system. At the least, that is what Congress concluded. We owe deference to that determination, which shows the absence of any legislative or executive motive, intent, purpose, or desire to encroach upon areas that Article III reserves to judges to whom it grants tenure and compensation protections.

Considering these factors together, I conclude that, as in *Schor*, "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." 478 U. S., at 856. I would similarly find the statute before us constitutional.

III

The majority predicts that as a "practical matter" today's decision "does not change all that much." *Ante*, at 36–37. But I doubt that is so. Consider a typical case: A tenant files for bankruptcy. The landlord files a claim for unpaid rent. The tenant asserts a counterclaim for damages suffered by the landlord's (1) failing to fulfill his obligations as lessor, and (2) improperly recovering possession of the premises by misrepresenting the facts in housing court. (These are close to the facts presented in *In re Beugen*, 81 B. R. 994 (Bkrtcy. Ct. ND Cal. 1988).) This state-law counterclaim does not "ste[m] from the bankruptcy itself," *ante*, at 34, it would not "necessarily be resolved in the claims allowance process," *ibid.*, and it would require the debtor to prove damages suffered by the lessor's failures, the extent to which the landlord's representations to the housing court were untrue, and damages suffered by improper recovery of possession of the premises, cf. *ante*, at 33-33. Thus, under the majority's holding, the federal district judge, not the bankruptcy judge, would have to hear and resolve the counterclaim.

Why is that a problem? Because these types of disputes arise in bankruptcy court with some frequency. See, *e.g.*, *In re CBI Holding Co.,* 529 F. 3d 432 (CA2 2008) (state-law claims and counterclaims); *In re Winstar Communications, Inc.*, 348 B. R. 234 (Bkrtcy. Ct. Del. 2005) (same); *In re Ascher*, 128 B. R. 639 (Bkrtcy. Ct. ND Ill. 1991) (same); *In re Sun West Distributors, Inc.*, 69 B. R. 861 (Bkrtcy. Ct. SD Cal. 1987) (same). Because the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases. Administrative Office of the United States Courts, J. Duff, Judicial Business of the United States Courts: Annual Report of the Director 14 (2010). Because unlike the "related" non-core state law claims that bankruptcy courts must abstain from hearing, *see ante*, at 36, compulsory counterclaims involve the same factual disputes as the claims that may be finally adjudicated by the bankruptcy courts. Because under these circumstances, a constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.

For these reasons, with respect, I dissent.

EXHIBIT B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 5, 2011 Decided June 24, 2011

No. 10-5245

AMERICAN NATIONAL INSURANCE COMPANY AND AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,
APPELLANTS
FARM FAMILY LIFE INSURANCE COMPANY AND FARM FAMILY CASUALTY INSURANCE COMPANY,
APPELLANTS
NATIONAL WESTERN LIFE INSURANCE COMPANY,
APPELLANT

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR WASHINGTON MUTUAL BANK, HENDERSON, NEVADA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-01743)

Gregory Stuart Smith argued the cause for appellants. With him on the briefs were *Andrew J. Mytelka* and *James M. Roquemore*.

Joseph Brooks, Counsel, Federal Deposit Insurance Corporation, argued the cause for appellee Federal Deposit Insurance Corporation, As Receiver For Washington Mutual Bank. With him on the brief were *Colleen J. Boles*, Assistant General Counsel, *Lawrence H. Richmond*, Senior Counsel, and *John J. Clarke Jr.* *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Robert A. Sacks argued the cause for appellees JPMorgan Chase & Co., et al. On the brief were *Bruce E. Clark* and *Stacey R. Friedman.*

Before: SENTELLE, *Chief Judge*, TATEL, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

SENTELLE, *Chief Judge*: Bondholders of the failed Washington Mutual Bank allege that JPMorgan Chase, through a series of improper acts, pressured the federal government to seize Washington Mutual Bank and then sell to it the bank's most valuable assets, without any accompanying liabilities, for a drastically undervalued price. The bondholders asserted three Texas state law claims in Texas state court, but, after the Federal Deposit Insurance Corporation intervened in the lawsuit, the case was removed to federal district court. Finding that 12 U.S.C. § 1821(d)(13)(D)(ii) jurisdictionally barred appellants from obtaining judicial review of their claims because they had not exhausted their administrative remedies under the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the district court dismissed appellants' complaint. Because we hold that appellants' suit falls outside the scope of the jurisdictional bar of § 1821(d)(13)(D), we reverse the decision of the district court and remand for further proceedings.

I.

On review of a district court's dismissal of a complaint for lack of subject matter jurisdiction, we make legal determinations *de novo*. *Nat'l Air Traffic Controllers Ass'n, AFL-CIO v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 786 (D.C. Cir. 2010); *see* FED. R. CIV. P. 12(b)(1). We assume the truth of all material factual allegations in the complaint and "construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged," *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005) (quoting *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004)); *see also Talenti v. Clinton*, 102 F.3d 573, 574–75 (D.C. Cir. 1996), and upon such facts determine jurisdictional questions. Applying that standard to the complaint before us, we assume the following facts:

Prior to September 2008, Washington Mutual Bank ("WMB"), a wholly owned subsidiary of Washington Mutual, Inc. ("WMI"), was the nation's largest savings and loan association. Compl. ¶ 33. However, on September 25, 2008, the Office of Thrift Supervision ("OTS") seized WMB and placed it in receivership with the Federal Deposit Insurance Corporation ("FDIC"). *Id.* ¶ 64. On the same day, the FDIC signed a purchase and assumption agreement with JPMorgan Chase & Co. and its wholly owned subsidiary JPMorgan Chase Bank (collectively, "JPMC"), in which it agreed to sell to JPMC for $1.9 billion "the most valuable assets of [WMB] without any of [its] liabilities," including its obligations to unsecured debt holders and litigation risk. *Id.* ¶ 67. WMB's bond contracts remained with the FDIC-as-receiver, which now cannot meet its obligations under the contracts. *Id.* ¶ 71. Left without its "primary income-producing asset," WMI, which filed for bankruptcy immediately following the sale of WMB's assets to JPMC, became similarly unable to service its bond contracts, and its common stock was rendered worthless. *Id.* ¶ 70.

Again assuming the truth of the allegations in the complaint, the dramatic fall of WMB and WMI (collectively, "Washington Mutual") was engineered by JPMC. JPMC engaged in an elaborate scheme designed to "improperly and illegally take advantage of the financial difficulties of [WMI]" and "strip away valuable assets of Washington Mutual without properly compensating the company or its stakeholders." *Id.* ¶¶ 20, 30. To carry out this scheme, JPMC first "strategically plac[ed] key personnel [at Washington Mutual] to gather information regarding Washington Mutual's strategic business decisions and financial health," *id.* ¶ 25, and "misus[ed] access to government regulators to gain non-public information" about Washington Mutual, *id.* ¶ 32. Further, when Washington Mutual sought to sell itself, JPMC "misrepresented to Washington Mutual that it would negotiate in good faith for the purchase of the company" and engaged in sham negotiations with Washington Mutual to gain access to Washington Mutual's confidential financial information. *Id.* ¶¶ 53–54. Then, despite signing a confidentiality agreement with Washington Mutual, JPMC leaked harmful information to news media, government regulators, and investors, in an effort to "distort the market and regulatory perception of Washington Mutual's financial health," *id.* ¶¶ 46, 54, 58.

JPMC also applied direct pressure on the FDIC to effectuate its scheme: It "exerted improper influence over government regulators to prematurely seize Washington Mutual . . . and to sell assets of Washington Mutual without an adequate or fair bidding process," *id.* ¶ 32. Indeed, prior to the seizure of WMB, JPMC had already negotiated an agreement with the FDIC that, anticipating the seizure of WMB, set forth the requirements for a bid to purchase assets of WMB-in-receivership and provided for the transfer of WMB's valuable assets by the FDIC-as-receiver to JPMC, at a large profit to JPMC. *Id.* ¶¶ 47, 58, 62.

JPMC used its inside knowledge of Washington Mutual to create a bid for WMB that would be profitable to JPMC. *Id.* ¶ 58. When, just prior to the seizure of WMB, the FDIC sought official bids for WMB, JPMC submitted its prearranged bid, *id.* ¶¶ 58, 62–63, and the FDIC accepted it, *id.* ¶ 64. In quick succession, OTS then seized WMB and JPMC signed a purchase and sale agreement with the FDIC for the below-market sale of WMB's "cherry-picked" assets, stripped of liabilities. *Id.* ¶¶ 43, 64, 67.

On February 16, 2009, several insurance companies that hold bonds of WMB and bonds and stocks of WMI filed suit against JPMC in the District Court of Texas, Galveston County, alleging that JPMC's execution of its scheme had injured the value of their stocks and bonds. The insurance companies asserted three Texas state law claims: tortious interference with existing contract, *id.* ¶¶ 88–93, breach of confidentiality agreement, *id.* ¶¶ 94–99, and unjust enrichment, *id.* ¶¶ 100–03.

After JPMC filed its answer, the FDIC intervened in the lawsuit and thereby became a party to the action. *See* TEX. R. CIV. P. 60 ("Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party."). The FDIC then removed the action to the U.S. District Court for the Southern District of Texas, *see* 12 U.S.C. § 1819(b)(2)(A) ("[A]ll suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States."); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."), and successfully moved for a transfer of venue to the U.S. District Court for the District of Columbia.

Before the District Court for the District of Columbia, the FDIC and JPMC both filed motions to dismiss, and plaintiffs filed a motion to remand to Texas state court. Prior to disposition of these motions, plaintiffs voluntarily dismissed with prejudice all claims premised upon harm to their WMI bonds or stock. As a result, four original plaintiffs lost their stake in the suit, and all remaining claims alleged damage solely to WMB bonds.

On April 13, 2010, the district court issued a Memorandum Opinion and Order granting the FDIC and JPMC's motions to dismiss and denying plaintiffs' motion to remand, holding that it lacked jurisdiction over plaintiffs' suit. *Am. Nat'l. Ins. Co. v. JPMorgan Chase & Co.*, 705 F. Supp. 2d 17 (D.D.C. 2010). Plaintiffs timely moved to alter or amend the judgment and requested leave to file an amended complaint. The district court denied their motion on July 19, 2010. Plaintiffs appeal the district court's April 13, 2010, and July 19, 2010, orders.

II.

The district court held that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA" or "the Act") barred it from exercising jurisdiction to hear appellants' claims. It held that because appellants' injuries depended on the FDIC's sale of Washington Mutual's assets to JPMC, § 1821(d)(13)(D)(ii) of FIRREA required it to dismiss appellants' complaint. *Id.* at 21.

Passed to "enable the FDIC . . . to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country," *Freeman v. FDIC*, 56 F.3d 1394, 1398 (D.C. Cir. 1995), FIRREA creates an administrative claims process for banks in receivership with the FDIC. 12 U.S.C. § 1821(d)(3)–(13). The Act requires the FDIC to give notice to

the failed bank's creditors to file claims against the bank, § 1821(d)(3)(b), and authorizes the FDIC to receive and then disallow or allow and pay such claims, § 1821(d)(5), (10).

FIRREA allows claimants either to obtain administrative review, followed by judicial review, of "any [disallowed] claim against a depository institution for which the [FDIC] is receiver," or to file suit for *de novo* consideration of the disallowed claim in a district court. § 1821(d)(6)–(7). It also prevents a court from exercising jurisdiction, "[e]xcept as otherwise provided" in the Act, over:

> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

§ 1821(d)(13)(D).

Noting that § 1821(d)(6) is "[t]he only clause of the subsection that 'otherwise provide[s]' jurisdiction," *Auction Co. of Am. v. FDIC*, 141 F.3d 1198, 1200 (D.C. Cir. 1998), we have described § 1821(d)(6) and § 1821(d)(13)(D) as setting forth a "standard exhaustion requirement," *id*. Section 1821(d)(6)(A) "routes claims through an administrative review process, and [§ 1821](d)(13)(D) withholds judicial review unless and until claims are so routed." *Id.*; *see also Freeman*, 56 F.3d at 1400 ("Section 1821(d)(13)(D) thus acts as a jurisdictional bar to claims or actions by parties who have not exhausted their § 1821(d) administrative remedies.").

The question we must answer, the same as that addressed by the district court, is whether § 1821(d)(13)(D) applies to and bars the suit brought by appellants. The FDIC and JPMC argue that subsection (ii) of § 1821(d)(13)(D) bars appellants' claims, in the absence of administrative exhaustion under § 1821(d)(6), because they "relat[e] to" an act of the FDIC-as-receiver: the FDIC's sale of Washington Mutual's assets to JPMC. Alternatively, they contend that subsection (i) of the same provision withholds jurisdiction without administrative exhaustion because appellants' claims are "for payment from, or . . . seek[] a determination of rights with respect to, the assets" of Washington Mutual.

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

Second, although subsection (i) of § 1821(d)(13)(D) reaches more broadly than (ii), encompassing not just "claims" but also "action[s] for payment from, or . . . seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver," its plain language excludes the suit brought by appellants. Appellants' suit seeks relief from JPMC for its own conduct; the mere fact that JPMC now owns assets that Washington Mutual once

owned does not render this suit one against or seeking a determination of rights with respect to those assets. *See Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 394 (3d Cir. 1991) (holding that claims for damages against assuming bank for its own acts did not fall within jurisdictional bar of subsection (i) because "they seek neither payment from nor a determination of rights with respect to the assets of [the bank-in-receivership]" but from the assuming bank).

An examination of FIRREA as a whole demonstrates that "claim" is a term-of-art that encompasses only demands that are resolvable through the administrative process set out by FIRREA. The Act creates a comprehensive administrative mechanism simply for the processing and resolution of "claims." Indeed, it builds the components of the administrative mechanism by defining how "claims" are to be treated at each stage of the administrative process. For example, after establishing the "[a]uthority of [the FDIC-as-receiver] to determine claims," § 1821(d)(3), and the FDIC's "[r]ulemaking authority relating to determination of claims," § 1821(d)(4), FIRREA sets forth the "[p]rocedures for determination of claims," § 1821(d)(5), the requirements for "agency review or judicial determination of claims," § 1821(d)(6), the content of administrative "[r]eview of claims," § 1821(d)(7), the availability of "[e]xpedited determination of claims," § 1821(d)(8), the exclusion of certain "[a]greement[s] as [forming the] basis of claim[s]," § 1821(d)(9), and the authority of the FDIC to make "[p]ayment of claims," § 1821(d)(10). It borders on tautology, therefore, that "claims" are necessarily demands that come within the scope of FIRREA's administrative process. Stated another way, demands unresolvable through the process are not "claims," as the term is used in the Act. *See Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1274 (10th Cir. 1994) ("As a practical matter of statutory construction, . . . we proceed on the

assumption that Congress intended the 'claims' barred by § 1821(d)(13)(D) to parallel those contemplated under FIRREA's administrative claims process laid out in the greater part of § 1821(d)."); *Rosa*, 938 F.2d at 394 ("Whatever its breadth, we do not believe that clause (ii) [of § 1821(d)(13)(D)] encompasses claims that are not susceptible of resolution through the claims procedure.").

Several factors convince us that only claims against depository institutions for which the FDIC has been appointed receiver can be processed by the administrative system set forth in FIRREA. First, § 1821(d)(5)(A)(i), entitled "Procedures for determination of claims: Determination period: In general," provides that "[b]efore the end of the 180-day period beginning on the date any claim *against a depository institution* is filed with the [FDIC] as receiver, the [FDIC] shall determine whether to allow or disallow *the claim*" (emphasis added). FIRREA does not contain any other deadline for FDIC action for other types of claims. No other kinds of claims are ever specified in the provisions setting forth the administrative claims process. Rather, § 1821(d)(6), which establishes the availability of "agency review or judicial determination of claims," similarly governs only "claim[s] against a depository institution for which the [FDIC] is receiver," and subsequent claims process provisions refer simply to "claims." Furthermore, FIRREA authorizes the FDIC to allow and pay claims, *see* § 1821(d)(3)(A), (5)(B), (10)(A)–(B), and requires the FDIC to distribute "amounts realized from the liquidation or other resolution of any insured depository institution" in payment of claims, *see* § 1821(d)(11)(A). That such relief would be categorically inappropriate in cases not against a depository institution for which the FDIC is receiver strengthens our conviction that FIRREA's administrative claims process is available only to claims against depository institutions.

The FDIC and JPMC argue that the jurisdictional bar of § 1821(d)(13)(D) demonstrates that claims other than those against a depository institution can go through the administrative claims process. They claim that the broad language used in that subsection demonstrates that the claims process was intended to be more widely available. To be sure, we have construed § 1821(d)(6)'s "claim against a depository institution" language broadly in light of §§ 1821(d)(13)(D)(i) and (ii). *See Freeman v. FDIC*, 56 F.3d 1394, 1400–01 (D.C. Cir. 1995); *OPEIU, Local 2 v. FDIC*, 962 F.2d 63, 67 (D.C. Cir. 1992). Indeed, to have done otherwise would mean either ignoring Congress's use of such broad language in § 1821(d)(13)(D) or transforming FIRREA from an administrative exhaustion scheme into a grant of immunity, "a result troubling from a constitutional perspective and certainly not the goal of FIRREA," *Auction Co. v. FDIC*, 141 F.3d 1198, 1200 (D.C. Cir. 1998); *see also id.* ("Congress did not intend FIRREA's claims process to immunize the receiver, but rather wanted to require exhaustion of the receivership claims before going to court." (quoting *Hudson United Bank v. Chase Manhattan Bank of Conn.*, 43 F.3d 843, 848–49 (3d Cir. 1994))). We, however, have only construed the claims process broadly where either the failed depository institution or the FDIC-as-receiver might be held legally responsible to pay or otherwise resolve the asserted claim. Where, as here, neither the failed depository institution nor the FDIC-as-receiver bears any legal responsibility for claimant's injuries, the claims process offers only a pointless bureaucratic exercise. *See supra* 10–11. And we doubt Congress intended to force claimants into a process incapable of resolving their claims.

The FDIC and JPMC also assert that the principle motivating the Sixth Circuit's decision in *Village of Oakwood v. State Bank & Trust Co.*, 539 F.3d 373 (6th Cir. 2008), bars this lawsuit. In *Village of Oakwood*, depositors of a failed bank sued

another bank (the "assuming bank") that had purchased various assets and liabilities of the failed bank from the FDIC-as-receiver. 539 F.3d at 376. Although plaintiffs in that case named only the assuming bank as a defendant in the action, their complaint alleged that the FDIC, not the assuming bank, had breached its fiduciary duty. *Id.* One of the four claims asserted against the third-party bank was aiding and abetting the FDIC's breach of its fiduciary duty. *Id.* Holding that plaintiffs' claims fell within the jurisdictional bar of FIRREA, the court of appeals explained that "permit[ting] claimants to avoid [the] provisions of [§ 1821](d)(6) and [§ 1821](d)(13) by bringing claims against the assuming bank . . . would encourage the very litigation that FIRREA aimed to avoid." *Id.* at 386 (quoting *Brady Dev. Co. v. Resolution Trust Corp.*, 14 F.3d 998, 1002–03 (4th Cir. 1994)) (alterations in original). In other words, the court of appeals rightly noted that plaintiffs cannot circumvent FIRREA's jurisdictional bar by drafting their complaint strategically. Where a claim is *functionally*, albeit not *formally*, against a depository institution for which the FDIC is receiver, it is a "claim" within the meaning of FIRREA's administrative claims process. Thus because the *Village of Oakwood* plaintiffs' suit was functionally a claim against the FDIC-as-receiver, which is a claim against the depository institution for which the FDIC is receiver, *see O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994) ("[T]he FDIC as receiver steps into the shoes of the failed [bank]") (internal quotations marks omitted); § 1821(d)(2)(A) ("[T]he [FDIC] shall, . . . by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution."), the court of appeals correctly held the action jurisdictionally barred.

The suit appellants press, however, is clearly distinguishable from that in *Village of Oakwood*. As just described, in *Village of Oakwood* the wrongdoing alleged was perpetrated by the FDIC-as-receiver, which the assuming bank

allegedly aided and abetted. Here, in contrast, appellants allege that JPMC, not the FDIC-as-receiver or Washington Mutual, itself committed the tortious acts for which they claim relief. Although the complaint alleges that the FDIC engaged in conduct without which JPMC's tortious acts would not have caused injury to appellants, that actions by the FDIC form one link in the causal chain connecting JPMC's wrongdoing with appellants' injuries is insufficient to transform the complaint into one against the FDIC.

The FDIC and JPMC maintain that this case resembles *Village of Oakwood* because appellants' complaint is similarly premised upon wrongdoing by the FDIC: They argue that the complaint alleges an agreement between JPMC and the FDIC to commit the torts alleged. However, even if a suit against only a third party that alleged a conspiracy between the FDIC and the third party to commit the acts forming the basis of the claim were properly characterized as a suit against a depository institution—a question we do not reach—that is not the case here. Although appellants' complaint may be susceptible to the interpretation urged by the FDIC and JPMC, the procedural posture of this case requires us to construe the complaint liberally, in the light most favorable to appellants. *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005). Doing so, we read the complaint to allege that JPMC alone committed the wrongdoing for which appellants sue and find no agreement between JPMC and the FDIC.

We therefore hold that § 1821(d)(13)(D) does not withdraw jurisdiction from the judiciary to entertain appellants' lawsuit because their complaint neither asserts a "claim" under FIRREA nor constitutes an action for payment from, or seeking a determination with respect to, the assets of a depository institution for which the FDIC is receiver.

III.

The FDIC and JPMC argue that we should uphold the district court's dismissal of appellants' complaint on an alternative jurisdictional ground. They contend that appellants lacked standing to bring their claims because the claims are for generalized harm to Washington Mutual and thus belong to the FDIC-as-receiver. *See* 12 U.S.C. § 1821(d)(2)(A) ("The [FDIC] shall, as conservator or receiver, and by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution.").

Perhaps it is true that *if* either the exclusive right to bring appellants' claims or the right to preclude appellants from bringing those claims rested with Washington Mutual, that right was passed to the FDIC-as-receiver by operation of § 1821(d)(2)(A) and appellants may not assert those claims here. However, the question whether Washington Mutual had any such right was not decided by the district court. This question is complex and involves several layers of inquiry: Are the "rights, titles, powers, and privileges" inherited by the FDIC-as-receiver from Washington Mutual determined exclusively by reference to state law or does federal law play a role? If we should look to state law, which state's law governs the claims asserted in this case? What is the substance of the applicable body of law? And, most basically, is the ownership of the claims presented below a jurisdictional question, as the FDIC and JPMC suggest, or is it a question of whether appellants have a cause of action? We need not answer these knotty questions and instead remand to the district court to consider them in the first instance.

Because we conclude that § 1821(d)(13)(D) did not bar the district court from hearing appellants' suit and remand to the district court for further proceedings, we do not reach appellants' alternative arguments regarding the availability of subject matter jurisdiction or appellants' contention that the district court erred in denying its motion to alter or amend the judgment and for leave to file an amended complaint.

IV.

For the reasons set forth above, we reverse the order of the district court and remand for proceedings consistent with this opinion.

Exhibit C

Claims/Actions Proposed To Be Resolved Or Released Pursuant To The Settlement

WMI ACTION (currently Pending in District Court in District of Columbia)[13]

WMI CLAIMS

Claim/Matter	**Parties** (P = Plaintiff; D = Defendant)	**Description of Claim/Matter**
Determination of Debtor's Proof of Claim in WMB Receivership	**P**: WMI; WMI Investment **D**: FDIC	• Pursuant to 12 U.S.C. § 1821(d)(6)(A), Debtors seek review and determination of the validity of their claims against the FDIC Receivership.
Dissipation of WMB's Assets	**P**: WMI; WMI Investment **D**: FDIC	• Debtors allege the FDIC breached its statutory duty to maximize distribution (12 U.S.C. § 1821(d)(13)(E)(i)) of the Debtors' assets by entering into the Purchase and Assumption ("P&A") Agreement with JPMC, rather than liquidating WMB's assets.
Fifth Amendment Taking of Debtors' Property Without Just Compensation	**P**: WMI; WMI Investment **D**: FDIC	• Based on the above, the FDIC's wasting of WMB's assets constituted a taking of Debtors' property without just compensation pursuant to the Fifth Amendment of the United States Constitution.
Conversion of Debtors' Property	**P**: WMI; WMI Investment **D**: FDIC	• Because the FDIC failed to compensate Plaintiffs for the property taken into the Receivership (property that belonged to Debtors rather than WMB), the FDIC **converted** Plaintiffs' property, which is *actionable under the Federal Tort Claims Act* (28 U.S.C. §§ 1346(b), 2671-80).
Declaration that the FDIC-Receiver's Disallowance of Debtors' Claim in the WMB Receivership is Void	**P**: WMI; WMI Investment **D**: FDIC	• Plaintiffs seek a declaratory judgment finding the FDIC-Receiver's failure to consider Plaintiffs' Proof of Claim (and subsequent disallowance of that POC) to be a violation of the FDIC's statutory duties, and, by extension, the decision the FDIC made (to disallow the claim) void.

[13] Washington Mut., Inc. v. FDIC, Adv. Proc. No. 09-00533 (RMC) (D.D.C. Oct. 13, 2009) (a/k/a "DC Action").

FDIC COUNTERCLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Ownership of Tax Refunds – *Declaratory Relief*	**P:** FDIC **D**: WMI; WMI Investment	• All tax refunds either received or due to WMI are due and owing in substantial part to WMB. • Pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, the FDIC requests a declaratory judgment finding that any refunds received by, or now due to, WMI be held in trust for WMB.
Recovery of Tax Related Assets	**P:** FDIC **D**: WMI; WMI Investment	• Based on above facts, the FDIC requests that tax-related funds now held by WMI that for which WMB is the rightful owner be turned over to WMB.
Trust Preferred Securities – *Declaratory Relief*	**P:** FDIC **D**: WMI; WMI Investment	• The FDIC seeks a declaratory judgment finding WMB is the rightful owner of the TPS, or, in the alternative, that the FDIC-Receiver or JPMC, as its assignee, may record the transfer of ownership of the TPS in the ownership registers of the SPE subsidiaries of WMPF. • The Assignment Agreement, under which WMI purportedly transferred the TPS to WMB, is governed by Washington State Law.
Request for Turnover or Compensation for Trust Preferred Securities	**P:** FDIC **D**: WMI; WMI Investment	• In the alternative, the FDIC seeks an order requiring WMI to turnover the TPS to the FDIC-Receiver, or pay a sum to the FDIC equal to the full amount of any liquidation preference accompanying the TPS.
Recovery of Intercompany Amounts	**P:** FDIC **D**: WMI; WMI Investment	• The FDIC seeks payment of any intercompany monies owed to WMB.

Deposit Accounts	**P:** FDIC **D**: WMI; WMI Investment	• The FDIC alleges substantial WMB assets exist in the co-mingled Deposit Accounts and requests an order requiring the turnover of those funds to the FDIC.
Damages for Failure to Comply with Capital Maintenance Obligations	**P:** FDIC **D**: WMI; WMI Investment	• WMI's alleged failure to maintain its capital obligations harmed WMB in an unliquidated amount. • The FDIC demands judgment against WMI for failing to maintain its capital obligations, and requests damages in an amount to be determined at trial.
Unlawful dividends	**P:** FDIC **D**: WMI; WMI Investment	• The FDIC asserts fraudulent transfer claims for the $15 billion in cash dividend payments WMI made from September 2003 to September 2008.
Goodwill Litigation	**P:** FDIC **D**: WMI; WMI Investment	• To the extent WMI recovers anything through the litigation that preceded the filing of its petition, the FDIC claims that it is entitled to the proceeds due WMB.
Insurance Proceeds	**P:** FDIC **D**: WMI; WMI Investment	• To the extent covered losses occurred under the Insurance Policies held by WMI and WMB (for which WMB was, at least in part, claimed to be a named or intended beneficiary), FDIC demands payments for covered losses suffered by WMB.

JPMC ACTION (Currently Pending In Bankruptcy Court)[14]

JPMC CLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Ownership of Trust Securities – *Request for Declaratory Relief*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment finding Debtors must proceed with any claim to the TPS via its District Court action (the "DC Action"). • Alternatively, JPMC requests declaratory judgment finding JPMC to be the rightful owner of the TPS by virtue of the Purchase and Assumption Agreement [entered into pursuant to 12 U.S.C. § 1823(c)(2)(A)].
Trust Securities – *Breach of Contract*	**P**: JPMC **Ds**: WMI; WMI Investment	• By entering into the Contribution Agreement, WMI is claimed to have assumed a direct obligation to WMB to immediately contribute and transfer the TPS to WMB following a Conditional Exchange. • Alternatively, it is claimed that WMB was the third-party beneficiary of WMI's commitment to the OTS and the FDIC under the Contribution Agreement. • It is also claimed that WMI assumed a direct obligation to WMB pursuant to the Assignment Agreement (governed by the laws of the State of Washington).
Trust Securities – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• To the extent the Court does not enter a judgment declaring JPMC the rightful owner of the TPS, JPMC requests the creation of a **constructive trust**, alleging the Debtors would be unjustly enriched on

[14] JPMorgan Chase Bank, N.A. v. Washington Mut., Inc., Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del. March 24, 2009).

		account of their treatment of the TPS as core capital, which allowed the Debtors to satisfy regulatory requirements and satisfy higher capital ratios.
Tax Refunds – *Request for Declaratory Relief*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory relief that it, through its acquisition of WMB, is the rightful owner of any tax refunds inuring to WMB and its subsidiaries. • WaMU filed—and JPMC claims ownership of the refunds for—returns in AK, AZ, CA, CO, HI, ID, IL, IN, KS, ME, MI, MN, MT, NE, NH, NM, OK, OR, TN, TX, UT, VT, as well as Federal returns
Tax Refunds – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks, in the alternative to its request for declaratory relief, the imposition of a constructive trust, into which would flow any proceeds from the tax refunds.
Disputed Funds – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC disputes the deposit liability that WMI claims it owns on account of receiving a $3.7 billion Book Entry Transfer and seeks declaratory judgment finding that (a) WMI must proceed with its deposit liability action through the DC Action or (b) JPMC is not liable.
Disputed Funds – *Setoff, Recoupment, & Other Equitable Remedies*	**P**: JPMC **Ds**: WMI; WMI Investment	• To the extent the Court finds that JPMC has *any* liabilities to the Debtors, including deposit liability, JPMC alleges that it should be entitled to (a) recoup and/or setoff all such amounts under the MBA; (b) impose a constructive trust over the funds of Debtors it possesses; or (c) enforce any security interest determined to apply to the Debtors' funds.
Disputed Funds – *Interpleader*	**P**: JPMC **Ds**: WMI; WMI Investment; FDIC	• JPMC seeks to interplead any remaining funds that constitute deposit liability
Goodwill Litigation – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI	• JPMC seeks a declaratory judgment finding it to be the owner of the beneficial interests in all judgment monies paid by and through

	Investment	*Anchor Savings Bank* and/or *American Savings Bank* litigation.
Rabbi Trusts – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment that it is the rightful owner of WMB and WMI's 16 Legacy Rabbi Trusts valued at approximately $550 million.
Rabbi Trusts – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court does not provide JPMC with its requested declaratory relief, JPMC requests that the Court impose **a** constructive trust consisting of the value of the Legacy Rabbi Trusts.
Pension and 401(k) Plans – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks to assume the Pension and 401(k) Plans in their entirety. • Debtors maintain that (a) the pensions must be terminated; (b) that JPMC must pay WMI an amount reflecting a purported "excess funding"; and (c) pay for associated litigation costs. • JPMC seeks a declaratory judgment forcing WMI to pursue any ownership claims in the DC Action and, in the alternative, a declaratory judgment finding JPMC may assume the Pensions without paying excess funding.
Pension and 401(k) Plans – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court does not provide JPMC with its requested declaratory relief, JPMC requests that the Court impose a post-petition constructive trust in the full amount necessary to compensate JPMC for the amounts it contributed to the 401(k) Plans.
Bank Owned Life Insurance Policies – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment finding WMI must pursue any claim to ownership of the Bank Owned Life Insurance ("BOLI") and Split Dollar Life Insurance Policies in the DC Action, or, alternatively, that JPMC is the rightful owner of the BOLI and Split Dollar Life Insurance Policies issued to the Debtors by various

		insurance companies.
Bank Owned Life Insurance Policies – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court does not provide JPMC with its requested declaratory relief, JPMC requests that the Court impose a constructive trust consisting of the value of the BOLI and Split Dollar Policies.
Visa Shares – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment finding the Visa Shares are assets purchased by JPMC, or, in the alternative, if the Court finds the Visa Shares belong to the Debtors, that the Debtors assume full liability for the restructuring and initial public offering associated with those shares.
Visa Shares – *Unjust Enrichment*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court finds the Debtors remain the rightful owners of the Visa Shares, JPMC seeks to impose a constructive trust for the value of those shares (to cover any attendant litigation and provide excess value of those shares to JPMC).
Intangible Assets – *Declaratory Judgment*	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks declaratory judgment finding that pursuant to the P&A and Title 12, it owns the Intangible Assets (including trademarks, logos, vendor contracts, and other contracts (e.g., licensing/software Ks)), or, in the alternative, has no liability to any persons for those Intangible Assets
Intangible Assets – *Constructive Trust*	**P**: JPMC **Ds**: WMI; WMI Investment	• In the event the Court finds the Debtors remain the rightful owners of the Intangible Assets, JPMC seeks to impose a constructive trust for the value of those Intangible Assets.
Administrative Claim	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks reimbursement for litigation expenses incurred in any disputes over the Debtors' assets.
Indemnification	**P**: JPMC **Ds**: WMI; WMI Investment	• JPMC seeks indemnity for any acts, omissions or conduct of the Debtors prior to the Petition Date for which JPMC, on

		account of its acquisition of WaMu, might be held liable.

WMI COUNTERCLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Avoidance and Recovery of Capital Contributions Pursuant to 11 U.S.C. §§ 548, 550	**P**: WMI; WMI Investment **D**: JPMC	• WMI made capital contributions to WMB within 2 years of filing for bankruptcy for which it did not receive reasonably equivalent value. • JPMC, as successor to WMB, owes WMI approximately $6.5 billion for the fraudulent transfers made by WMI to WMB.
Avoidance and Recovery of Capital Contributions Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.041, 19.40.051, & 19.40.081	**P**: WMI; WMI Investment **D**: JPMC	• Based on the same facts, JPMC is liable for the fraudulent transfers WMB received pursuant to 11 U.S.C. § 544 and under Washington State Law [RCW (Revised Code of Washington) §§ 19.40.041 and 19.40.051].
Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 548, 550	**P**: WMI; WMI Investment **D**: JPMC	• WMI alleges that the transfer of the TPS to either WMB or JPMC was a fraudulent transfer since the transfer either rendered WMI insolvent or WMB being seized by the OTS was so likely that equity shares in WMB were valueless.
Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.041, 19.40.051, 19.40.071 & 19.40.081	**P**: WMI; WMI Investment **D**: JPMC	• Based on the same facts, JPMC is liable for the fraudulent transfers WMB received pursuant to 11 U.S.C. § 544 and under Washington State Law.

Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 547, 550	**P**: WMI; WMI Investment **D**: JPMC	• In the alternative, the transfer of the TPS was a preference avoidable under 11 U.S.C. § 547.
Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.051, 19.40.071, & 19.40.081	**P**: WMI; WMI Investment **D**: JPMC	• In the alternative, the transfer of the TPS is avoidable pursuant to 11 U.S.C. § 544 and under Washington State Law.
Declaratory Judgment that Trust Securities are Property of the Estate	**P**: WMI; WMI Investment **D**: JPMC	• WMI disputes that the P&A transferred ownership interest of the TPS to JPMC
Avoidance and Recovery of Preferential Transfers to WMB Pursuant to 11 U.S.C. §§ 547, 550	**P**: WMI; WMI Investment **D**: JPMC	• Within one year of the petition date, WMI transferred substantial sums of cash to WMB and WMB fsb to satisfy tax and intercompany obligations. Those transfers were preferential and thus now avoidable, since JPMC is liable as a subsequent transferee.
Avoidance and Recovery of Preferential Transfers Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.051, 19.40.071, & 19.40.081	**P**: WMI; WMI Investment **D**: JPMC	• In the alternative, the Preferential Transfers are avoidable pursuant to 11 U.S.C. § 544 and under Washington State Law.
Fraudulent Transfer Pursuant to 11 U.S.C. § 541; RCW §§ 19.40.041, 19.40.051, 19.40.071 & 19.40.081; NEV. REV. STAT. §§ 112.180, 112.190, 112.210, & 112.220	**P**: WMI; WMI Investment **D**: JPMC	• The P&A Transaction is avoidable as a fraudulent transfer under Nevada State Law or, in the alternative, under Washington State Law.
Disallowance of Claims Pursuant to 11 U.S.C. §§ 105, 502	**P**: WMI; WMI Investment **D**: JPMC	• Debtors object to any and all claims filed by JPMC pursuant to 11 U.S.C. § 502(d). • Debtors also have a right of set off so,

		because the Debtors have claims against JPMC that exceed any liability they may have to JPMC, JPMC's claims are unenforceable and should be disallowed.
Declaratory Judgment that Certain Assets are Property of the Estate	**P**: WMI; WMI Investment **D**: JPMC	• Debtors dispute JPMC's claims to the Assets JPMC lists in its Complaint and request declaratory judgment finding that those Disputed Assets are property of the Debtors.
Turnover of Intercompany Amounts Due Pursuant to 11 U.S.C. § 542	**P**: WMI; WMI Investment **D**: JPMC	• Pursuant to 11 U.S.C. § 542, Debtors allege that the Intercompany Amounts Due are debts that JPMC must pay to the Debtors' estates.
Unjust Enrichment, Constructive Trust, and Equitable Lien	**P**: WMI; WMI Investment **D**: JPMC	• In the event the Court does not grant Debtors' request for a Declaratory Judgment finding them to be the rightful owner of the Disputed Assets, the Debtors request the Court impose a constructive trust for the value of those assets transferred to JPMC.
Trademark Infringement Pursuant to 15 U.S.C. § 1114	**P**: WMI; WMI Investment **D**: JPMC	• WMI, as the owner of the WaMu trademarks, alleges it is entitled to (a) force JPMC to reassign any rights it may have in the WaMu trademarks or (b) recover damages as a result of the JPMC federal trademark infringement, including any profits arising therefrom. • WMI seeks treble damages for the willful and deliberate infringement of its trademarks.
Common Law Trademark Infringement	**P**: WMI; WMI Investment **D**: JPMC	• Same facts as above for federal trademark infringement
Patent Infringement	**P**: WMI; WMI Investment **D**: JPMC	• WaMu developed and registered a patent that JPMC, by practicing the patent in connection with its business, is infringing pursuant to 35 U.S.C. § 271.

Federal Copyright Infringement Pursuant to 17 U.S.C. § 501	**P**: WMI; WMI Investment **D**: JPMC	• Despite WMI owning the copyright for the website at wamu.com, JPMC continues to display, reproduce, and distribute the website, thus violating 17 U.S.C. § 106.

TURNOVER ACTION (Currently Pending in Bankruptcy Court)[15]

WMI CLAIMS

Claim/Matter	Parties (P = Plaintiff; D = Defendant)	Description of Claim/Matter
Turnover Pursuant to 11 U.S.C. § 542	**P**: WMI; WMI Investment **D**: JPMC	• Plaintiffs demand that JPMC turnover the nearly $4 billion in deposits that the Debtors held with WMB pre-petition, citing **11 U.S.C. §§ 363 and 542** as authority. • Moreover, JPMC is not entitled to set off (pursuant to 11 U.S.C. § 553) any of the monies it holds in those deposit accounts.
Unjust Enrichment	**P**: WMI; WMI Investment **D**: JPMC	• Plaintiffs claim that JPMC has been unjustly enriched by withholding the funds in the deposit accounts, and that they "do not have an adequate remedy of law." • Plaintiffs seek an order from the Court finding JPMC has been unjustly enriched and providing Plaintiffs with restitution, at an amount to be determined by the Court.

JPMC COUNTERCLAIMS

Claim/Matter	**Parties** (P = Plaintiff; D = Defendant)	**Description of Claim/Matter**
Intercompany Amounts in Disputed Accounts – *Declaratory Judgment*	**P**: JPMC **D**: WMI	• Absent a contrary finding in the DC Action, WMI has had its claim against the FDIC-Receiver disallowed. • JPMC seeks a declaratory judgment (i) that WMI's claims against JPMC for the same assets for which their claim against the

[15] Washington Mut., Inc. v. JPMorgan Chase Bank, N.A., Adv. Proc. No. 09-50934 (Bankr. D. Del. April 27, 2009).

		FDIC were disallowed are similarly disallowed and (ii) that it may challenge disallowance only in the DC Action.
$3.7 Billion Book Entry Transfer – *Declaratory Judgment*	**P**: JPMC **D**: WMI	• JPMC requests a declaratory judgment finding that Debtors must proceed with any claim to ownership of the nearly $4 billion in deposit monies in the DC Action or, alternatively, that JPMC has no deposit liability.
Setoff, Recoupment, and Other Equitable Limitations – *Declaratory Judgment*	**P**: JPMC **D**: WMI	• To the extent JPMC has any liabilities, it seeks to (i) recoup/set off all such amounts under the MBA Policy, (ii) impose a **constructive trust**, or (iii) enforce any security interest that may apply to the funds of the Debtors.
Fraud	**P**: JPMC **D**: WMI	[Asserted only if Court determines JPMC has deposit liability] • WMI directed the nearly $4 billion to WMB's deposit accounts with knowledge that WMB was unsafe and would shortly be seized by regulators, and it intentionally concealed these facts from WMB fsb.
Interpleader	**P**: JPMC **D**: WMI; WMI Investment; FDIC	• JPMC seeks to interplead any remaining funds that constitute deposit liabilities, since JPMC, WMI, and the FDIC have asserted (and may assert) competing claims to those funds.
Disputed Assets – *Declaratory Judgment*	**P**: JPMC **D**: WMI	• JPMC seeks a declaratory judgment that it owns the Disputed Assets (intercompany amounts; the TPS; tax refunds; proceeds of the Debtors' goodwill litigation; ownership of certain Rabbi trust and benefit plans; ownership of common stock in Visa; and ownership of the intellectual property, contracts, and intangible assets of the Debtors).
Ownership of Other Assets – *Declaratory Judgment*	**P**: JPMC **D**: WMI; WMI Investment; FDIC	• JPMC seeks a declaratory judgment that it is the rightful owner of the assets transferred from WMB to JPMC, but now subject to a claim dispute by the Debtors.

Ownership of Other Assets – *Unjust Enrichment*	**P**: JPMC **D**: WMI	• In the event the Court denies JPMC's request for declaratory judgment finding the Other Assets are not property of JPMC, JPMC requests the Court impose a **constructive trust** for the benefit of JPMC consisting of the value the Debtors realized as a result of treatment of the TPS as core capital; tax refunds; value of certain Rabbi trusts and life insurance policies; amounts necessary to reimburse JPMC for contributions made to a benefit plan; ownership of common stock in Visa; and value of the intellectual property, contracts, and intangible assets of the Debtors.
Breach of Contract re Trust Securities	**P**: JPMC **D**: WMI	• By entering into the Contribution Agreement [entered into pursuant to 11 U.S.C. § 365(o)], WMI assumed a direct obligation to WMB to immediately contribute and transfer the TPS to WMB following the Conditional Exchange. • Alternatively, WMB was the third-party beneficiary of WMI's commitment to the OTS and the FDIC under the Contribution Agreement. • WMI also assumed a direct obligation to WMB pursuant to the Assignment Agreement (governed by the laws of the State of Washington). • WMI breached the Contribution Agreement in the event the Assignment Agreement is interpreted as providing anything more than bare legal title. WMI further breached by refusing to assist JPMC in obtaining registered ownership of the TPS. • JPMC alleges money damages as a proximate result of WMI's breach.
Administrative Claim	**P**: JPMC **Ds**: WMI	• JPMC seeks reimbursement for litigation expenses incurred in any disputes over the Debtors' assets.

Indemnification	**P**: JPMC **Ds**: WMI	JPMC seeks indemnity for any acts, omissions or conduct of the Debtors prior to the Petition Date for which JPMC, on account of its acquisition of WaMu, might be held liable.

Exhibit D

Stern Views on Bankruptcy Court Jurisdiction – United States Supreme Court Addresses Bankruptcy Court Jurisdiction in the Anna Nicole Smith Case

Posted By Sara Coelho
Published on July 6, 2011

Category: Claims,Jurisdiction

Recently [1], we wrote about the United States Supreme Court's decision in *Stern v. Marshall* [2], where the Court held by a 5 to 4 majority that the United States Constitution prohibits federal bankruptcy judges from entering a final judgment on a state law counterclaim asserted by a debtor where the counterclaim is not resolved in the process of ruling on the creditor's proof of claim. In *Stern*, the Court found that such determinations may only be made by judges who enjoy the privileges of lifetime tenure and salary protection provided by Article III of the Constitution. The decision revives questions about the extent and nature of bankruptcy court jurisdiction, that many thought were resolved by the Court's seminal 1982 decision on bankruptcy jurisdiction, *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, and subsequent amendments to the bankruptcy jurisdiction statutes in 1984. In this post, we explore the underpinnings of the Court's decision, and some of its implications, in more detail.

Facts and Procedural History

The case arises from disputes over the inheritance of the late J. Howard Marshall II's fortune. Before Howard Marshall's death, his wife, Vickie Lynn Marshall (better known as Anna Nicole Smith), filed a suit in Texas alleging that Howard Marshall's son, E. Pierce Marshall, fraudulently induced Howard Marshall to cut Smith out of his estate. Following Howard Marshall's death, Smith filed for bankruptcy in California. Pierce Marshall filed a claim against Smith in the bankruptcy case, asserting that Smith's allegations of fraud defamed him, and an adversary proceeding seeking a determination that his defamation claim was not dischargeable in the bankruptcy. Smith counterclaimed, alleging, among other claims, tortious interference with the gift she expected from Howard Marshall. Under Federal Rule of Bankruptcy Procedure 7013, she was required to do so to the extent that her counterclaim was "compulsory."

The bankruptcy court ruled against Pierce Marshall's claim and in favor of Smith's claim, and awarded Smith more than $425 million. Appeals ensued. In the meantime, the Texas state court issued a conflicting judgment in favor of Pierce Marshall. The various appellate findings (including one by the U.S. Supreme Court) are not detailed here, except to say that, in the end, on remand, the Ninth Circuit found that Smith's counterclaim was not a "core" proceeding that bankruptcy judges have the power to hear under section 157(b)(2)(C) of the Judicial Code because resolution of her claim was not necessary to resolve the claims asserted against her by Pierce Howard. Although Smith had, by that time, passed away, her estate had continued the case. The U.S. Supreme Court granted certiorari.

The Court's Decision

The Court agreed with Smith that the bankruptcy court correctly applied section 157 of the Judicial Code, but it held that the Constitution requires that Smith's common law claim be resolved by an Article III judge. Under the U.S. Constitution, Article III defines the judicial power of the United States and prescribes that federal judges enjoy important salary and tenure protections designed to prevent the political branches from encroaching on the judicial power. U.S. Const. Art. III, § 1. Bankruptcy judges on the other hand, are appointed pursuant to Article I of the U.S. Constitution, which confers on the Congress the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," and do not enjoy constitutionally imposed salary and tenure protections. U.S. Const. Art. I, § 8. Citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856), a 155-year-old Supreme Court decision, which states that "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,'" the Court found that Congress could not confer authority on a bankruptcy judge to resolve Smith's state law counterclaim without violating the mandate of Article III of the Constitution because a non-Article III judge could not enter final judgment on claims like

those asserted by Smith. The Court further concluded that this result was consistent with the plurality opinion in *Marathon*, 458 U.S. 50 (1982), which found that a statute's grant of jurisdiction to bankruptcy judges to issue final decisions on state law contract claims violated Article III, and the opinion of the majority in *Marathon* that (i) a public rights exception did not apply in that case, and (ii) the bankruptcy court was not acting as an adjunct of the district court. The Court rejected arguments that Smith's counterclaim could be resolved in the bankruptcy court under several alternate theories, which are discussed here in turn.

First, the Court found that any "public rights" exception to the requirement of Article III adjudications was not applicable and did not permit a bankruptcy court to adjudicate Smith's claim. In *Murray's Lessee*, the Court described "matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Such rights, the Court argued, are historically within the purview of the legislative or executive branches, which, in conferring such rights, have the power to determine whether those rights will be subject to adjudication before Article III courts or before a different tribunal, such as an administrative law judge. Subsequent cases have expounded on this doctrine, but the Court maintained the doctrine has always been limited to cases where the "claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority" and that public rights are "integrally related to particular federal government action." The Court held that Smith's counterclaim did not resemble public rights under any of the precedent as it was not a "matter that could be pursued only by grace of the other branches." It also found that Smith's counterclaim did not flow from any federal statutory scheme and that the bankruptcy court authority to decide Smith's counterclaim was not limited to a particularized area of the law, as in an agency adjudication.

The Court similarly rejected the argument that the bankruptcy court had jurisdiction to decide Smith's counterclaim as a result of Pierce Marshall having filed a proof of claim in Smith's bankruptcy case. The Court asserted that Pierce Marshall's "decision to file a claim" should not "make any difference with respect to the characterization of [Smith's] counterclaim." The majority opinion referred to and distinguished from the instant case previous cases that had permitted assertion of a preference action in the bankruptcy court against creditors that had filed proofs of claim because, among other things, in those cases, resolution of the preference actions had been necessary to resolve the disputed proofs of claim, and the actions brought had been created by federal bankruptcy law. Thus, the Court continued the validity of bankruptcy court jurisdiction for certain counterclaims, particularly where such claims are grounded in the Bankruptcy Code. Resolution of Smith's counterclaim however, required rulings from the bankruptcy court on issues that the bankruptcy court did not need to determine in the course of allowing or disallowing Pierce Howard's claim.

The Court also rejected the notion that the mandates of Article III were met because the bankruptcy court was operating as an "adjunct" of the district court. It found that because the bankruptcy court "exercises the essential attributes of judicial power" and because it did not make "specialized" factual determinations in a particular area of law, but rather resolves "'[a]ll matters of fact and law in whatever domains of the law to which' the parties' counterclaims might lead," the bankruptcy court could not properly be viewed as an adjunct to another court.

The Court dismissed arguments that its ruling would lead to substantial additional cost and delay as unconvincing, and pointed to other kinds of state law claims that reside outside the bankruptcy court's jurisdiction. It so doing, the majority downplayed the potential effects of its decision stating, "[w]e do not think the removal of counterclaims such as [Smith's] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree . . . that the question presented here is a 'narrow' one."

The Dissent

In the dissent, Justice Breyer, joined by justices Ginsburg, Sotomayor and Kagan, argued that the Court overstated the importance of *Murray's Lessee* and *Marathon*, and failed to apply more recent precedent under which the Court has laid out factors to consider in determining whether a particular delegation of adjudicatory authority to a non-Article III judge encroaches on the judicial branch. Such factors include the nature of the claim to be adjudicated and of the non-Article III tribunal, the extent of control over the proceeding by Article III courts, whether the parties consent, and the nature and importance of the legislative purpose served by the grant of adjudicatory authority to the non-Article III forum. To the extent that the rights in question are "private rights," a more "'searching' examination of the relevant factors" is required. In weighing these factors under the Court's precedent, Justice Breyer concluded that the "magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." (Internal quotations omitted).

Justice Breyer's dissent also argued against the majority's assertion that the effect of its decision would be minor, citing the frequency of similar disputes, the "staggering" volume of bankruptcy cases (approximately 1.6 million filings in 2010 compared with approximately 358,000 federal district court cases for the same period) and the fact that

compulsory counterclaims are frequently premised on the same factual disputes as the claims asserted against bankruptcy estates that the bankruptcy courts are authorized to adjudicate. He argued that a "constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy."

Effects of the Decision

In addition to the logistical difficulties identified by the dissent, the *Stern* opinion raises numerous questions about a bankruptcy court's jurisdiction in general, and how a debtor should assert its counterclaims in particular. Most importantly, although the majority was careful to say that it was ruling on a narrow question, it will have to be seen how litigants and courts apply *Stern's* reasoning. In the case of state law counterclaims asserted by a debtor, it is not clear how procedures for referring those matters to the district court will evolve, or how claims presently being litigated will be treated. In addition, the jurisdictional issue will, in some instances, be difficult for the bankruptcy court to determine at the outset of a case, and there may be cases where it becomes apparent that jurisdiction is lacking after substantial investment in the litigation by the parties.

Stern is not the first Supreme Court decision to raise substantial questions about the bankruptcy court's power, however, and if past controversies are any guide, it will take time to fully understand its significance as the bankruptcy courts (and no doubt, Article III courts) grapple with its application.

Article printed from Weil Bankruptcy Blog: **http://business-finance-restructuring.weil.com**

URL to article: **http://business-finance-restructuring.weil.com/claims/stern-views-on-bankruptcy-court-jurisdiction-%e2%80%93-united-states-supreme-court-addresses-bankruptcy-court-jurisdiction-in-the-anna-nicole-smith-case/**

Click here to print.

Copyright © 2010 Weil Bankruptcy Blog. All rights reserved.

EXHIBIT D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

THE TPS CONSORTIUM'S POST-TRIAL BRIEF IN FURTHER OPPOSITION TO THE DEBTORS' MODIFIED SIXTH AMENDED JOINT PLAN

BROWN RUDNICK LLP
Seven Times Square
New York, New York 10036
(212) 209-4800

- and -

One Financial Center
Boston, Massachusetts 02111
(617) 856-8200

- and -

CAMPBELL & LEVINE LLC
800 North King Street, Suite 300
Wilmington, DE 19809
(302) 426-1900

Dated: August 10, 2011

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 5

I. This Court Lacks Authority To Confirm The Plan In Its Present Form, And No Evidence Or Argument Has Been Presented To Support Any Different Conclusion 5

A. The Plan Violates The Divestiture Rule, And Nothing Has Been Presented To Support Any Different Conclusion 5

1. Applicable Legal Principles 5

2. The Plan Unabashedly Flouts The Divestiture Rule 8

3. The Court's Jurisdictional Boundaries Must Be Recognized, Even If It Frustrates The Debtors' Preferred Case Strategy 10

4. The TPS Securities Must Be Fully Escrowed In A Disputed Claims Reserve Pending The Ultimate Outcome Of The Appellate Process 12

B. The Plan Amounts To Little More Than Bankruptcy "Wrapping" For A Settlement Of Complex Non-Core Litigation That Is Beyond This Court's Constitutional Power To Resolve With Finality, And Nothing Has Been Presented To Support Any Different Conclusion 13

1. The Court Lacks Constitutional Power To Adjudicate The Estate Claims Against JPMorgan And The FDIC 13

2. The Court Also Lacks Constitutional Power To Grant Final Approval Of The Global Settlement, Which Resolves Non-Core Estate Claims Against JPMorgan And The FDIC 16

3. Such Ruling Recognizes The True Nature Of This Chapter 11 Case (A Liquidation) And The True Nature Of This Plan (Bankruptcy "Wrapping" For A Settlement Of Claims That Must Be Adjudicated By The District Court) 20

II. The Plan Over-Compensates Creditors, And No Evidence Or Argument Has Been Presented To Support Any Different Conclusion 21

A. As A Matter Of Law, Unsecured Creditors Are Not Entitled To Post-Petition Interest Beyond The Federal Judgment Rate, Determined As Of Entry Of The Confirmation Order, Regardless Of Creditor Activity Or Good Faith 21

1. In A Solvent-Debtor Case, Unsecured Creditors Are Entitled Only To Post-Petition Interest At The Federal Judgment Rate 22

2. Judicial Discretion To Determine The Rate Of Post-Petition Interest Arises Only In Connection With Unsecured Creditor "Cram-Down;" It Does Not Arise In The Circumstances Now Before The Court, Especially Where There Is Sufficient Estate Cash To Satisfy All Creditor Claims 22

3. The Date Of "Judgment" For Determining The Federal Judgment Rate Of Interest Is The Confirmation Date 26

4. The Economic Impact Is Quite Significant 29

5. The Debtors Are Not Able To Evade This Conclusion By Pointing To Unsustainable "Tack On" Claims That Have Absolutely No Legal Or Evidentiary Support 31

a. The WMI Estate Is Not Responsible For PIERs Turn-Over Obligations To Senior Funded Debt 32

b. Neither The Law Nor The Trial Evidence Support A Finding Of Any Class 18 Liability 34

(i) There Is No "MARTA" Liability 36

(ii) There Is No D&O Liability 37

(iii) There Is No Other Class 18 Liability. 37

B. The Plan Deprives Rejecting Holders Of TPS Securities (Class 19) Of Their Legal Entitlement To (1) The Proceeds Of Estate Causes Of Action And (2) Participate In The Governance Of Post-Consummation Litigation, And Nothing Has Been Presented To Support Any Different Conclusion 38

1. The TPS Holders Are Legally Entitled To Proceeds Of Unsettled Estate Causes Of Action And Nothing Has Been Presented To Support Any Different Conclusion 38

a. The Plan's "Death-Trap" Provision Foists A Significant Added Evidentiary Burden On The Debtors: That The Value Of Estate Causes Of Action To Be Vested In The Liquidation Trust Is Less Than The "Delta" Before Holders Of TPS Securities Are "In-The-Money" 38

b. The Debtors Have Failed To Carry Their Burdens Of Proof And Persuasion; To The Contrary, The Evidence Suggests That The Estate Causes Of Action May Be Worth Hundreds Of Millions, Perhaps Billions, Of Incremental Dollars 40

c. The Plan Wrongfully Allocates Trust Value For The Primary Benefit Of The Settlment Noteholders 46

2. TPS Holders Are Legally Entitled To Meaningful Participation In The Post-Consummation Governance Of Estate Litigation, And Nothing Has Been Presented To Support Any Different Conclusion 46

III. The Debtors Have Failed To Carry Their Burden Of Proof For Continued Approval Of The Global Settlement, Especially In Light Of Substantial New Evidence And The Appellate Reversal of ANICO 49

A. The "Law Of The Case" Doctrine Does Not Foreclose Evaluation Of The Global Settlement 49

B. Even If The Court Had Issued A Final Order Regarding The Global Settlement Agreement, Reconsideration Of That Order Would Be Warranted By Significant Factual Developments Since December 2010 50

C. The Evidentiary Record Cannot Support Approval Of The Global Settlement Agreement.. 52

D. Now That Light Has Been Shed On The Plan Negotiations, It is Clear The Settlement, Negotiated By Conflicted Counsel, Was Designed To Overcompensate Creditors, Leave Equity With Nothing, And Deliver All Remaining Value To JPMorgan 54

E. If The Court Is Inclined To Recommend Settlement Approval To Chief Judge Sleet, The Debtors Should Be Ordered To Identify (With Specificity) Where Evidence Exists In The Record To Support Such A Recommendation... 57

1. Rules Applicable To The Preparation Of Proposed Findings Of Fact And Conclusions Of Law 57

2. The Debtors Should Identify Where In The Record Evidence Exists On Which To Base Final Approval Of The Global Settlement Agreement... 60

IV. The Debtors Have Failed To Resolve Substantial Additional Points Of Objection Raised By The TPS Consortium 60

V. If The Court Determines To Confirm The Plan, The Case Itself And The Particular Matters Raised In Connection With Confirmation Are Sufficiently Important As To Warrant Issue Certification Directly To The Third Circuit Court Of Appeals 61

CONCLUSION.. 65

TABLE OF AUTHORITIES

CASES

Amcast Indus. Corp. v. Detrex Corp.,
45 F.3d 155 (7th Cir. 1995) 27

Bank of Am., N.A. v. N. LaSalle St., P'ship (In re 203 N. LaSalle St. P'ship),
246 B.R. 325 (Bankr. N.D. Ill. 2000) 33

Bialac v. Harsh Inv. Corp. (In re Bialac),
694 F.2d 625 (9th Cir. 1982) 7

Biggs v. Capital Factors, Inc. (In re Herb Goetz & Marlen Horn Assocs., Inc.),
No., 96-55944, 1997 WL 415340 (9th Cir. July 24, 1997).......... 54

Bittner v. Borne Chem. Co.,
691 F.2d 134 (3d Cir. 1982) 35

Cable v. Millennium Digital Media Sys., L.L.C. (In re Broadstripe, LLC),
435 B.R. 245 (Bankr. D. Del. 2010) 49

Capon v. Van Noorden,
6 U.S. 126 (1804) 14

Case Fin., Inc. v. Alden,
2009 WL 2581873 (Del. Ch. Aug. 21, 2009) 43

Council of Alt. Political Parties v. Hooks,
179 F.3d 64 (3d Cir. 1999) 49

Credit Alliance Corp. v. Idaho Asphalt Supply, Inc. (In re Blumer)
95 B.R. 143 (B.A.P. 9th Cir. 1988) 54

Everett v. Perez (In re Perez),
30 F.3d 1209 (9th Cir. 1994) 41

Fed. Deposit Ins. Corp. v. O'Melveny & Myers,
61 F.3d 17 (9th Cir. 1995) 45

First Fidelity Bank, N.A. v. Midlantic Nat'l Bank (In re Ionsophere Clubs, Inc.),
134 B.R. 528 (Bankr. S.D.N.Y. 1991) 32

Fry's Metals, Inc. v. Gibbons (In re RFE Indus., Inc.),
283 F.3d 159 (3d Cir. 2002) 52, 53

Gander Mountain Co. v. Cabela's, Inc.,
540 F.3d 827 (8th Cir. 2008) 49

Grace Bros., Ltd. v. UniHolding Corp.,
2000 WL 982401 (Del. Ch. July 12, 2000) 44

Granfinanciera v. Nordberg,
492 U.S. 33 (1989) 14

Griggs v. Provident Consumer Disc. Co.,
459 U.S. 56 (1982) ... 6

HSBC Bank USA, N.A. v. Bank of New York Mellon Trust Co., (In re Bank of New England Corp.)
No. 10-1456, 2011 WL 2476470 (1st Cir. June 23, 2011) ... 33

In re Barone,
No. 07-51621, 2011 Bankr. LEXIS 1267 (Bankr. M.D. Pa April 11, 2011) ... 53

In re BearingPoint,
No. 09-10691, 2011 WL 2709295 (Bankr. S.D.N.Y. July 11, 2011) ... 15

In re Chambers Dev. Co., Inc.,
148 F.3d 214 (3d Cir. 1998) ... 10

In re Chicago, Milwaukee, St. Paul and Pac. R.R. Co.,
791 F.2d 524 (7th Cir. 1986) ... 25

In re Christian Anthanassious,
Nos. 09-4594 & 10-2285, Slip Opinion (3d Cir. Feb. 7, 2011) ... 11

In re Colfer,
159 B.R. 602 (Bankr. D. Me. 1993) ... 35

In re Combustion Eng'g, Inc.,
391 F.3d 190 (3d Cir. 2004) ... 28

In re Coram Healthcare Corp,.
271 B.R. 228 (Bankr. D. Del. 2001) ... 47

In re Coram Healthcare Corp.,
315 B.R. 321 (Bankr. D. Del. 2004) ... 24

In re Country Manor of Kenton, Inc.,
254 B.R. 179 (Bankr. N.D. Ohio 2000) ... 22

In re DeMarco,
258 B.R. 30 (Bankr. M.D. Fla. 2000) ... 7

In re Dow Corning Corp.,
237 B.R. 380 (Bankr. E.D. Mich. 1999) ... 22, 23

In re Dow Corning Corp.,
244 B.R. 678 (Bankr. E.D. Mich. 1999) ... 24

In re Draiman,
2011 WL 1486128 (Bankr. ND Ill. April 29, 2011) ... 40

In re Garriock,
373 B.R. 814 (E.D. Va. 2007) ... 23

In re MCorp Fin., Inc.,
137 BR 219 (Bankr. S.D. Tex. 1992) ... 39, 40, 54

In re Melenyzer,
143 B.R. 829 (Bankr. W.D. Tex. 1992) ... 22

In re New Valley Corp.,
168 B.R. 73 (Bankr. D.N.J. 1994) 25

In re Nova Real Estate Inv. Trust,
23 B.R. 62 (Bankr. E.D. Va. 1982).. 35

In re Okwanna,
No. 10-31663, 2011 WL 3421561 (Bankr S.D. Tex. Aug. 3, 2011) 17

In re Olympia Holding Corp.,
250 B.R. 136 (Bankr. M.D. Fla. 2000) 28

In re Pac. Lumber Co.,
584 F.3d 229 n.19 (5th Cir. 2009) 11

In re PPI Enterprises (U.S.), Inc.,
324 F.3d 197 (3d cir. 2003) 24

In re Schoeneberg,
156 B.R. 963 (Bankr. W.D. Tex. 1993).. 25

In re Smith,
77 B.R. 624 (Bankr. N.D. Ohio 1987).. 33

In re Strawberry Square Assocs.,
152 B.R. 699 (Bankr. E.D.N.Y. 1993).. 8

Int'l Yacht and Tennis, Inc. v. Wasserman (In re Int'l Yacht and Tennis, Inc.),
922 F.2d 659 (11th Cir. 1991) 34

Johnson v. Stemple (In re Stemple),
361 B.R. 778 (E.D. Va. 2007) 27

Kaiser Aluminum & Chem. Corp. v. Bonjomo,
494 U.S. 827 (1990).. 29

Kopp v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.),
213 B.R. 1020 (B.A.P. 10th Cir. 1997) 53

LaRoche Indus., Inc. v. Orica Nitrogen LLC (In re LaRoche Indus., Inc.),
312 B.R. 249 (Bankr. D. Del. 2004).. 28

Louisville & Nashville R.R. v. Motley,
211 U.S. 149 (1908).. 14

Louisville Joint Stock Land Bank v. Radford,
295 U.S. 555 (1935).. 20

M/V Am. Queen v. San Diego Marine Constr. Corp.,
708 F.2d 1483 (9th Cir. 1983) 54

Mazzeo v. Lenhart (In re Mazzeo),
167 F.3d 139 (2d Cir. 1999) 58

Mennen Co. v. Atl. Mut. Ins. Co.,
147 F.3d 287 (3d Cir. 1998) 14

Miller v. Greenwich Capital Fin. Prods. (In re Am. Bus. Fin. Servs., Inc.),,
Nos. 05-10203, 06-50826, 2011 WL 3240596 (Bankr. D. Del. July 28, 2011) 16

Myers v. Martin (In re Martin),
91 F.3d 389 (3d Cir. 1996) 53

NCP Litig. Trust v. KPMG LLP,
187 N.J. 353 (N.J. 2006).. 45

Nelson v. Nationwide Mortg. Corp.,
659 F. Supp. 611 (D.D.C. 1987).. 19

Nordhoff Invs., Inc. v. Zenith Elecs. Corp. (In re Zenith),
258 F.3d 180 (3d Cir. 2001) 11

Official Comm. of Unsecured Creditors of Allegheny Health Educ. and Research Fund v. PricewaterhouseCoopers LLP,
989 A.2d 313 (Pa. 2010).. 45

Official Comm. of Unsecured Creditors of Verestar, Inc. v. Am. Tower Co. (In re Verestar, Inc.),
343 B.R. 444 (Bankr. S.D.N.Y. 2006).. 44

Onink v. Cardelucci (In re Cardelucci),
285 F.3d 1231 (9th Cir. 2002) 22, 23

Polis v. Getaways, Inc. (In re Polis),
217 F.3d 899 (7th Cir. 2000) *41*

Premier Entm't Biloxi LLC v. Pacific Mgmt. Co., LLC (In re Premier Entm't Biloxi LLC),
No. 08-60349, 2009 WL 1616681 (5th Cir. June 9, 2009)... 12

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,
390 U.S. 414 (1968).. 52

Rosener v. Majestic Mgmt., Inc. (In re OODC, LLC),
321 B.R. 128 (Bankr. D. Del. 2005) 44

Rupp v. United States (In re Rocky Mountain Refractories),
208 B.R. 709 (B.A.P. 10th Cir. 1997) 28

Schoenmann v. FDIC,
Case No. 10-03989, 2011 U.S. Dist. LEXIS 43375 (N.D. Cal. April 21, 2011)...................... 49

Schroeder v. New Century Liquidating Trust (In re New Century),
407 B.R. 576 n.27 (D. Del. 2009).. 11

Silverman v. Tracar, S.A. (In re Am. Preferred Prescription, Inc.),
255 F.3d 87 (2d Cir. 2001) 27

Smart World Tech., LLC v. Juno Online Servs. (In re Smart World Tech., LLC),
423 F.3d 166 (2d Cir. 2005) 41

Southland Corp. v. Toronto-Dominion (In re Southland Corp.),
160 F.3d 1054 (5th Cir. 1998) 25

Stern v. Marshall,
131 S.Ct. 2594 (2011).. Passim

SW. Equip. Rental v. Fundsnet, Inc. (In re SW Equip. Rental),
152 B.R. 207 (Bankr. E.D. Tenn. 1992) *26*

Travelers Cas. and Surety Co. v. Future Claimants Representative,
No. 07-2785, 2008 WL 821088 (D.N.J. March 25, 2008) 53

United States v. Hark,
320 U.S. 531 (1944) 26

Varsity Carpet Servs. v. Richardson (In re Colorex Indus., Inc.),
19 F.3d 1371 (11th Cir. 1994) 28

Venen v. Sweet,
758 F.2d 117 (3d Cir. 1985) 6, 12

Whispering Pines Estates v. Flash Island, Inc. (In re Whispering Pines Estates),
369 B.R. 752 (B.A.P. 1st Cir. 2007) 6, 7

Yoo Wong Park, v. United States AG,
472 F.3d 66 (3d Cir. 2006) 10, 36

STATUTES

11 U.S.C. § 502(b)(2) 27

11 U.S.C. § 502(c)(1) 35

11 U.S.C. § 510(c) 23

11 U.S.C. § 552(b)(2) 23

11 U.S.C. § 704(a)(5) 34

11 U.S.C. § 762(a) 34

11 U.S.C. §§ 1107 34

11 U.S.C. § 1123(a)(7) 47

11 U.S.C. § 1141 27

28 U.S.C. § 636(b)(1)(A) 19

28 U.S.C. §§ 1961(a) 26, 28

Wash. Rev. Code § 23B.08.510 (2010) 37

RULES

Fed. R. Bankr. P. 7052 58

Fed. R. Bankr. P. 9017 54

Fed. R. Bankr. P. 9024 50

Fed. R. Bankr. P. 9033(b) 57

Fed. R. Civ. Pro. 23(e)(1)(C) 18

OTHER AUTHORITIES

4 Collier on Bankruptcy, ¶502.04[2] (16th ed. 2011) 35

6 Collier on Bankruptcy, ¶726.02[6] (16th ed. 2011) 23

7 Collier on Bankruptcy, ¶1123.01[6] (16th ed. 2011) 48

7 Collier on Bankruptcy, ¶1123.LH[6] (16th ed. 2011) 47

7 Collier on Bankruptcy, ¶1129.01 (16th ed. 2011) 27

10 Moore's Federal Practice,¶54.02[2] (3rd ed. 2011) 26

10 Collier on Bankruptcy, ¶9019.02 (16th ed. 2011) 53

10 Moore's Federal Practice, ¶54.02[2] (3d ed. 2011) 25

14 Moore's Federal Practice, ¶72.02[12] (3rd ed. 2011) 19

S. Rep. No. 95-989, 95th Cong., 2d Sess. 5, reprinted in Vol. D Collier on Bankruptcy App. Pt. 4(e)(i) (15th ed. 2011) 28

Patrick Darby, Southeast and New England Mean New York: The Rule of Explicitness and Post-Bankruptcy Interest on Senior Unsecured Indebtednes, 38 Cumb. L. Rev. 467 (2008) 34

The consortium of holders of interests subject to treatment under Class 19 of the Plan (the "TPS Consortium"),[1] by and through its undersigned counsel, respectfully submits this post-hearing summation brief, following this Court's seven-day trial (July 13-15, 18-21, 2011) on the modified sixth amended plan [Docket Nos. 6696, 6964 and 7038], Debtors' Conf. Exs. 255, 256 and 257 (collectively, the "Plan") (App. A)[2] filed by Chapter 11 debtors Washington Mutual Inc. ("WMI") and WMI Investment Corp ("WMI Investment" and, together with WMI, the "Debtors"). In continued opposition to the Plan and in further support of its previously-filed objections to the Plan [Docket Nos. 6020, 7480 and 8100], fully incorporated herein by reference, the TPS Consortium respectfully submits as follows:

PRELIMINARY STATEMENT

1. Now before this Court is a tangle of complicated legal and factual issues. The varied arguments and conflicting evidence are confusing and tend to obfuscate, and all are inappropriately shadowed by jingoist urgings that the settlement is "Too Big To Fail." While multiple days of the confirmation trial delved into factual issues that may create independent bases for confirmation denial (e.g., allegations of insider trading), that same conclusion is otherwise mandated by a straight-forward application of legal principles to the more commercial-oriented facts.

2. The thicket needs pruning, and pruning requires careful legal analysis without rhetorical distraction. Accordingly, in this Brief, the TPS Consortium explores applicable legal

---

1 As set forth in the *Verified Fourth Amended Statement of Brown Rudnick LLP and Campbell & Levine LLC Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure*, dated June 16, 2011 [Docket No. 7916] (App. B), the TPS Consortium is comprised of parties who have been classified for treatment under Class 19 of the Plan.

2 The accompanying Appendix (App. __) provides copies of, or excerpts from, cited record and other materials

principles, specifically identifies important portions of the evidentiary record, and explains why application of principle to commercial fact requires denial of confirmation. As explained herein, the Plan may not be confirmed for at least six reasons.

3. First, as a result of the pending appeal of the Court's ruling in Blackhorse Capital LP v. JPMorgan Chase Bank, N.A., Adv. No. 10-51387 (MFW), on appeal, Civ. Action No. 11-124-GWS, this Court lacks jurisdiction to confirm the Plan, given that the Plan incorporates numerous provisions obviously intended to moot issues now within the exclusive province of Chief District Court Judge Gregory M. Sleet. Unless the TPS Securities are placed into a disputed-claims escrow pending completion of the appellate process – the usual and customary mechanic for plans to comply with the Divestiture Rule – the Court simply lacks the jurisdictional power to issue the requested confirmation order.

4. Second, because this Plan is largely bankruptcy "wrapping" for a settlement of claims that must be litigated before an Article III District Court, this Court lacks Constitutional power to approve the Global Settlement with finality. Placing the Global Settlement Agreement before this Court for final approval is akin to placing a large class action settlement before a federal magistrate (another Article I judge), and asking the magistrate to enter the final "fairness" judgment pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and thereby impose the settlement on all disaffected members of the class. Federal magistrates are not empowered to issue such judgments; they may only render proposed findings of fact and conclusions of law. Similarly, pursuant to Stern v. Marshall, this Court may do no more than submit proposed findings of fact and conclusions of law to Chief Judge Sleet.

5. Third, the Plan over-compensates creditors. The law mandates post-petition interest for unsecured creditors in a solvent-debtor case, but payable at only the federal judgment

rate. Any discretion this Court may have in setting post-petition interest beyond the federal judgment rate arises only in connection with plans contemplating unsecured creditor "cram-down," and that is not the Plan presently before this Court. The federal judgment rate is determined as of entry of the confirmation order (i.e., the date of entry of the "judgment") and, since the Global Settlement results in distributable cash exceeding full claim satisfaction (including post-petition interest payable at the appropriate rate), creditors are unimpaired and holders of TPS Securities are entitled to excess cash, WMRRC value (whatever that may be), and proceeds from unsettled estate causes of action (whatever they prove to be), among other significant residual value.

6. Fourth, for another reason, the Plan over-compensates creditors, including especially the Settlement Noteholders. The Plan vests unsettled estate causes of action in a Liquidation Trust that will distribute litigation proceeds first to unpaid creditors and, thereafter, to holders of TPS Securities and preferred stock. But, the Plan "death-traps" any such right of recovery: any holder of TPS Securities or preferred stock that did not deliver a release as part of its Plan vote is denied any such distribution. Given that few holders of TPS Securities and preferred stock (other than the Settlement Noteholders) actually tendered this release, one-half of the litigation proceeds go (uncapped) to the Settlement Noteholders. The Debtors have utterly failed to prove the value of such estate causes of action and, in turn, have utterly failed to carry their burdens of proof and persuasion that this aspect of the Plan is consistent with Bankruptcy Code Sections 1129(a)(7) and 1129(b). Quite the contrary, the evidence strongly suggests that these causes of action are worth hundreds of millions, if not billions, of dollars (the Debtors were, after all, at the epicenter of the nation's macro-economic meltdown, and their role in that meltdown was facilitated by Wall Street and a number of other "aiders and abetters"). The Plan

therefore violates the "best interests" test and is not "fair and equitable" respecting holders of TPS Securities.

7. Fifth, the evidence supporting the Court's prior preliminary approval of the Global Settlement Agreement has changed. The Senate Report (giving strong challenge to any continued factual contention of pre-petition solvency) and the ANICO reversal (meaning that the estate business tort claims now may be litigated) both occurred after issuance of the Court's January 7, 2011 opinion denying confirmation (the "January 7th Opinion") [Docket No. 6528] (App. C). Estate avoidance and business tort claims against JPMorgan and the FDIC were among the most significant sources of potential estate recovery covered by the Global Settlement Agreement ($6+ billion); and, settlement of those claims historically had the wisp-thinnest of evidentiary support. That support has now evaporated completely, mandating a different conclusion. At the very least, it mandates an Order of the Court directing the Debtors to deliver to this Court a draft (on notice to all parties-in-interest) of proposed findings of fact and conclusions of law, identifying with particularity where, in the record, evidence exists for the Court to conclude that the Global Settlement Agreement is fair and appropriate in light of the fact-intensive nature of the avoidance actions and business tort claims.

8. Further to this point, the trial evidence – insufficient for anything more than suspicion in December 2010, but proven conclusively in July 2011 – clearly establishes that: (i) the "driver" of the settlement was allocation of tax refunds and the delivery of TPS Securities to JPMorgan, and did not involve any analysis whatsoever as to the value of the avoidance and business tort claims; (ii) the deal was struck at what the Settlement Noteholders thought was a pittance below full payment of the PIERs; and (iii) the Debtors (led by conflicted professionals) turned a blind-eye to – and never truly investigated – potential avoidance and business tort

claims to enable the deal to close, unfettered by what the true facts may be. The evidence now establishes the Debtors' "fairness" analysis was, in truth, a hand-over-equity on the balance-sheet: all above were to be paid; all beneath the hand were to receive nothing; underlying facts and legal sufficiency were (to the Debtors) analytically irrelevant.

9. Sixth, the Plan calls for "completion" of the Conditional Exchange of TPS Securities for WMI preferred stock that does not exist, in violation of Bankruptcy Code Section 365(c)(2), and continues the Debtors' past pattern of over-reaching releases.

10. To confirm the Plan, the Court must find for the Debtors on all six of these points. To do so would require the Court to dramatically bend long-established legal principles and/or establish entirely new ways of thinking about the law, and to ignore incontrovertible facts. This the Court should not do. But, if the Court is inclined to find for the Debtors on all six points, the TPS Consortium respectfully asks the Court to exercise its discretion under 28 U.S.C. § 158(d)(2), certifying issues for direct appeal to the Third Circuit Court of Appeals. In light of anticipated (never-ending) appeals, the TPS Consortium respectfully submits that Third Circuit certification is the surest means to near-term case conclusion.

ARGUMENT

I. This Court Lacks Authority To Confirm The Plan In Its Present Form, And No Evidence Or Argument Has Been Presented To Support Any Different Conclusion.

A. The Plan Violates The Divestiture Rule, And Nothing Has Been Presented To Support Any Different Conclusion.

1. Applicable Legal Principles.

10. The "Divestiture Rule" is really quite simple. During the pendency of a bankruptcy case, two parties litigate a matter before the Court. The Court renders a ruling and an appeal is taken. Jurisdiction over the matter on appeal is removed from this Court and vested

exclusively with the Article III District Court. The matter thereafter is "ring-fenced." This Court may do nothing to invade the District Court's exclusive jurisdiction over the matter. This Court may not enter any order on collateral issues that would disable the District Court from reversing and returning the parties to the status quo ante. The Debtors may not propose a plan, and this Court may not confirm a plan, that advertently or inadvertently moots the appeal by invading what is now the exclusive province of the District Court.

11. In Griggs v. Provident Consumer Disc. Co., 459 U.S. 56 (1982), the Supreme Court explained the Divesture Rule as follows: "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Id. at 58. The Third Circuit Court of Appeals emphasized that this Rule is to be rigidly observed by lower courts: "'Divest' means what it says – the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere." Venen v. Sweet, 758 F.2d 117, 120-21 (3d Cir. 1985). Courts throughout the United States have, time and again, consistently heeded this instruction in the bankruptcy context, and correctly honored the Divestiture Rule in situations similar to the one before the Court.

12. For example, in Whispering Pines Estates v. Flash Island, Inc. (In re Whispering Pines Estates), 369 B.R. 752 (B.A.P. 1st Cir. 2007), the Bankruptcy Court confirmed a plan proposed by the secured lender, over the debtor's objection. The debtor appealed the confirmation order. While that appeal was pending, the Bankruptcy Court entered an order granting the secured lender stay relief to foreclose on collateral. The debtor then appealed the stay relief order. In connection with the second appeal, the Bankruptcy Appellate Panel vacated the stay relief order, holding that it violated the Divestiture Rule:

> [W]e find the subject matter under the appeal of the Confirmation Order so closely related to the Stay Relief Motion that the entry of the Stay Relief Order impermissibly interfered with the Debtor's rights in its appeal. As such, we find that the bankruptcy court's decision contravenes the generally recognized rule of appellate jurisdiction and our previous decisions recognizing this rule.

Id. at 759.

13. In Bialac v. Harsh Inv. Corp. (In re Bialac), 694 F.2d 625 (9th Cir. 1982), the Bankruptcy Court granted the secured lender stay relief to foreclose on its collateral. The debtor appealed the stay relief order and, soon thereafter, filed a plan of reorganization with the Bankruptcy Court. At the appellate level, the debtor argued the stay relief order should be vacated so that its plan could go forward before the Bankruptcy Court. The Ninth Circuit Court of Appeals rejected the argument, finding no error in the stay relief order and, in turn, that the Divestiture Rule prohibited the Bankruptcy Court from entering any order advancing the debtor's plan: "The pending appeal divested the lower court of jurisdiction to proceed further in the matter. Even though a bankruptcy court has wide latitude to reconsider and vacate its own prior decisions, not even a bankruptcy court may vacate or modify an order while on appeal." Id. at 627 (citations omitted).

14. Almost directly on point is In re DeMarco, 258 B.R. 30 (Bankr. M.D. Fla. 2000). There, the IRS filed a large secured claim. The debtor filed a motion to determine the debtor was not liable on the claim, and a trial was conducted. The Bankruptcy Court ruled against the IRS, and the IRS appealed. While the appeal was pending before the District Court, the debtor filed a plan that afforded the IRS nothing on account of its asserted secured claim. The IRS objected to the plan, contending that it violated the Divestiture Rule. The Bankruptcy Court agreed, finding that the plan invaded the District Court's exclusive jurisdiction over the matter on appeal. The Bankruptcy Court deferred consideration of the plan pending conclusion of the appeal process.

15. The plan-related impact of the Divesture Rule was concisely stated in In re Strawberry Square Assocs., 152 B.R. 699, 702 (Bankr. E.D.N.Y. 1993), as follows: "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."

2. The Plan Unabashedly Flouts The Divestiture Rule.

16. This Plan is, quite obviously, constructed to disable Chief Judge Sleet from effectively reviewing on appeal this Court's decision in Black Horse Capital LP v. JPMorgan Chase Bank, N.A., Adv. No. 10-51387 (MFW), on appeal, Civ. Action No. 11-124-GWS. The following Plan provisions impermissibly encroach on Chief Judge Sleet's exclusive jurisdiction in violation of the Divestiture Rule:

- **Plan Section 2.1(c).** Provides that, as part of the Global Settlement,[3] the Debtors shall "sell, transfer, and assign" the TPS Securities to JPMorgan (App. A).

- **Global Settlement Agreement Section 2.3.** Provides that, on the Plan's Effective Date, the TPS Securities will be sold to JPMorgan pursuant to Bankruptcy Code Section 363. Thereafter, JPMorgan will be the exclusive owner of the TPS Securities. JPMorgan is also granted the ability to direct parties to reflect the transfer on all applicable registers, and otherwise document the title transfer. This section also contains a release, directed towards ending the appeal before Chief Judge Sleet: "And all claims against the Debtors, the WMI Entities, the Acquisition JPMC Entities and the FDIC Parties with respect to the Trust Preferred Securities shall be released and withdrawn, with prejudice, including any claims under section 365(o) of the Bankruptcy Code or any priority claim under section 507(a)(9) of the Bankruptcy Code." (App. I)

[3] Under Plan Section 2.1 prelude, the Global Settlement Agreement is incorporated into and made part of the Plan. In fact, where there is a conflict, the Settlement Agreement controls the Plan (App. A).

- **Global Settlement Agreement Section 3.2.** Provides as follows: "Any other Person that claims through [the Debtors' estates] . . . shall be deemed to have irrevocably and unconditionally. . . waived, released, acquitted and discharged" JPMorgan from any claims, "including . . . claims related in any way to the Trust Preferred Securities." (App. I)

- **Plan Section 23.2.** Extinguishes all Class 19 rights but, at the same time, provides that, as of the Plan Effective Date, "JPMC or its designee is the sole legal, equitable and beneficial owner of the Trust Preferred Securities for all purposes." (App. A)

- **Plan Section 38.1.** Provides for the following conditions precedent to confirmation: (1) approval of the Global Settlement Agreement (38.1(a)(5)); (2) authorization of the taking of all actions to effectuate the transfer of the TPS Securities under the Global Settlement Agreement (38.1(a)(8)); (3) approval of the transactions reflected in the Global Settlement Agreement (38.1(a)(9)); and (4) an order providing that, on the Effective Date, the TPS Securities shall be sold to JPMorgan free and clear of all rights, claims and interests (38.1(a)(10)). Most importantly: The confirmation order must protect JPMorgan as a "good faith" purchaser of the TPS Securities, pursuant to Bankruptcy Code Section 363(m), thereby immunizing JPMorgan from disgorgement if Chief Judge Sleet reverses on appeal (38.1(a)(10)) (App. A).

- **Plan Section 43.2.** 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 (App. A).

- **Plan Sections 43.6, 43.7, 43.9 and 43.12.** All further inhibit the TPS Consortium's arguments on appeal, and are directed towards preventing due recovery, if the appeal is successful (App. A).

3. The Court's Jurisdictional Boundaries Must Be Recognized, Even If It Frustrates The Debtors' Preferred Case Strategy.

17. The Debtors and JPMorgan argue that the TPS Consortium's reference to the Divesture Rule here is just a ruse to evade the impact of equitable mootness, and that this Court is free to simply ignore the Rule. They are wrong.[4]

18. First, the Divesture Rule is not a "ruse." It is a long-standing rule of law that rigidly circumscribes this Court's jurisdiction over matters on appeal before a superior court. It is clearly developed in binding precedent and must be followed, regardless of the impact to the Debtors' preferred case strategy.

19. Second, the Debtors and JPMorgan misstate the law, by conflating two distinct legal postulates. Equitable mootness, on the one hand, arises when a Bankruptcy Court wrongfully confirms a plan, but relief cannot be effectively granted thereafter. It has a retroactive vantage point: the appeal is meritorious but, regrettably, there is nothing the appellate court can do to rectify the situation given interceding developments. The Divestiture Rule, on the other hand, arises prior to that point in time, as parties are in the process of constructing a plan. It has a forward-looking vantage point, providing in effect as follows: (i) in the United States, "due process" rights are important and must be honored; (ii) Bankruptcy Courts are courts

---

[4] Earlier in this case, JPMorgan argued aggressively in favor of application of the Divestiture Rule in its own dispute with the Debtors. See Notice of Divestiture of Jurisdiction Pending Appeals, at 2-3, JPMorgan Chase Bank, N.A. v. Washington Mut., Inc., Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del., September 18, 2009) [Docket No. 146] (App. D) ("JPMC has not and need not seek a stay. The timely filing of a notice of appeal *automatically* divests the lower court of jurisdiction") (emphasis in the original). JPMorgan should be estopped from contending that this same rule is somehow inapplicable here. See Yoo Wong Park v. United States AG, 472 F.3d 66, 73 (3d Cir. 2006) (quoting In re Chambers Dev. Co., Inc., 148 F.3d 214, 229 (3d Cir. 1998)) ("Judicial estoppel is 'a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding.'").

of limited jurisdiction, and their jurisdictional bounds must be honored; (iii) as parties go about constructing a plan, the plan they construct must abide by these legal principles; and (iv) if the parties fail to abide by these legal principles, the Bankruptcy Court will lack the jurisdiction necessary to confirm the plan they propose.

20. Third, equitable mootness is not some beloved, enshrined doctrine to be sheltered. It is in fact disfavored, even despised by appellate tribunals. See Nordhoff Invs., Inc. v. Zenith Elecs. Corp. (In re Zenith), 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring) ("I continue to disagree with the expansive version of the equitable mootness doctrine that . . . can easily be used as a weapon to prevent any appellate review of court orders confirming reorganization plans."); In re Pac. Lumber Co., 584 F.3d 229, 244 n.19 (5th Cir. 2009) (discussing the negative impact equitable mootness can have on markets and the unwillingness of lenders to work with debtors when appellate review can be thwarted by equitable mootness). The equitable mootness doctrine, where applicable, forces appellate courts to begrudgingly acknowledge an injustice has occurred. The Debtors and JPMorgan are simply wrong to ask this Court to coddle an evasive form of justice.[5]

21. The position espoused by the Debtors and JPMorgan is not aided one whit by cries of "Settlement!" and dire predictions that the deal is "Too Big To Fail!" Regardless of the accuracy/likely-inaccuracy of such predictions, this Court has no choice but to scrupulously honor its jurisdictional boundaries. As the Supreme Court specifically admonished in Stern v.

[5] The doctrine of equitable mootness may be inapplicable in any event, being that this is a bankruptcy liquidation. See, e.g., In re Christian Anthanassious, Nos. 09-4594 & 10-2285, slip op. at 6 n.3 (3d Cir. Feb. 7, 2011) (App. E) (questioning whether the doctrine of equitable mootness has any application to an appeal in the context of a chapter 7 liquidation); Schroeder v. New Century Liquidating Trust (In re New Century), 407 B.R. 576, 588 n.27 (D. Del. 2009) (questioning whether the doctrine of equitable mootness applies respecting a Chapter 11 plan of liquidation).

Marshall: "It goes without saying that the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it." 131 S. Ct. 2594, 2619 (2011). Indeed, the Third Circuit Court of Appeals specifically instructed that jurisdictional bars must never bend for case advancement: "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." Venen, 758 F.2d at 123.

4. The TPS Securities Must Be Fully Escrowed In A Disputed Claims Reserve Pending The Ultimate Outcome Of The Appellate Process.

22. To be sure, Chapter 11 does not compel pre-confirmation resolution of all disputed entitlements to estate value. It is, in fact, a usual plan mechanic to continue claims-reconciliation post-consummation. Plans commonly provide that holders of disputed claims will be afforded their fair day in court, with all attendant due process rights preserved. Distributions (based on the amount claimed by the creditor) are held in escrow, pending final adjudication of the claim. If the claimant is proven correct, it will receive its due plan entitlement from the escrow. If the claimant is proven incorrect, amounts escrowed will be released to other claimants in the same class or in lower classes. This common plan mechanic comports perfectly with the Divesture Rule, since it "ring-fences" the value and, thus, enables (rather than obstructs) the appellate process. See, e.g., Premier Entm't Biloxi LLC v. Pacific Mgmt. Co., LLC (In re Premier Entm't Biloxi LLC), No. 08-60349, 2009 WL 1616681 (5th Cir. June 9, 2009) (finding the debtors' plan properly deposited disputed funds into an escrow account, with a determination of which party was entitled to those proceeds to be made through post-confirmation litigation); see also January 7th Opinion, at 50-51 (App. C) (noting the need for a sufficient plan escrow to

protect the interests of holders of litigation tracking warrants should they be classified as unsecured claims rather than common equity).

23. Proper recognition and application of the Divesture Rule compels inclusion of the same mechanic in this Plan: The TPS Securities must be placed in a "ring-fenced" escrow pending final resolution of the appellate process. If this Court's decision regarding current ownership of the TPS Securities is reversed, the TPS Securities demanded by the members of the TPS Consortium must be released to them. If the Court's decision regarding ownership is affirmed after full exhaustion of appellate rights, the TPS Securities then may be released to JPMorgan. Absent such escrowing, the Plan invades the District Court's exclusive jurisdiction in violation of the Divestiture Rule, and cannot be confirmed. No argument advanced, and no evidence admitted at trial, supports any other conclusion.

B. The Plan Amounts To Little More Than Bankruptcy "Wrapping" For A Settlement Of Complex Non-Core Litigation That Is Beyond This Court's Constitutional Power To Resolve With Finality, And Nothing Has Been Presented To Support Any Different Conclusion.

1. The Court Lacks Constitutional Power To Adjudicate The Estate Claims Against JPMorgan And The FDIC.

24. In Stern v. Marshall, a majority of the Supreme Court charted the boundary between Congress's Article I power "to establish uniform laws on the subject of bankruptcies" and the "judicial power" vested exclusively in Article III Courts. Three points of law, clearly established in the Stern opinion, are particularly relevant here.

25. First, Acts of Congress do not control the question. So, even if 28 U.S.C. § 157, the Bankruptcy Code, or the Bankruptcy Rules facially provide this Court authority to render a particular order or judgment, that does not mean such order or judgment is Constitutionally valid

and enforceable. On this point, Stern simply reiterates the teachings of Granfinanciera v. Nordberg, 492 U.S. 33, 50 (1989). See Stern, 131 S. Ct. at 2614.

26. Second, if the Court is presented with an issue for resolution that has the look, feel, taste, and smell of a true cause of action – i.e., is the "Stuff of the Courts of Westminster" – then that issue is not for this Court to decide. It must be passed to the District Court for final resolution. See id. at 2609. That is true if the lawsuit arises under non-bankruptcy law (like the estate's tort claim in Stern) or under the Bankruptcy Code (like the estate's fraudulent conveyance claim in Granfinanciera). See id. at 2609-10. That is also true if the parties consent to trial by this Court, since private litigants cannot confer on a tribunal Constitutional power that does not otherwise exist. See Capon v. Van Noorden, 6 U.S. 126 (1804); Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 293-94 (3d Cir. 1998). Any final judgment by this Court in violation of the foregoing would be subject to subsequent collateral attack. See Stern, 131 S. Ct. at 2594; Louisville & Nashville R.R. v. Motley, 211 U.S. 149 (1908).[6]

---

[6] Although not issue dispositive, it bears noting that neither JPMorgan nor the FDIC have consented to this Court's jurisdiction to adjudicate estate claims asserted or assertable against them. See Notice of Divestiture of Jurisdiction Pending Appeals at 2-3, JPMorgan Chase Bank, N.A. v. Washington Mut., Inc., Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del. March 24, 2009) [Docket No. 146] (App. D) ("JPMC has not and need not seek a stay. The timely filing of a notice of appeal *automatically* divests the lower court of jurisdiction") (emphasis in the original); Motion to Dismiss in Part Pursuant to Federal Rules 12(b)(1) and 12(b)(6) at 3, Washington Mut., Inc. v. FDIC, Adv. Proc. No. 09-00533 (RMC) (D.D.C. Oct. 13, 2009) [Docket No. 25] (App. F) (seeking dismissal of four of the five counts alleged against the FDIC on the theory that "federal law expressly deprives courts of subject matter jurisdiction to even consider some of those claims"). They have consented only to this Court's jurisdiction to adjudicate the settlement. If the settlement is not approved, those parties presumably will return to other courts for further proceedings; see also Supplemental Memorandum of Law in Support of Motion to Dismiss of JPMorgan Chase Bank, N.A., Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A., No. 10-03266 (JMP) (Bankr. S.D.N.Y. Aug. 5, 2011) [Docket No. 90] (App. G) (advancing arguments under Stern that are indistinguishable from those advanced by the TPS Consortium in this case).

27. Third, the Court's jurisdiction does not expand if the litigation target files a proof of claim. In that situation, the Court may adjudicate the estate lawsuit as part of the trial over the disputed proof of claim, but only if: (a) the off-set provisions of Bankruptcy Code Section 502(d) apply (not applicable here); or (b) the trial concerning the estate claim is completely entwined with the trial concerning the disputed proof of claim. Stern, 131 S. Ct. at 2611, 2616. Stern instructs that estate counter-claims are entwined with the underlying claim dispute when the elements of the trial (on both sides) perfectly overlap; in other words, where the estate lawsuit does not raise any elements in addition to those at issue respecting the disputed proof of claim. Id. at 2617-18. Thus, if the debtor has a tort claim against a creditor and creditor has a contract claim against the debtor, the litigation is not entwined. In that situation, the Court may try the dispute over the proof of claim, but the estate lawsuit must be passed to the District Court for separate adjudication.[7]

28. Following these principles of law, it seems incontrovertible that this Court lacks jurisdiction to resolve the estate claims against JPMorgan and the FDIC. Estate litigation already commenced asserts true causes of action; it is the "Stuff of the Courts of Westminster." Much of this litigation arises under non-bankruptcy law, including causes of action asserted under Washington state corporation law, general state tort law, federal intellectual property law, state fraudulent conveyance law, and the Federal Tort Claims Act. See Second Supplemental Objection of the Consortium of Trust Preferred Security Holders to Confirmation [Docket No.

---

[7] For this reason, and in deference to judicial economy, SDNY Bankruptcy Judge Gerber recently deferred litigation over a proof of claim, so that it might be joined with the estate litigation that must be litigated elsewhere. See In re BearingPoint, No. 09-10691, 2011 WL 2709295, at *1 (Bankr. S.D.N.Y. July 11, 2011) ("[T]here are no benefits in hearing the action here. To the contrary, requiring the Trustee to endure the procedural hurdles in starting (but evidently, not finishing) the litigation in the bankruptcy court . . . can hardly be said to be in the interests of justice.") (App. J).

8100], Ex. C (App. H). Moreover, these claims do not perfectly over-lap (and, thus, are not entwined with) the disputed proofs of claim asserted by JPMorgan and the FDIC. Those proofs of claim arise under other law, and involve elements distinct from those at issue in the estate claims. See Global Settlement Agreement (Second Amended and Restated Agreement, dated as of February 7, 2011) at 3, Debtor's Conf. Ex. 255H (App. I).

29. As a result, this Court may not render final findings of fact or conclusions of law bearing on those lawsuits.[8] Any such findings or conclusions would be, according to Stern, subject to subsequent collateral attack. See Stern, 131 S. Ct. at 2594.

2. The Court Also Lacks Constitutional Power To Grant Final Approval Of The Global Settlement, Which Resolves Non-Core Estate Claims Against JPMorgan And The FDIC.

30. The next level of legal analysis asks: if this Court cannot try estate causes of action against JPMorgan and the FDIC, may the Court still adjudicate a hotly-contested settlement of those very same non-core claims? It is true that Bankruptcy Code Section 1123(b)(3)(A) and Bankruptcy Rule 9019 may be read to mean that Congress has granted Bankruptcy Courts general authority to adjudicate contested settlements of estate

[8] This Court's decision in Miller v. Greenwich Capital Fin. Prods. (In re Am. Bus. Fin. Servs., Inc.), Nos. 05-10203, 06-50826, 2011 WL 3240596 (Bankr. D. Del July 28, 2011) is not to the contrary. In American Business, the Court concluded the Stern decision did not foreclose the Court's final adjudication of the claims at issue. See id at *2. But, the estate claims in American Business all related to post-petition acts, arose as part of the administration of the bankruptcy case, and/or related to actions taken in connection with the Court's approval of use of cash collateral. See id. at *1. Such issues, having a direct nexus to the Court's Constitutionally-permitted oversight of bankruptcy proceedings, are distinguishable from the claims and causes of action here, arising under numerous non-bankruptcy legal regimes, that would be finally resolved through the Court's approval of the Global Settlement Agreement.

claims.[9] But, again, statutes and rules of procedure may not authorize the Court to do what, according to Stern, is reserved exclusively for Article III District Courts. Any such grant of authority would be an unconstitutional encroachment on the judicial power. See Stern, 131 S. Ct. at 2614.[10]

31. In circumstances like these, Stern poses the analytical inquiry in the following way. Is the issue before the bench: (a) a court-like adjudicatory function, falling within what is traditionally thought of as the "stuff" of Article III District Courts; or (b) an administrative function, falling within what is traditionally thought of as the "stuff" of bankruptcy-administration? See id. at 2609-10, 2615. According to the Supreme Court, the issue is the "stuff" of bankruptcy-administration if: (x) it is within that "particularized area of law" generally

---

9 It is, however, worth noting that neither Bankruptcy Code Section 1123(b)(3)(A) nor Bankruptcy Rule 9019 specifies what particular type of estate claim may be settled and, so, a determination by this Court that it lacks jurisdiction to render the type of settlement approval requested here does not require a ruling that these provisions are facially unconstitutional. Rather, such a determination would simply recognize the bounds of the Constitutionally-appropriate application of Bankruptcy Code Section 1123(b)(3)(A) and Rule 9019, a result itself consistent with the teachings of Stern. See Stern, 131 S. Ct. at 2605 (where possible, federal statutes are to be construed so as to avoid doubts as to their Constitutionality).

10 In a recent decision, the Bankruptcy Court for the Southern District of Texas held that, since Rule 9019 gives bankruptcy courts the discretion to approve compromises and since that Rule had been interpreted by federal courts, Bankruptcy Courts retained the power to enter final orders approving settlements notwithstanding the Stern decision. See In re Okwanna, No. 10-31663, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011), at *4. Assuming jurisdiction based on a procedural rule would appear to fly in the face of Stern's admonition that it is the Constitution, rather than any statute, that determines whether a Bankruptcy Court has the power to act (particularly given the Stern court's holding notwithstanding the existence of 28 U.S.C. § 157(b)(2)(C) and the numerous judicial interpretations thereof). Further, the Court should decline to follow Okwanna given the decision was in the context of a dispute totaling $20,000 (versus the billions of dollars at issue in this case), no party in that case had opposed the Bankruptcy Court's exercise of jurisdiction (or had briefed the issue), the holding was arguably dicta given the Court's alternative basis for exercising jurisdiction, and the decision is not controlling on this Court.

considered bankruptcy; (y) it involves issues that Bankruptcy Courts are widely seen as "experts" at resolving; and (z) the Bankruptcy Court is "particularly suited to examine and determine" the issue. Id. at 2615.

32. To be sure, the trial over the Global Settlement Agreement bears all of the hallmarks of a court-like adjudicatory function, falling within what is traditionally thought of as the "stuff" of Article III District Courts. The evidentiary record of the December 2010 trial and the July 2011 trial is massive; the volume of the rhetoric is deafening; the arguments and allegations (on both sides of the aisle) are complex and aggressive, focusing on whether third-parties bear judgment liability; the amounts at stake are staggering; and most importantly, the January 7th Opinion dedicated more than 65-pages to an evaluation of the underlying merits of non-core estate causes of action. See January 7th Opinion (App. C). This is not some "rubber-stamp" resolution at the universal behest of all parties-in-interest. This matter prompted a large trial over whether the settlement is fair to – and, therefore, may be forcibly imposed upon – thousands of disaffected parties-in-interest. The Court's final order is fully intended by the parties supporting confirmation to have res judicata and collateral estoppel effect. It is fully intended to become binding on parties (such as the TPS Consortium) that vigorously oppose the settlement terms. It is fully intended to have the force of judgment by a Court of Law, as if rendered by historic "Courts of Westminster."

33. This contested matter is, in fact, much like a "fairness" hearing over whether a class action settlement should be made binding on all members of the class, not only the lead plaintiff. See Fed. R. Civ. Pro. 23(e)(1)(C). Pursuant to Rule 23(e)(1), notice of the hearing must be distributed to all class members, and they all must be given a full opportunity to voice their objections before the settlement is forcibly made binding on them. Under the law, a

magistrate judge (another Article I judge) cannot render the "fairness" ruling. The magistrate judge only may deliver to the District Court proposed findings of fact and conclusions of law. See 28 U.S.C. § 636(b)(1)(A); Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611, 619-20 (D.D.C. 1987); see also 14 Moore's Federal Practice ¶ 72.02[12] (3d ed. 2011). A final "fairness" determination is the "stuff" of court adjudication; it is the "stuff" reserved exclusively for Article III District Courts. Such a division of labor between an Article I Court and the Article III Court is no less principled (and mandated) here.

34. The Debtors and JPMorgan contend the trial over the Global Settlement Agreement instead bears the hallmarks of traditional bankruptcy-administration. That is not credible. The hotly-contested resolution of complex causes of action involving, among other non-core law, Washington State corporation law, general state business tort law, federal intellectual property law, the Federal Tort Claims Act, and FIRREA simply does not fall within the "particularized area of law" generally thought of as bankruptcy. Respectfully, this Court is not an "expert" on these matters. Stated differently, this Court is not as "particularly suited to examine and determine" a settlement of these claims as it is more traditional bankruptcy matters, such as (a) contested cash collateral usage, (b) DIP and exit financing, (c) lease assumption and rejection, and (d) enterprise valuation. This latter grouping is the real "stuff" of bankruptcy.

35. The trial over the Global Settlement Agreement is outside the ambit of bankruptcy administration; it is outside the ambit of the Court's Constitutional power. The trial record – as a whole – confirms this conclusively. This Court may do no more than issue proposed findings of fact and conclusions of law for review and final consideration by Chief Judge Sleet.

3. **Such Ruling Recognizes The True Nature Of This Chapter 11 Case (A Liquidation) And The True Nature Of This Plan (Bankruptcy "Wrapping" For A Settlement Of Claims That Must Be Adjudicated By The District Court).**

36. The Debtors and JPMorgan contend that recognizing the import of Stern v. Marshall in this manner would ring the death knell of Chapter 11 as we know it today. That is a vast overstatement. Regardless of the Court's ruling in this particular case, American companies will continue to face financial troubles for myriad reasons; American companies will therefore continue to seek Chapter 11 relief in Delaware. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), will continue to be the law of the land and, as a result, Chapter 11 debtors will still require DIP and exit financing. Businesses will need to be reorganized or liquidated; contracts will need to be assumed or rejected; claims will need to be allowed or disallowed; businesses will need to be sold pursuant to Bankruptcy Code Section 363; plans of reorganization will need to be confirmed; and enterprises will need to be valued.

37. This case is far removed from the "typical" Chapter 11 case. The Debtors do not have a business. They do not have any future prospects. They are a liquidating shell with no operational assets.[11] The estates' asset-base is predominantly rights of recovery from the government and third-parties, under various theories of non-bankruptcy law. The case probably

[11] See Transcript of July 13, 2011 Hearing (Testimony of Steven Zelin), at 330:3-330:8 (App. K) ("The value that's intrinsic in this business is the existing runoff. It has no management team, it has no sales force, no ability today, nor did it have one while it was a captive pre-bankruptcy to go generate its own asset value. I'm sorry, to go generate new reinsurance contracts"); Transcript of July 14, 2011 Hearing, at 172:3-173:3 (App. K) (acknowledging that WMRRC: (i) has no employees; (ii) has only two people managing the day-to-day operations of the company; (iii) has no financing imposed on WMMRC; (iv) has no business plan; and (v) has no plans to write new insurance policies); Transcript of December 2, 2010 Hearing (Testimony of William Kosturos), at 138:17-23 (App. L) (acknowledging "the current analysis of the value of WMMRC assumes that there will be no new business").

should have been converted to Chapter 7 a long time ago. The Plan is largely bankruptcy "wrapping" for a settlement of estate causes of action that must be litigated before the District Court. The Court lacks Constitutional power to render a final ruling on the Plan because the Plan, at its core, is not the "stuff" of bankruptcy. It is the "stuff" of federal District Court litigation. Final decision on the Global Settlement should be reserved for Chief Judge Sleet, and nothing in the record speaks differently.[12]

II. The Plan Over-Compensates Creditors, And No Evidence Or Argument Has Been Presented To Support Any Different Conclusion.

A. As A Matter Of Law, Unsecured Creditors Are Not Entitled To Post-Petition Interest Beyond The Federal Judgment Rate, Determined As Of Entry Of The Confirmation Order, Regardless Of Creditor Activity Or Good Faith.

38. As previously briefed for the Court, the "best interests" test of Bankruptcy Code Section 1129(a)(7) invokes Bankruptcy Code Section 726(a)(5). Those two Bankruptcy Code provisions operate to entitle unsecured creditors to post-petition interest at "the legal rate" before stockholders may receive dividends from the estate. This begs two questions. First, is "the legal rate" the contract rate, the federal judgment rate, or some other discretionary rate in between? Second, if "the legal rate" is the federal judgment rate, is the reference date for determining the applicable rate of interest the petition date, the confirmation date, or the plan effective date? These two questions are addressed in turn below.

[12] Such a ruling also promotes judicial efficiency given that, in light of the Divestiture Rule, the TPS Securities must be escrowed through the appeal process. If the Court delivers proposed findings of fact and conclusions of law for Chief Judge Sleet's final consideration, he then will be procedurally positioned to simultaneously consider the TPS Consortium appeal and the Global Settlement.

1. In A Solvent-Debtor Case, Unsecured Creditors Are Entitled Only To Post-Petition Interest At The Federal Judgment Rate.

39. The case law is clear: "the legal rate" for determining post-petition interest on unsecured claims is the federal judgment rate, as set forth in 28 U.S.C. § 1961(a). This conclusion has a firm analytical foundation: (i) the phrase "the legal rate" has large precedential meaning outside the bankruptcy context referring to the federal judgment rate; (ii) such interpretation furthers uniformity within federal law and uniform treatment of all unsecured creditors; (iii) the Bankruptcy Code's legislative history strongly suggests Congress intended "the legal rate" to mean the federal judgment rate; (iv) the language of the Bankruptcy Code itself strongly suggests federal judgment rate, since Bankruptcy Code Section 726(a)(5) refers to "the legal rate" while Bankruptcy Code Section 506(b) refers explicitly to the rate provided "under the agreement . . . under which such claim arose"; and (v) Bankruptcy Code Section 726(a)(5) imposes one particular rate – "the" legal rate – not "a" rate. See, e.g., Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231 (9th Cir. 2002); In re Country Manor of Kenton, Inc., 254 B.R. 179 (Bankr. N.D. Ohio 2000); In re Dow Corning Corp., 237 B.R. 380 (Bankr. E.D. Mich. 1999) ("Dow I"); In re Melenyzer, 143 B.R. 829 (Bankr. W.D. Tex. 1992).

40. The federal judgment rate is the rate that should apply here, as a matter of law.

2. Judicial Discretion To Determine The Rate Of Post-Petition Interest Arises Only In Connection With Unsecured Creditor "Cram-Down;" It Does Not Arise In The Circumstances Now Before The Court, Especially Where There Is Sufficient Estate Cash To Satisfy All Creditor Claims.

41. In the January 7th Opinion, the Court stated: "The Court has considered this issue before and concluded that the federal judgment rate [is] the minimum that must be paid to unsecured creditors in a solvent debtor case under a plan to meet the best interests of creditors

test, but that the court [has] discretion to alter it." January 7th Opinion, at 93 (App. C). For the reasons that follow, no such discretion should be exercised in this particular case.

42. As an initial matter, the words "the legal rate" do not reflect a general grant of equitable discretion. Congress afforded Bankruptcy Courts discretion in certain specific provisions of the Bankruptcy Code. See, e.g., 11 U.S.C. § 510(c) ("under principles of equitable subordination . . ."); 11 U.S.C. § 552(b)(2) (". . . except to the extent that the court . . . based on the equities of the case, orders otherwise."). But, not here, not respecting Bankruptcy Code Section 726(a)(5). Here, Congress did not indicate, by the words it chose, any equitable discretion respecting the rate of post-petition interest required under Bankruptcy Code Section 726(a)(5). Instead, Congress directed Bankruptcy Courts to rigidly order the payment of interest at "the" rate – a rate that is the "legal" rate – as might an historic Court of Law (not a Court of Equity).

43. Consistent with that reading, the bulk of legal authority holds that Bankruptcy Courts are not empowered to set the rate of post-petition interest based on case circumstance. See, e.g., Cardelucci, 285 F.3d at 1236 (9th Cir. 2002) ("'[I]nterest at the legal rate' is a statutory term with a definitive meaning that cannot shift depending on the interests invoked by the specific factual circumstances before the court."); In re Garriock, 373 B.R. 814, 817 (E.D. Va. 2007) ("Nor, given the statutory interpretation analysis set forth above, is the Court free to interpret '"the legal rate'" in different ways depending on the specific factual circumstances before the Court.") (citation omitted); Dow I, 237 B.R. at 409 ("Therefore, this Court is duty-bound, equitable concerns notwithstanding, to apply 'interest at the legal rate' in accordance with its most plausible meaning – the rate of interest fixed by 28 U.S.C. § 1961(a)."); see also 6

Collier on Bankruptcy ¶ 726.02[6] (16th ed. 2011) ("The reference in the statute to the 'legal rate' suggests that Congress envisioned a single rate.").

44. A careful review of the case law indicates that judicial discretion to set the rate of post-petition interest arises, in a solvent-debtor case, only in connection with plans requiring unsecured creditor "cram down" under Bankruptcy Code Section 1129(b). See, e.g., In re Coram Healthcare Corp., 315 B.R. 321, 346 (Bankr. D. Del. 2001) ("[W]e conclude that the specific facts of each case will determine what rate of interest is 'fair and equitable'" under Bankruptcy Code Section 1129(b)); In re Dow Corning Corp., 244 B.R. 678 (Bankr. E.D. Mich. 1999) ("Dow II"). But, that is not the nature of the Plan now before this Court. This contested matter focuses only on whether the Plan passes the "best interests" test of Bankruptcy Code Section 1129(a)(7), not what is "fair and equitable" treatment to enable creditor cram down under Bankruptcy Code Section 1129(b). The analysis under each of those two Bankruptcy Code provisions is different. See Dow II, 244 B.R. at 687 ("Thus there is no contradiction between the holding in our previous decision [federal judgment rate for "best interests" test analysis] and the contention that § 1129(b) may mandate recognition of contractual interest rates.").

45. Indeed, as discussed further below, the trial evidence clearly establishes there is more than sufficient estate cash to fully satisfy all creditor claims, plus post-petition interest at the federal judgment rate. All creditor claims are, therefore, unimpaired and not entitled to vote; unsecured creditor "cram down" is not an issue under the circumstances of this case. See In re PPI Enterprises (U.S.), Inc., 324 F.3d 197, 207 (3d Cir. 2003). The Court's analysis, thus, need

not delve any further than determining required interest at "the legal rate" for the purposes of Bankruptcy Code Section 1129(a)(7).[13] That is the federal judgment rate, pure and simple.

46. Other cases cited in the January 7th Opinion in connection with judicial discretion to set the interest rate are readily distinguishable from the present case circumstance, and are therefore analytically inapposite. See Southland Corp. v. Toronto-Dominion (In re Southland Corp.), 160 F.3d 1054 (5th Cir. 1998) (determining level of interest pursuant to Bankruptcy Code Section 506(b) for an over-secured creditor); In re Chicago, Milwaukee, St. Paul and Pac. R.R. Co., 791 F.2d 524 (7th Cir. 1986) (determining level of interest for 100-year railroad debt under the prior Bankruptcy Act, which did not have provisions comparable to those in the Bankruptcy Code at issue here).

47. Only one decision cited by the Debtors, issued by a Texas bankruptcy court more than 18 years ago, concluded that "the legal rate" of post-petition interest is whatever the bankruptcy judge thinks appropriate under the case circumstances. See In re Schoeneberg, 156 B.R. 963 (Bankr. W.D. Tex. 1993). Importantly, Schoeneberg dealt with post-petition interest payable to a single creditor and, therefore, did not implicate considerations of equality of treatment across a class of unsecured creditors. It also is a decision today held in wide disrepute. See, e.g., In re New Valley Corp., 168 B.R. 73, 80 (Bankr. D.N.J. 1994) (rejecting Schoeneberg because that court did not have "the opportunity to consider the statutory construction argument

---

[13] With this determination, the Court may avoid ruling on other thorny evidentiary issues presented at trial, such as the value of the WMRRC net operating loss carry-forward and the value of the estate causes of action to be vested the Liquidation Trust. That is because all such value, whatever it may be, simply "flows down" the capital structure to holders of TPS Securities and equity. This presents something of a Solomonic solution, if this Court determines to overrule the TPS Consortium's continued objection regarding the Global Settlement Agreement.

presented to this court"). The Court should likewise decline to follow such an untenable reading of Bankruptcy Code Section 726(a)(5).

48. The federal judgment rate applies in this case. That is the result regardless of whether the evidence does or does not support a finding that the Settlement Noteholders traded on inside information. That is the rate mandated by law.

3. The Date Of "Judgment" For Determining The Federal Judgment Rate Of Interest Is The Confirmation Date.

49. As indicated above, the vast bulk of legal authority instructs that post-petition interest shall be calculated in accordance with Section 1961(a) of Title 28 of the United State Code. That statute provides, in pertinent part, as follows (emphases added):

> Interest shall be allowed on any money judgment in a civil case recovered in a district court…. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

Thus, the interest reference date for determining the federal judgment rate is the date of entry of the "judgment."

50. Again, this begs the following question: What event occurring in the bankruptcy is most like the "judgment" date for purposes of Section 1961(a)? One thing seems certain: It is not the date the Debtors filed their voluntary bankruptcy petitions. Under Bankruptcy Code Section 301(b), the Debtors' voluntary bankruptcy filing generated an automatic "order for relief" not subject to appeal. See, e.g., Sw. Equip. Rental v. Fundsnet, Inc. (In re Sw. Equip. Rental), 152 B.R. 207, 210 (Bankr. E.D. Tenn. 1992). But, an order is properly categorized as a "judgment" only if it is "a final judicial decision subject to appeal." United States v. Hark, 320 U.S. 531, 534 (1944); see also 10 Moore's Federal Practice ¶ 54.02[2] (3d ed. 2011) ("If the order is appealable, the order is a 'judgment.'"). Analogizing a Chapter 11 case to federal civil

court litigation, the petition date is much more akin to the date the complaint is filed (initiating suit) than the date the judgment is entered.[14]

51. The plan effective date also does not analogize well to the date of judgment. No judicial action occurs on the plan effective date; rather, that is the date of transaction "closing" following entry of the confirmation order directing distribution of estate value. The effective date seems more akin to the date that a judgment is paid, and thus ends the lawsuit.

52. Rather, it is entry of the confirmation order that is most analogous to the date of federal court judgment. See Silverman v. Tracar, S.A. (In re Am. Preferred Prescription, Inc.), 255 F.3d 87, 92 (2d Cir. 2001) ("The confirmation of a plan in a Chapter 11 proceeding is an event comparable to the entry of a final judgment in an ordinary civil litigation."). The confirmation order is, after all, the order establishing the means for case resolution. See 11 U.S.C. § 1141; see also 7 Collier on Bankruptcy ¶ 1129.01 (16th ed. 2011) ("Confirmation of a plan of reorganization is the statutory goal of every chapter 11 case."). The confirmation order has res judicata and collateral estoppel effect, Johnson v. Stemple (In re Stemple), 361 B.R. 778, 796 (E.D. Va. 2007), just like a judgment in federal civil litigation, Amcast Indus. Corp. v.

---

[14] Also militating against use of the petition date is the fact that, as of the petition date, there is no entitlement to payment of post-petition interest. See 11 U.S.C. § 502(b)(2). Rather, the entitlement (if any) to post-petition interest arises only when distributions become payable from a solvent estate: in Chapter 7, on the date a dividend is declared and paid pursuant to Bankruptcy Rule 3009; and, in a Chapter 11 case, on the date the plan providing for such payments is confirmed. To engage in the fiction that the petition date is the date of "judgment" for purposes of Section 1961(a) would be to ignore, among other things: (a) the inability (in the vast majority of cases) to determine solvency on the petition date; and (b) the reality that enterprise value may fluctuate and administrative expense claims may accrue over the course of a case, meaning a debtor solvent on the petition date might become insolvent by the time estate distributions are payable (and, in the case of fluctuating enterprise valuation, vice versa). As such, use of the petition date as the "judgment date" for purposes of Section 1961(a) would be to adopt the untenable proposition of a "judgment" that, depending on subsequent case events, might or might not have any ultimate vitality.

Detrex Corp., 45 F.3d 155, 158 (7th Cir. 1995). After confirmation, the Bankruptcy Court's subject matter jurisdiction narrows considerably. See LaRoche Indus., Inc. v. Orica Nitrogen LLC (In re LaRoche Indus., Inc.), 312 B.R. 249, 257 (Bankr. D. Del. 2004) (Walrath, J.). And, of course, the confirmation order is appealable. See, e.g., In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004) (vacating confirmation order).

53. Beyond just simple logic, this conclusion also comports with numerous cases holding that, if a Chapter 11 case is converted midstream to a proceeding under Chapter 7, the date of "judgment" for determining the date post-petition interest begins accruing under Bankruptcy Code Section 726(a)(5) is – not the petition date – but the date of the order converting the case. See, e.g., Varsity Carpet Servs. v. Richardson (In re Colorex Indus., Inc.), 19 F.3d 1371, 1384 (11th Cir. 1994) ("[U]pon conversion to Chapter 7, the interest accruing thereafter enjoys only the fifth priority pursuant to § 726(a)(5)."); Rupp v. United States (In re Rocky Mountain Refractories), 208 B.R. 709, 713 (B.A.P. 10th Cir. 1997) ("Section 726(a)(5) applies to post-Chapter 7 interest."); In re Olympia Holding Corp., 250 B.R. 136, 144 (Bankr. M.D. Fla. 2000) ("The interest accruing . . . from the date of conversion of the case until the date of payment is entitled to payment pursuant to § 726(a)(5).").

54. This conclusion is not altered one iota by the language of Bankruptcy Code Section 726(a)(5), affording "payment of interest at the legal rate from the date of the filing of the petition." Congress's use of the word "from" indicates that the prepositional phrase ("*from* the date of the filing of the petition") relates only to the time period interest is due; i.e., the phrase simply means that the creditor is entitled to interest for the post-petition time period. See S. Rep. No. 95-989, 95th Cong., 2d Sess. 5, reprinted in Vol. D Collier on Bankruptcy App. Pt. 4(e)(i) (15th ed. 2011) (Bankruptcy Code Section 726(a)(5) "provides that postpetition interest

on prepetition claims is . . . to be paid to the creditor."). It says nothing about how that interest rate is to be calculated, mechanically.

55. And, the "from" prepositional phrase most certainly does not direct a determination that post-petition interest shall be calculated using the federal judgment rate in existence "as of" the petition date. See Kaiser Aluminum & Chem. Corp. v. Bonjomo, 494 U.S. 827, 838 (1990) (finding the language of 28 U.S.C. § 1961(a) – that interest "shall be calculated *from the date of the entry of the judgment*" – implies "the calculation of interest is inextricably tied to the date of the entry of judgment") (emphasis in the original). The interest reference date is determined by the words preceding the word "from;" those words direct the Court to impose "the legal rate" of post-petition interest in accordance with 28 U.S.C. § 1961(a). And, Section 1961(a) would have interest determined as of the date of "judgment," to wit: the date the plan is confirmed.[15]

4. The Economic Impact Is Quite Significant.

56. The liquidation analysis attached as Exhibit A to the Declaration of Jonathan Goulding, dated July 8, 2011, Debtors' Conf. Ex. 374 (the "Goulding Declaration") (App. M),

---

[15] The TPS Consortium acknowledges the existence of a limited number of cases in which Bankruptcy Courts, without analysis, used the petition date as the interest reference date rather than the confirmation date. The TPS Consortium is, however, unaware of any case (including those particular cases) where the Court was actually asked to – and actually did – thoroughly analyze what particular date should be used as the interest reference date. Perhaps that is because litigants previously were not economically motivated to press the legal point, given that the federal judgment rate is only now at an historically low level. Moreover, in this Court's prior decision in Coram, the Court did not apply the federal judgment rate existing on the petition date (6.35%); rather, the Court used the rate that was in effect on the date of the Official Equity Committee filed its Third Amended Disclosure Statement (0.97%). As such, it appears that the question of which federal judgment rate should be applied is really one of first impression; but one of critical importance here in that application of the correct post-petition interest rate (i.e., at the federal judgment rate on the confirmation date) will result in hundreds of millions of dollars in value being made available to otherwise disenfranchised parties-in-interest.

attests to the following two uncontroverted facts: (1) the amount of distributable cash on the Plan's Effective Date is $7,129 million; and (2) the aggregate amount of claims to be paid in this case, excluding post-petition interest, is $7,032 million.

57. Attached hereto as Exhibit A are documents that have also been submitted as Confirmation Exhibits "TPS 301-A" and "TPS 301-B" [Docket Number 8315]. As indicated on TPS 301-A, the now-prevalent federal judgment rate of interest has been below 0.20%, and was 0.16% at the conclusion of the confirmation trial. As indicated on TPS 301-B, application of this interest rate (0.16%) to all forms of debt, for the entire post-petition period, yields an incremental $33.5 million due to creditors. Thus, of the $7,129 million in distributable cash available, $7,065.5 million is due to creditors (principal plus pre-petition and post-petition interest), leaving an excess of $63.5 million after full creditor satisfaction. Besides the $63.5 million, the estates would also still hold the following residual value: (i) unsettled estate causes of action worth perhaps hundreds of millions or billions of dollars; (ii) WMMRC, worth (according to Messrs. Goulding and Zelin) $160 million; (iii) subsidiary investments, worth (according to Mr.

Goulding) $72 million; and (iv) future income tax receivables, worth (according to Mr. Goulding) $75 million.[16]

58. The Plan distributes all such excess value to creditors, resulting in their over-compensation. Respecting holders of TPS Securities, such over-compensation violates Bankruptcy Code Sections 1129(a)(7) and 1129(b), thus rendering the Plan unconfirmable.

5. The Debtors Are Not Able To Evade This Conclusion By Pointing To Unsustainable "Tack On" Claims That Have Absolutely No Legal Or Evidentiary Support.

59. Debtors resort to non-evidentiary smoke and mirrors in an attempt to distract the Court from the Plan's legal infirmities. They contend that none of the foregoing value would accrue to holders of the TPS Securities because: (a) the PIERs are entitled to "gross-up" their unsecured claim to cover their contractual subordination obligations to holders of senior funded debt (i.e., senior debt takes PIERs distributions to the extent that the estates do not deliver post-petition interest at the contract rate); and (b) Class 18 litigation claims stand as a material obstacle in the way of the TPS holders realizing any of the excess value. Neither contention is supported by the law or the evidence.

---

[16] There is a fair amount of "poetic justice" in this result. As discussed herein, the evidence adduced in July 2011 now conclusively establishes that: (i) the Settlement Noteholders bought negotiating influence and exploited it to construct a deal that over-enriched themselves at the expense of others lower in the capital structure; (ii) the "driver" of the settlement was allocation of tax refunds and the delivery of TPS Securities to JPMorgan, and did not involve any analysis whatsoever as to the value of the avoidance and business tort claims; (iii) the deal was struck at what they thought was a level just a pittance below full payment of the PIERs, so that the Settlement Noteholders retained case control; and (iv) the Debtors (led by conflicted professionals) turned a blind-eye to – and never truly investigated – the potential avoidance and business tort liability to enable the deal to close, unfettered by what the true facts may be. This was a Machiavellian "gaming" of the system. It seems perfectly fitting and equitable that, due to their miscalculation and the appropriate operation of law, all of this value flows down to those parties-in-interest the Plan architects aimed to disenfranchise.

a. The WMI Estate Is Not Responsible For PIERs <u>Turn-Over Obligations To Senior Funded Debt</u>.

60. Bankruptcy Code Section 502(b)(2) explicitly provides that an unsecured claim does not include post-petition interest. That does not change in a solvent-debtor case; there is no "solvency exception" built into the Bankruptcy Code Section 502(b)(2). The right to post-petition interest in the solvent-debtor case derives instead from Bankruptcy Code Section 1129(a)(7) and the Bankruptcy Code Section 726(a)(5) "waterfall" mechanic that entitles unsecured creditors to post-petition interest at "the legal rate" before any amount may flow down to preferred equity. This sort of flow-down "tax" is merely a supplemental creditor entitlement in a solvent-debtor case. The pre-petition unsecured claim does not "grow" to encapsulate post-petition interest in contravention of Bankruptcy Code Section 502(b)(2).

61. Thus, once senior creditors receive their Bankruptcy Code Section 502(b)(2) entitlement (principal plus accrued pre-petition interest) and their Bankruptcy Code Section 726(a)(5) entitlement (post-petition interest at the federal judgment rate), they are not entitled to any additional value from the estates; all estate obligations to the senior creditor class <u>are paid in full</u>. Likewise, when subordinated creditors receive their Bankruptcy Code Section 502(b)(2) entitlement (principal plus accrued pre-petition interest) and their Bankruptcy Code Section 726(a)(5) entitlement (post-petition interest at the federal judgment rate), all estate obligations to the subordinated creditor class <u>are also paid in full</u>. Any estate value remaining thereafter goes to preferred equity.

62. That does not change if there is a subordination agreement between the senior creditors and the junior creditors, obligating the junior creditors to "turn-over" their distributions so that the senior creditors receive more than "the legal rate" of post-petition interest (<u>e.g.</u>, the contract rate). That is an arrangement only involving those two creditor groups; it is not anyone

else's business or obligation. But, if a plan properly gives Bankruptcy Code Section 510(a) effect to a subordination agreement and, as a result, (a) the senior creditors receive post-petition interest at the contract rate and (b) the junior creditors retain less than par, that is not the estates' problem. Again, both classes of claims are fully paid as far as the Bankruptcy Code is concerned, and the junior creditors do not have any entitlement whatsoever to ask the estates for more. See Bank of Am., N.A. v. N. LaSalle St. P'ship (In re 203 N. LaSalle St. P'ship), 246 B.R. 325, 330 (Bankr. N.D. Ill. 2000) ("A senior creditor under a subordination agreement could argue that its claim was entitled to postpetition interest, despite the general prohibition, with the payment of interest coming not from the estate, but from the dividend that would otherwise be paid to the subordinated claim."); First Fidelity Bank, N.A. v. Midlantic Nat'l Bank (In re Ionsophere Clubs, Inc.), 134 B.R. 528, 532 (Bankr. S.D.N.Y. 1991) ("Payment of [post-petition] interest may have the effect of sharply reducing or eliminating recovery for the [junior creditors] because while the [senior creditors'] claim for interest increases, the [junior creditors'] aggregate claim against the Debtor remains the same. Thus, the [senior creditors] can only receive their interest payment out of the potential dividends of one or more of the subordinated series."); see also HSBC Bank USA, N.A. v. Bank of New York Mellon Trust Co. (In re Bank of New England Corp.), No. 10-1456, 2011 WL 2476470 (1st Cir. June 23, 2011) (explaining that, under subordination agreements, "the payment of post-petition interest to senior creditors [can eliminate] any recovery on junior indebtedness, [by] entitling senior creditors to amounts that would otherwise be payable to junior creditors"); In re Smith, 77 B.R. 624, 627 (Bankr. N.D. Ohio 1987) (finding that subordination agreements between creditors (i) may not impair the rights of non-contracting parties and that (ii) "the amount of claims against the Debtor, and the distribution to uninvolved creditors, remains unaffected").

63. This understanding is reinforced by the lead-in clause of Bankruptcy Code Section 726(a): "Except as provided in section 510 of this title . . . ." This clause states, in effect: Creditors are entitled to participate in the Bankruptcy Code Section 726(a) "waterfall" of estate distributions, unless a subordination agreement obligates a reallocation of such distributions to different (contractually senior) creditors. See Patrick Darby, Southeast and New England Mean New York: The Rule of Explicitness and Post-Bankruptcy Interest on Senior Unsecured Indebtedness, 38 Cumb. L. Rev. 467, 477 (2008) ("[W]hen the estate is solvent, the Bankruptcy Code may provide a basis for allowing post-petition interest on senior debt. To the extent senior debt is unsecured, however, the Bankruptcy Code does not allow for post-petition interest as a claim against the estate. To collect interest, which may be substantial in the course of a lengthy bankruptcy case involving large debts, the senior creditor must look to the junior creditor under the subordination agreement.").

64. The WMI estate does not bear PIERs "gross-up" liability because of that class's contractual subordination obligations. There is absolutely nothing in the Bankruptcy Code to support such a ruling, which would otherwise be in clear derogation of the express terms of Bankruptcy Code Section 502(b)(2). The Court should reject any such contention out-of-hand.

b. Neither The Law Nor The Trial Evidence Support A Finding Of Any Class 18 Liability.

65. The law does not allow the Debtors to hold up phantom (contingent, unliquidated) litigation claims in an effort to divert estate value from flowing where it naturally should. Such litigation strategy is not in keeping with the Debtors' fiduciary responsibilities, nor with Bankruptcy Code Sections 1129(a)(2) and (a)(3). See 11 U.S.C. §§ 1107, 704(a)(5) (obligating the debtor-in-possession to "object to the allowance of any claim that is improper"); Int'l Yacht and Tennis, Inc. v. Wasserman (In re Int'l Yacht and Tennis, Inc.), 922 F.2d 659, 661 (11th Cir.

1991) (finding debtor-in-possession "has the duty to object to the allowance of any claim that is improper").

66. Moreover, if there truly is a question as to whether such claims are sustainable, the law does not allow the Court simply to whisk the issue aside and confirm the Plan, as the Debtors here request. Rather, the Bankruptcy Code explicitly obligates this Court to estimate the amount of such contingent, unliquidated claims before confirming the Plan. See 11 U.S.C. § 502(c)(1) ("There shall be estimated for purposes of allowance under this section any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.") (emphasis added); 4 Collier on Bankruptcy ¶ 502.04[2] (16th ed. 2011) ("The language of section 502(c) is mandatory and places upon the court an affirmative duty to estimate unliquidated claims in the proper circumstances."); In re Nova Real Estate Inv. Trust, 23 B.R. 62, 65 (Bankr. E.D. Va. 1982) (estimation of contingent, unliquidated claim mandated where claim calls plan into question).

67. As Plan proponents, the Debtors bear the burdens of proof and persuasion respecting such claim estimation. In other words, it was the Debtors' obligation to present to this Court evidence proving that there are sustainable Class 18 claims that absorb the value otherwise expected by holders of the TPS Securities. See In re Colfer, 159 B.R. 602, 608 (Bankr. D. Me. 1993) (holding that "the burden rests on the debtors to persuade the court, by preponderance of the evidence, that the classification and treatment they propose does not discriminate unfairly"); Bittner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982) (finding a Bankruptcy Court may determine the value of a claim only after the debtor has provided "sufficient evidence on which to base a reasonable estimate of the claim"). The Debtors did not carry these burdens. Quite the

contrary, the evidence establishes that there is no sustainable liability standing between the PIERs (Class 17) and the TPS Securities (Class 19).

(i) There Is No "MARTA" Liability.

68. The primary Class 18 claim is a bondholder fraud claim, called the "MARTA" claim. In the Debtors' Amended Thirty-Second Omnibus (Substantive) Objection to Claims (Claim Nos. 3812, 2689, 3174, 3179, 3187), dated May 18, 2010 [Docket No. 3801] (App. N), the Debtors provided a 69-page explanation, submitted to this Court under the strictures of Bankruptcy Rule 9011, as to why the estates bear absolutely no MARTA liability.

69. Second, in the Debtors' Motion to Estimate Maximum Amount of Certain Claims for Purposes of Establishing Reserves Under the Debtors' Confirmed Chapter 11 Plan, dated November 17, 2010 [Docket No. 5971], at Exhibit B, pages B-10 and B-11 (App. O), the Debtors make the following representation to the Court:

> Claim Nos. 2689 and 3812 are based on securities claims asserted in the class action captioned *Boilermakers National Annuity Trust Fund v. WaMu Mortgage Pass-Through Certificates, et al.*, Case No. 09-0037 (W.D. Wash.), filed by a retirement plan based on the purchase of WaMu Mortgage Pass-Through Trust Certificates. A consolidated class action complaint was filed on 11/23/09, alleging, among other things, that certain offering documents contained false and misleading statements . . . .
>
> The Debtors objected to these claims as part of the *Thirty-Second Omnibus Objection to Claims*, on the grounds that there was no legal basis to hold WMI liable for any of the Securities Act claims or state statutory securities claims asserted in the underlying non-bankruptcy litigation. No response was filed by the claimants. The Debtors have conferred with the claimants and are in the process of executing a stipulation pursuant to which these claims shall be withdrawn without prejudice to refile. Upon entry of the stipulation, there will be no liability to WMI arising from these claims, but in an abundance of caution, the Debtors seek to estimate their maximum exposure at $0 on account of these claims.

Having made these representations to the Court in pleadings that remain outstanding, the Debtors are judicially estopped from now claiming differently for strategic purposes. See Yoo Wong

Park, 472 F.3d at 73 ("Judicial estoppel is 'a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding.'").

(ii) There Is No D&O Liability.

70. The Debtors also classify certain contingent, unliquidated director and officer indemnification claims against the estates under Class 18. There is absolutely no evidence in the record establishing the sustainability of any such claims. Quite the contrary, the Senate Report reflects strong likelihood that all such claims will be expunged. See Wash. Rev. Code § 23B.08.510 (2010) ("A [Washington] corporation may not indemnify a director [ ]: (a) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or (b) in connection with any other proceeding in connection with any other proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director was adjudged liable on the basis that personal benefit was improperly received by the director."). Alternatively, all such claims will be covered by D&O insurance. See Docket Nos. 8367, 8368 and 8385 (App. P, Q & R).

71. Based on the findings of the Senate Report, there is no reason to suspect the estates will ever write a check to WMI executives. But, based on the findings of the Senate Report, there is every reason to suspect WMI executives ultimately will be writing very large checks to the estates. The D&O claims do not stand in the way of Class 19 distributions.

(iii) There Is No Other Class 18 Liability.

72. Similarly, there is nothing in the record establishing Class 18 liability owed on any other claim placed in that class. As such, the Court should not entertain any non-evidentiary

statements of counsel regarding some significant, yet undefined, body of subordinated claims standing between Class 19 and its due entitlement to estate value once the PIERs are paid in full.

73. In sum, even if the TPS Consortium is unsuccessful on its appeal in Blackhorse Capital LP v. JPMorgan Chase Bank, N.A., there is still value worth hundreds of millions, perhaps billions, of dollars due to holders of TPS Securities. That is true even if the Court again determines to approve the Global Settlement Agreement. The Plan deprives the TPS Consortium of that entitlement in violation of Bankruptcy Code Section 1129. No argument or evidence put before this Court directs a different conclusion. The Plan should not be confirmed.

B. The Plan Deprives Rejecting Holders Of TPS Securities (Class 19) Of Their Legal Entitlement To (1) The Proceeds Of Estate Causes Of Action And (2) Participate In The Governance Of Post-Consummation Litigation, And Nothing Has Been Presented To Support Any Different Conclusion.

1. The TPS Holders Are Legally Entitled To Proceeds Of Unsettled Estate Causes Of Action, And Nothing Has Been Presented To Support Any Different Conclusion.

a. The Plan's "Death-Trap" Provision Foists A Significant Added Evidentiary Burden On The Debtors: That The Value Of Estate Causes Of Action To Be Vested In The Liquidation Trust Is Less Than The "Delta" Before Holders Of TPS Securities Are "In-The-Money".

74. As indicated in previous sections of this Brief, settlement cash is not the only value being distributed under the Plan. There are also interests in the Liquidation Trust. The Trust is to receive all the estate causes of action not being compromised under the Plan. Mr. Kosturos will be the Liquidation Trustee. He reports to a four-person Trust Advisory Board that is 75% appointed by the Official Creditors' Committee; including indenture trustees for bond debt fully satisfied under the Plan. See Plan, § 1.201 (App. A). Trust beneficial interests are delivered to holders of PIERs, then to Class 18 claimants (until those claims are withdrawn or

otherwise disallowed). Then, the beneficial interests in the Trust would be delivered to holders of TPS Securities and preferred stock.

75. But, that last sentence is not quite accurate. Plan Section 43.6 provides as follows:

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

(App. A). Since members of the TPS Consortium voted against the Plan and did not tender the release, they are deprived of any distributions under the Plan. Section 43.6 is, in other words, a "death-trap" provision and, for the members of the TPS Consortium, the death-trap has sprung.

76. In so doing, the Debtors have imposed upon themselves a tremendous added evidentiary burden. To be sure, the Plan cannot "death-trap" distributions to which a party is otherwise entitled. If there is value due to members of the TPS Consortium, the Debtors have no legal entitlement to build into the Plan a "carrot and stick" provision because: (a) the members of the TPS Consortium are legally entitled to the "carrot;" and (b) the Debtors have no legal entitlement to wield the "stick." Such a plan would not pass the "best interests" test of Bankruptcy Code Section 1129(a)(7) and it most assuredly would not be "fair and equitable" under Bankruptcy Code Section 1129(b). In this regard, In re MCorp Fin., Inc., 137 BR 219 (Bankr. S.D. Tex. 1992), is directly on point:

> Debtors have included in their plan(s) a provision authorizing some possible payout to equity (MCorp classes 15, 16, 17) upon a favorable vote by Class 15 (Shearson), but none to these three classes upon a negative vote by Class 15. Shearson has colorfully labeled this the "death trap provision." While Shearson's choice of language is indeed colorative, it is also reasonably descriptive. . . .
>
> The asset which the MCorp plan conditionally made available to Shearson and equity classes junior to it was potential "overflow" from the Debtors' Dallas

> Federal District Court litigation with the FDIC . . . . This provision is egregious in its "carrot and stick" approach to the problem of how to treat, in a plan of reorganization, an asset as highly speculative as possible recovery on a lawsuit won thus far at the United States District Court level as to liability against the FDIC. . . .
>
> The court finds that this MCorp Plan provision results in the plan's not being fair and equitable.

Id. at 236.

77. The Debtors have thus forced the following evidentiary question: What is value of the estate causes of action to be vested in the Liquidation Trust? By this point in the legal analysis discussed herein, the question is academic; holders of the TPS Securities are already "in-the-money." Thus, the "death-trap" provision is unto itself a fatal Plan infirmity, given that the Debtors have no entitlement to withhold value rightfully due to the TPS Consortium. But, if the Court were to determine that post-petition interest should be calculated using the federal judgment rate in effect as of the Petition Date (rendering the TPS Securities, according to the Goulding Declaration, $96 million out-of-the-money) or using the contract rate (rendering TPS Securities, according to the Goulding Declaration, $781 million out-of-the-money), the Plan theoretically may be confirmed only if the Debtors have proven to the Court that the value of the estate causes of action to be vested in the Liquidation Trust is less than the shortfall before holders of TPS Securities are "in-the-money."

b. The Debtors Have Failed To Carry Their Burdens Of Proof And Persuasion; To The Contrary, The Evidence Suggests That The Estate Causes Of Action May Be Worth Hundreds Of Millions, Perhaps Billions, Of Incremental Dollars.

78. Of course, since this is the Debtors' Plan, the Debtors exclusively bear the burdens of proof and persuasion respecting the value of estate claims. See, e.g., In re Draiman, No. 09-17582, 2011 WL 1486128, at *24, 26 (Bankr. ND Ill. April 29, 2011) (concluding that

the "Debtor has not carried his burden of showing the best interests test has been met" because the "Debtor failed to present any evidence of the value of the assets to be transferred to the Litigation Trust, the value of any potential recovery claims to be transferred to the Liquidation Trust, [or] a potential recovery estimate from the Liquidation Trust.")

79. The law clearly instructs how the Debtors were supposed to carry their burdens of proof and persuasion at trial. In Polis v. Getaways, Inc. (In re Polis), 217 F.3d 899 (7th Cir. 2000), Circuit Judge Richard Posner explained: "Legal claims are assets whether or not they are assignable, especially when they are claims for money; as a first approximation, the value of [the debtor's] claim is the judgment that she will obtain if she litigates and wins multiplied by the probability of that . . . happy outcome." Id. at 902. The Debtors were, in other words, required to present to the Court: (a) factual evidence regarding the estate claims to be vested in the Liquidation Trust; (b) documentary or testimonial support establishing the aggregate amount of anticipated judgment demands; and (c) expert opinion or other evidence establishing the percentage likelihood that those demands will be realized.

80. And, it bears repeating that, on this point, the Debtors' burdens of proof and persuasion to achieve Plan confirmation are "heavy." See, e.g., Everett v. Perez (In re Perez), 30 F.3d 1209, 1214 n.5 (9th Cir. 1994) ("The burden of proposing a plan that satisfies the requirements of the Code always falls on the party proposing it, but it falls particularly heavily on the debtor-in-possession or trustee since they stand in a fiduciary relationship to the estate's creditors."); Smart World Tech., LLC v. Juno Online Servs. (In re Smart World Tech., LLC), 423 F.3d 166, 175 (2d Cir. 2005) ("As fiduciary, the debtor bears the burden of maximizing the value of the estate, including the value of any legal claims.") (citations and internal quotations omitted). This aspect of the confirmation hearing is not a "canvassing" of the issues; this is not

part of settlement approval. Allocation of the proceeds of unsettled estate causes of action is a material component of the Plan itself. The Debtors must fully prove that such allocation is fair and appropriate by a preponderance of the admitted evidence.

81. This they did not do. Not a single piece of evidence, not a single utterance of witness testimony, not a single document admitted into the trial record supports any particular valuation for the estate causes of action to be vested in the Liquidation Trust. Indeed, the Debtors aggressively opposed introduction of evidence that would allow the Court to reach a conclusion as to the significant potential value of such claims. Even if the Court were to find that post-petition interest should be calculated using the contract rate, the Plan still may not be confirmed because the Court has absolutely no evidence on which to support the required conclusion that the estate causes of action to be vested in the Liquidation Trust are not worth $1 (or even $1 billion) more than is necessary to satisfy in full the claims ahead of Class 19.

82. In fact, there is substantial evidence in the record that unsettled estate causes of action are likely worth hundreds of millions, if not billions, of incremental dollars past the Class 19 threshold. As excerpted in Exhibit B hereto (see also Docket No. 8312), the Senate Report concludes WMI directors and officers grossly mismanaged the Debtors' business enterprise, imposing vastly unsustainable risk and eventually ruining the Debtors' asset-base. Such findings give rise to substantial estate claims sounding in breach of fiduciary duty and corporate waste, among other theories. The Senate Report gives reason to suspect that certain individual members of management have personal wherewithal to satisfy large judgments; but, regardless, Mr. Kosturos testified as to the existence of at least $250 million in available D&O insurance coverage. See Transcript of July 21, 2011 Hearing (Testimony of William Kosturos), at 270:10-18 (App. K). Moreover, the Senate Report concludes that "deep-pocket" Wall Street firms,

including Goldman Sachs and Deutsche Bank, knowingly assisted in such mismanagement for their own substantial economic gain, giving rise to substantial complicity liability to the WMI estate. Rating agencies and appraisal firms also bear considerable estate liability, according to the findings contained in the Senate Report.

83. The Debtors and the FDIC baldly retort that there are inhibitions on successfully realizing on such claims. Nothing in the evidentiary record supports such a contention, which is otherwise belied by: (1) the Debtors' pending application to retain the law firm of Klee Tuchin Bogdanoff & Stern, LLP [Docket No. 8111] "to investigate, assess, and, if requested, potentially prosecute claims of the WMI estate against former officers and directors and other third parties, including former auditors, investment banking advisors, rating agencies, and others that may be identified" (¶ 6) (App. S); and (2) Mr. Goulding's testimony as to the parties' intent to invest $50 million to $75 million to fund, among other things, the prosecution of estate litigation. (Transcript of July 14, 2011 Hearing, at 133:15-17 (App. K). It is simply too incredible to be believed that the sophisticated parties involved in the negotiation of this Plan would have agreed to invest tens of millions of dollars to pursue litigation without the expectation of exponential returns on that investment.

84. Apparently realizing the evidentiary shortcoming, the Debtors and the FDIC now resort to claiming that the mismanagement and complicity claims really belong to the Debtors' bank subsidiary and, in turn, the FDIC. Utter nonsense. The law is quite clear that, when the directors or officers of a parent-holding company squander the corporation's primary asset (a cash-generating subsidiary) by running that subsidiary into the ground and/or failing to take actions necessary to prevent the collapse of the subsidiary, those directors or officers bear liability to the parent-holding company itself. See, e.g., Case Fin., Inc. v. Alden, Civ Action No.

1184, 2009 WL 2581873 (Del. Ch. Aug. 21, 2009) (parent-holding company successfully alleged claim for breach of fiduciary duty against executive for actions deteriorating the value of the company's principal, wholly-owned subsidiary); Grace Bros., Ltd. v. UniHolding Corp., Civ. Action No. 17612, 2000 WL 982401, at *12 (Del. Ch. July 12, 2000) (Strine, V.C.) ("To the extent that members of the parent board are on the subsidiary board or have knowledge of proposed action at the subsidiary level that is detrimental to the parent, they have a fiduciary duty, as part of their management responsibilities, to act in the best interests of the parent and its stockholders."); see also Official Comm. of Unsecured Creditors of Verestar, Inc. v. Am. Tower Co. (In re Verestar, Inc.), 343 B.R. 444, 473-74 (Bankr. S.D.N.Y. 2006) ("Any situation where a wholly-owned and controlled subsidiary enters the zone of insolvency obviously requires all responsible parties to act with the utmost care and responsibility.").

85. The law is also quite clear that third-parties who knowingly aid and abet wrongful management activities at the parent-holding company also bear complicity liability to the parent-holding company. See, e.g., Rosener v. Majestic Mgmt., Inc. (In re OODC, LLC), 321 B.R. 128, 144 (Bankr. D. Del. 2005) (Walrath, J.) ("To establish liability for aiding and abetting a breach of fiduciary duty, the plaintiff must prove three elements: a) that the fiduciary's conduct was wrongful; b) that the defendant had knowledge that the fiduciary's wrongful conduct was

occurring; and c) that the defendant's conduct gave substantial assistance or encouragement to the fiduciary's wrongful conduct.") (citations and internal quotations omitted).[17]

86. Thus, evidence contained in the Senate Report proving that WMI directors and officers ran the bank in a manner that effectively squandered WMI's principal, cash-generating asset (its interest in the bank) and/or failed to act appropriately to remedy mismanagement of the bank gives rise to substantial D&O liability to the WMI Chapter 11 estate. And, proof that Wall Street investment banks (e.g., Goldman Sachs and Deutsche Bank), rating agencies, appraisal firms, and others knowingly aided and abetted such wrongful WMI director and officer activity gives rise to substantial complicity liability also to the WMI Chapter 11 estate.

87. The evidence before this Court can only support a factual finding of potentially extraordinary incremental value, distributable in part to holders of the TPS Securities. The Plan violates Bankruptcy Code Sections 1129(a)(7) and 1129(b), and should not be confirmed.

---

[17] Even the in pari delicto defense is of lesser concern in this case, given that complicity claims likely arise under West Coast law, and the Ninth Circuit has perhaps the most bankruptcy-friendly view of that defense. See Fed. Deposit Ins. Corp. v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir. 1995) ("[T]he equities between a party asserting an equitable defense and a bank are at such variance with the equities between the party and a receiver of the bank that equitable defenses good against the bank should not be available against the receiver."). Moreover, there recently has been substantial dilution of the defense, especially in claims asserted on behalf of a bankruptcy estate. See Official Comm. of Unsecured Creditors of Allegheny Health Educ. and Research Fund v. PricewaterhouseCoopers LLP, 989 A.2d 313 (Pa. 2010); NCP Litig. Trust v. KPMG LLP, 187 N.J. 353 (N.J. 2006). And, of course, the claims at issue here would be brought against rather unsympathetic defendants, including Wall Street firms that (i) reaped extraordinary profits betting against the deals they helped construct that, in turn, precipitated the nation's macro-economic collapse, and (ii) thereafter, accepted TARP bailout funding for American taxpayers.

c. The Plan Wrongfully Allocates Trust Value For The Primary Benefit Of The Settlement Noteholders.

88. The evidence establishes that the Settlement Noteholders own $955.7 million of TPS Securities. See First Supplemental Verified Statement of Fried, Frank, Harris, Shriver & Jacobson LLP [Docket No. 3761] ¶ 2 and Exs. A & D (the "Settlement Noteholder Rule 2019 Statement") (App. T). The evidence also establishes that few holders of TPS Securities and preferred stock actually tendered a release with their Plan vote. In fact, only approximately 34% of Class 19 (or, approximately 1.36 billion shares) and only approximately 20% of Class 20 (or, approximately 600,000 shares) did so and will, therefore, share in the proceeds of the Liquidation Trust. As a result, the evidence establishes that, due to the "death-trap" Plan mechanic, the Settlement Noteholders (as holders of approximately one-half of the preferred securities that tendered releases and became eligible to participate in Trust distributions) are entitled to receive approximately one-half (uncapped) of all litigation proceeds and other future distributions from the Liquidation Trust. According to the Settlement Noteholder Rule 2019 Statement, all of the TPS Securities owned by those parties were purchased after the Petition Date, at pennies (or even fractions of pennies) on the dollar of liquidation preference.

89. It is hard to fathom how this result is anywhere near a "fair and equitable" resolution of this Chapter 11 proceeding. The Plan is not confirmable.

2. TPS Holders Are Legally Entitled To Meaningful Participation In The Post-Consummation Governance Of Estate Litigation, And Nothing Has Been Presented To Support Any Different Conclusion.

90. Parties entitled to participate in the proceeds of estate litigation (vested post-consummation in a liquidation trust) also are entitled to assurance that any such litigation will be properly managed post-consummation by that trust. A plan may not, in other words, replace: (a) the debtor's trustee-like stewardship, under the Bankruptcy Court's watchful eye, pre-

consummation; for (b) a post-consummation trustee and oversight board beholden only to certain parochial interests, to the exclusion of other trust beneficiaries. See 11 U.S.C. § 1123(a)(7). As explained by Collier:

> Section 1123(a)(7) is derived from Section 216(11) of the former Bankruptcy Act, which prescribed that a Chapter X reorganization plan shall include provisions which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy, with respect to the manner of selection of the persons who are to be directors, officers or voting trustees, if any, upon the consummation of their plan, and their respective successors.
>
> The Senate Report accompanying the Chandler Act stated with respect to Section 216(11) that such provision "directs the scrutiny of the court to the methods by which the management of the reorganized corporation is to be chosen, so as to ensure, for example, adequate representation of those whose investments are involved in the reorganization."

7 Collier on Bankruptcy ¶ 1123.LH[6] (16th ed. 2011).

91. A plan trust that engenders insecurity and suspicion – because of its governance structure – is almost by definition not advanced in "good faith" per Bankruptcy Code Section 1129(a)(3). See, e.g., In re Coram Healthcare Corp., 271 B.R. 228, 234 (Bankr. D. Del. 2004) (finding the "good faith" requirement considers whether the plan effects "results consistent with the objectives and purposes of the Bankruptcy Code."). It also is not "fair and equitable" to the dissenting class of beneficiaries.

92. This is a corollary to the fundamental Chapter 11 precept that post-consummation management must be made to answer to beneficiaries of the enterprise going forward. It is precisely for this reason Bankruptcy Code Section 1123(a)(6) prohibits the issuance of non-voting stock and also provides for "an appropriate distribution" of equity voting power among classes:

> This section codifies a position long supported by the Securities and Exchange Commission that participation in, and control of, the selection of the management of a reorganized debtor must be considered as a part of a fair and equitable plan

> and provided for accordingly. It is thus not enough to determine merely which of the new securities will be entitled to vote; the securities must be distributed so that the allocation of voting power – i.e., the control of the company – properly recognizes the respective position of the claimants and stockholders according to their rank and rights they surrender. Consequently, creditors who are forced to take stock in the new company, or whose rights as creditors are modified or altered so that they assume some risk of the success of the reorganized corporation, are entitled to an allocation of voting power and a voice in the selection of management that will protect their interests.

See 7 Collier on Bankruptcy ¶ 1123.01[6] (16th ed. 2011). In other words, the law conclusively presumes that, for an interest in the enterprise to be meaningful, and not illusory, the beneficiaries should be afforded reasonable management participation and/or oversight to prevent their value entitlement from being squandered in the future.

93. The Plan is inconsistent with these legal principles. The Liquidation Trust will be administered by Mr. Kosturos, who was selected by the Debtors and negotiating creditors without any input from holders of the TPS Securities or equity securities. Mr. Kosturos will answer to a four-person Trust Advisory Board. Three members sit on, and were appointed by, the Official Creditors' Committee. They include indenture trustees for WMI bond debt that is fully repaid under the Plan – meaning that the holders of such debt have absolutely no right to participate in Trust distributions. This smacks of political patronage. Holders of TPS Securities have perhaps the largest economic interest in the Liquidation Trust and, yet, have absolutely no representation on the Board, let alone the majority voice that their position in the capital structure warrants. The Plan should not be confirmed.

III. The Debtors Have Failed To Carry Their Burden Of Proof For Continued Approval Of The Global Settlement, Especially In Light Of Substantial New Evidence And The Appellate Reversal Of ANICO.

A. The "Law Of The Case" Doctrine Does Not Foreclose Evaluation Of The Global Settlement.

94. The Debtors and JPMorgan contend that the "law of the case" doctrine forecloses any discussion whatsoever of the Global Settlement. That is wrong. 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.). The Court's January 7th Opinion did not culminate in a final order. So, there is no "law" binding the parties.[18] Indeed, it is precisely because the Debtors have renewed their request for final approval of the Global Settlement Agreement that the record from the December 2010 trial was incorporated into the record of the July 2011 trial. Simply stated, there is no "law of the case" precluding the Court's evaluation of the Global Settlement Agreement in connection with the Debtors' current request for Plan confirmation.

---

[18] The Debtors and JPMorgan advocated that position quite emphatically in their opposition of the Official Equity Committee's request for direct appeal of the January 7th Opinion to the Third Circuit Court of Appeals. See JPMC's Objection to the Equity Committee's Petition for Certification of Direct Appeal, at ¶ 4 [Docket No. 6656] (App. U) ("As of now, there is no confirmation order, no final plan . . . and no final settlement for an appellate court to review. . . . [T]he Equity Committee's appeal therefore is premature"); see also Debtors' Objection to the Equity Committee's Petition for Certification of Direct Appeal, at ¶ 2 [Docket No. 6653] (App. V) ("Any appeal of the Court's findings regarding the Global Settlement Agreement must await entry of an order confirming a plan."). Here again, principles of estoppel come into play.

B. Even If The Court Had Issued A Final Order Regarding The Global Settlement Agreement, Reconsideration Of That Order Would Be Warranted By Significant Factual Developments Since December 2010.

95. Even if the Court had issued a final order approving the Global Settlement Agreement in the January 7th Opinion denying confirmation, the "law of the case" doctrine would not stand in the way of the Court's reconsideration of that order in light of significant factual developments since the first confirmation trial concluded in December 2010. See Fed. R. Bankr. P. 9024 (incorporating Federal Rule of Civil Procedure 60(b)(2) and contemplating relief from a final order or judgment based on new evidence). More specifically, the Court's reconsideration of any approval of the Global Settlement Agreement would be warranted in light of: (a) the subsequently-issued Senate Report; and (b) the Circuit-level reversal of the ANICO decision.

96. The evidentiary record of the December 2010 trial established that the largest potential claims against JPMorgan and the FDIC arose under avoidance and business tort theories. See, e.g., Transcript of December 2, 2010 Hearing (Testimony of William Kosturos) at 199:13-201:18 (App. L). Such claims included potential actions against the FDIC seeking recovery: (a) for a breach of the FDIC's duty to maximize the value of WMB; (b) under the "Takings" Clause of the 5th Amendment to the United States Constitution; and (c) on claims sounding in conversion under the Federal Tort Claims Act.[19] See Complaint Against Federal

---

[19] The heavy-handed tactics of the FDIC during the 2008/2009 financial crisis (and potential liability therefore) have come under increasing scrutiny in other cases – including, inter alia, with respect to potential liability for facilitating intentional fraudulent transfers from bank holding companies to banks that were subsequently seized by the FDIC. See e.g., Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, at 2, Schoenmann v. FDIC, Case No. 10-03989, 2011 U.S. Dist. LEXIS 43375, *2 (N.D. Cal. April 21, 2011) (App. W) (denying FDIC motion to dismiss claims for actual fraud). The record before the Court shows WMI has similar claims against the FDIC, and nothing in the record demonstrates such claims are not viable.

Deposit Insurance Corporation, Washington Mut., Inc. v. FDIC, Adv. Proc. No. 09-00533 (RMC) (D.D.C. Oct. 13, 2009) [Docket No. 1], Debtors' Conf. Ex. 32 (App. X). Potential claims against JPMorgan included: (x) claims to recover, inter alia, approximately $6.5 billion in pre-petition transfers from WMI to WMB and to recover the TPS Securities (valued at $4 billion); see Complaint for Turnover of Estate Property, Washington Mut., Inc. v. JPMorgan Chase Bank, N.A., Adv. Proc. No. 09-50934 (Bankr. D. Del. April 27, 2009) [Docket No. 1], Debtors' Conf. Ex. 48 (App. Y), and (y) myriad potentially "meritorious and highly valuable claims" including unfair competition, tortious interference, interference with prospective economic advantage, breach of contract, misappropriation of confidential information and trade secrets, and conversion, among others. See Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004.1 Directing the Examination of JPMorgan Chase Bank, N.A., at 2, 3, 8 & 10 [Docket No. 974], Debtors' Conf. Ex. 68 (App. Z).

97. In the January 7th Opinion, based on the record then available, the Court concluded WMI's chances of prevailing on business tort claims against JPMorgan were "not high," citing to: (a) the potential failure of the Debtors to properly preserve such rights in the WMB receivership proceedings; and (b) and the then-current status of the ANICO litigation, which had been dismissed on the basis that similar tort-like claims would have had to have been pursued in the WMB receivership rather than against JPMorgan directly. See January 7th Opinion, at 53-56 (App. C). With the reversal of the ANICO decision – in effect, clearing the way for direct WMI claims against JPMorgan without involvement of the WMB receivership – both such bases for the Court's conclusions regarding business tort claims against JPMorgan have disappeared.

98. Moreover, to the extent the Court's conclusions regarding the viability of estate avoidance actions against JPMorgan and/or the FDIC were based on the possibility WMI was not insolvent prior to the petition date, the Senate Report included findings that WMI's pre-petition stock pricing was irrationally inflated, due to market misperception that the company was being appropriately regulated by the Office of Thrift Supervision. See Summary of Senate Report [Docket No. 8312], Ex. A at 4. These findings by the Senate Subcommittee were not available when the Court rendered its January 7th Opinion and must now be taken into account in considering WMI's pre-petition solvency and the viability of WMI's avoidance claims.[20]

C. The Evidentiary Record Cannot Support Approval Of The Global Settlement Agreement.

99. It is a fundamental principle of law that settlement approval in the bankruptcy context requires evidence. See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (noting that a court must "apprise [ ] [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise."); Fry's Metals, Inc. v. Gibbons (In re

[20] The TPS Consortium understands the Court may view pre-petition insolvency as potentially damaging to "business tort" claims the WMI estate might assert. See e.g., January 7th Opinion, at 56 (App. C). Respectfully, given WMI's early abandonment of its investigation into such claims, the record is insufficient with regard to the various types of claims that might be asserted and whether, under applicable law, such claims would be viable notwithstanding WMI's insolvency. Further, to the extent the Debtors conducted any legal analysis of the effect of insolvency on the viability of business tort claims, that analysis was specifically withheld from the parties and the Court, and is not part of the record. Finally, notwithstanding any effect it might have on business tort claims, WMI's pre-petition insolvency directly supports the assertion of avoidance-type estate claims.

RFE Indus., Inc.), 283 F.3d 159, 165 (3d Cir. 2002) (Third Circuit reversed bankruptcy court's approval of a settlement, holding that "the bankruptcy court did not make any findings of fact [regarding the four Martin factors]. . . . Hence, we remand for an examination of the 'fairness, reasonableness and adequacy' of the Settlement in light of the factors listed in Martin.") (citing to Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996)).

100. Unless there is substantial reason to believe the settled claims will be dismissed on pure legal grounds, there must be evidence as to the underlying merits of the claims proposed to be compromised. See Travelers Cas. and Surety Co. v. Future Claimants Representative, No. 07-2785, 2008 WL 821088, at *9 (D.N.J. March 25, 2008) (citing RFE Indus., 283 F.3d at 165 (finding that the bankruptcy court must make specific findings pursuant to the Martin test, and reach an objective and independent opinion as to the reasonableness of the compromise)); In re Barone, No. 07-51621, 2011 Bankr. LEXIS 1267 (Bankr. M.D. Pa. April 11, 2011) (citing to RFE Indus. as the basis for the court's request that trustee's counsel present evidence in support of the motion seeking approval of the settlement); 10 Collier on Bankruptcy ¶ 9019.02 (16th ed. 2011) (discussing how the evidence must enable a court to "make detailed enough findings so that a reviewing court knows that the proper factors were considered and an informed judgment made"); see also Kopp v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.), 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997) (vacating bankruptcy court approval of settlement when such approval was not "an informed one based upon an objective evaluation of developed facts") (citations and internal quotations omitted).

101. With the reversal of the ANICO decision (clearing the primary cited obstacles to asserting business tort claims directly against JPMorgan) and the issuance of the Senate Report (clearing away doubts as to the pre-petition insolvency of WMI), the remainder of the

evidentiary record to support approval of the Global Settlement Agreement consists of pleadings filed in the various different litigations. No underlying evidence as to the viability of the various estate claims or defenses has been provided to the Court. As a matter of law, pleadings do not qualify as evidence. See Fed. R. Bankr. P. 9017 (applying the federal rules of evidence to bankruptcy cases); see also Biggs v. Capital Factors, Inc. (In re Herb Goetz & Marlen Horn Assocs., Inc.), No. 96-55944, 1997 WL 415340, at *2 (9th Cir. July 24, 1997) ("Although a court may take judicial notice of its own records, it cannot take judicial notice of the truth of the contents of all documents found therein."); M/V Am. Queen v. San Diego Marine Constr. Corp., 708 F.2d 1483, 1491 (9th Cir. 1983) ("As a general rule, a court may not take judicial notice of proceedings or records in another case so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.") (citations omitted); Credit Alliance Corp. v. Idaho Asphalt Supply, Inc. (In re Blumer), 95 B.R. 143, 146 (B.A.P. 9th Cir. 1988) ("[A] court [cannot] take judicial notice of the truth of all documents found within a court's records."); MCorp, 137 B.R. at 229 ("The pleadings, including the Disclosure Statement . . . are therefore not accepted for the truth of the allegations contained therein . . . .").

102. Accordingly, the Global Settlement Agreement, devoid of evidentiary support in the record, should not be approved now.

D. Now That Light Has Been Shed On The Plan Negotiations, It Is Clear The Settlement, Negotiated By Conflicted Counsel, Was Designed To Overcompensate Creditors, Leave Equity With Nothing, And Deliver All Remaining Value To JPMorgan.

103. During the December confirmation proceedings, the Settlement Noteholders remained curiously silent regarding the parts they played in negotiating the Plan and Global Settlement Agreement; instead hiding behind the Debtor and its own assertions of privilege. At the July 2011 hearing, however, the Settlement Noteholders were flushed from the back rows of

the courtroom by allegations of their illegal conduct and forced to reveal the roles they played and the course of the Plan negotiations. And, what had been suspected in December 2010 – that the settlement was negotiated to pay creditors in full (or more), with all residual value diverted to JPMorgan and no true analysis of the estate's entitlement to value – has been all too painfully confirmed.

104. The testimony elicited at the July 2011 proceedings establishes the Settlement Noteholders purchased and exploited influence to control the Plan process and richly reward themselves. As the settlement discussions matured, the Settlement Noteholders moved within the capital structure to ensure they would maintain control over the process through ownership of the PIERs – the putative "fulcrum" security they intended to be nominally impaired through the imposition of inappropriately high rates of post-petition interest on senior classes of debt (in which the Settlement Noteholders also maintained significant holdings). See, e.g., Transcript of July 18, 2011 Hearing (Testimony of Daniel Gropper) at 173:25-174:8 (App. K). Transcript of July 19, 2011 Hearing (Testimony of Daniel Gropper) at 50:19-55:15 (App. K); Transcript of July 21, 2011 Hearing (Testimony of Vivek Melwani) at 36:21-37:16, 39:19-40:9 (App.K) (explaining how "the Settlement Noteholders struck a deal with the Debtors that the Plan be drafted in order to provide for the payment of post-petition interest on their debts at the contract rate"); see also Settlement Noteholder Rule 2019 Statement, ¶ 2 (App. T). The record shows that the ultimate settlement result was driven not by some analysis of the strengths and weaknesses of the parties' legal rights (e.g., with respect to the business tort and avoidance claims), but by the introduction of billions of dollars in tax refunds that made it possible to get the Settlement Noteholders a rich recovery and for JPMorgan to walk away from the table further enriched, with the estate's rights in the TPS Securities already in hand. See Transcript of July 18, 2011 Hearing

(Testimony of Daniel Gropper) at 29:2-40:17 (App. K) (claiming that the additional $2.6 billion tax refund "was a very, very material input"); Transcript of July 21, 201 Hearing (Testimony of William Kosturos) at 167:22-168:13 (explaining that the tax refunds were "the key to the proposal"); see also Transcript of December 2, 2010 Hearing (Testimony of William Kosturos) at 73:18-78:8 (App. L) (discussing JPMorgan's minimal out-of-pocket expenses).

105. All the while, the Debtors remained so myopically focused on getting "a" settlement, that they never bothered to do the diligence necessary to determine whether the deal being negotiated around them by the Settlement Noteholders was a "fair" settlement. That neglect continues to this day as the Debtors ask the Court to confirm a Plan that will vest the Settlement Noteholders with significant residual beneficial interests in all remaining estate claims and litigation (through the Liquidating Trust) – yet the Debtors have not bothered to put a value on those assets. See Transcript of July 14, 2011 Hearing (Testimony of Jonathan Goulding) at 179:2-181:5 (App. K); Transcript of July 21, 2011 (Testimony of William Kosturos) at 268:7-270:5 (App. K). Finally, the record now shows unequivocally the primary substantive terms of Global Settlement Agreement – resulting in significant value diversion to JPMorgan – were negotiated by Weil, Gotshal & Manges, LLP and Alvarez & Marsal, both of whom count JPMorgan as a significant source of business in other cases. See Application of the Debtors Pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code For Authorization to Employ and Retain Weil, Gotshal & Manges LLP as Attorneys for the Debtors, Nunc Pro Tunc to the Commencement Date, dated October 13, 2008 [Docket No. 64], at Exhibit B (Affidavit and Disclosure Statement on Behalf of Weil, Gotshal & Manges LLP Pursuant to Sections 327, 328(a), 329 and 504 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2014(a) and 2016(b)), ¶ 15 (App. AA) (identifying JPMorgan Chase Bank, National Association

as a current client); Supplemental Declaration of William C. Kosturos in Support of Motion of the Debtors Pursuant to 11 U.S.C. § 363 for an Order Authorizing the Employment of Alvarez & Marsal North America, LLC and Designating William C. Kosturos as Chief Restructuring Officer Nunc Pro Tunc to October 2, 2008, dated October 24, 2008 [Docket No. 152], at Schedule B (App. BB) (identifying JPMorgan Chase as a current client); Transcript of December 2, 2010 Hearing (Testimony of William Kosturos) at 179:17-181:1 (App. L). And, with the sunlight shed on the negotiations by the insider trading investigation, it is clear that special conflicts counsel for WMI – brought in to address conflicts resulting from Weil Gotshal & Manges LLP's relationship with JPMorgan – played a very limited (if any) role in the actual negotiation of the terms that came to be embodied in the Global Settlement Agreement. See Transcript of December 2, 2010 Hearing (Kosturos) at 184:9-16 (App. L).

106. As such, the estate's analysis of the "fairness" of the settlement amounted to nothing more than determining how much was necessary to pay creditors in full (or more) and then delivering everything else to JPMorgan without regard to the entitlement of WMI equity holders to estate value. Such a tainted result should not be graced with this Court's sanction.

E. If The Court Is Inclined To Recommend Settlement Approval To Chief Judge Sleet, The Debtors Should Be Ordered To Identify (With Specificity) Where Evidence Exists In The Record To Support Such A Recommendation.

1. Rules Applicable To The Preparation Of Proposed Findings Of Fact And Conclusions Of Law.

107. Bankruptcy Rule 9033 instructs Bankruptcy Courts to "file proposed findings of fact and conclusions of law." Such a filing precipitates an objection process, focused on "specific proposed findings and conclusions." Fed. R. Bankr. P. 9033(b) (emphasis added). Thereafter, the District Court undertakes a de novo review of the record, comparing it to the

proposed judgment submitted by the Bankruptcy Court. This process marries with Bankruptcy Rule 7052, which is made applicable to this contested matter by Bankruptcy Rule 9014. Bankruptcy Rule 7052 instructs as follows (emphasis added): "In an action tried on the facts . . . the court must find the facts specially and state its conclusions of law separately."

108. Where the trial record is voluminous – as it is here – these rules prompt the Court to include in the proposed judgment explicit evidentiary citations in support of the Court's "specific" and "special" findings of fact. See Mazzeo v. Lenhart (In re Mazzeo), 167 F.3d 139, 142 (2d Cir. 1999) ("The findings and conclusions must, however, at least be sufficient to permit meaningful appellate review."). Given that the January 7th Opinion denied plan confirmation, it fittingly did not include evidentiary citations. Also, respecting avoidance and business tort claims, the Court's conclusion was based on factual and legal predicates that no longer exist. Thus, the January 7th Opinion is insufficient to deliver to Chief Judge Sleet as proposed findings of fact and conclusions of law.

109. And, of course, when preparing the proposed judgment, care must be taken so as not to inadvertently shift the burden of proof (which, again, falls squarely and "heavily" on the Debtors' shoulders). Rather, the proposed findings of fact must be rooted in the record as established by the Debtors and must demonstrate that the Debtors proved their case with admissible evidence, especially respecting the settlement of the estates' avoidance and business tort claims. In other words, the proposed findings must show the Debtors came forward with sufficient admissible evidence in support of settlement approval and not just factual allegations set forth in pleadings (themselves devoid of any record support demonstrating the estate claims to be compromised suffered from infirmities making compromise preferable to prosecution).

110. This presents a serious problem for the Debtors. The historic record shows potentially enormous avoidance and business tort claims against JPMorgan and/or the FDIC, as discussed in the Debtor's 2004 motion to investigate estate claims,[21] ANICO complaint against JPMorgan,[22] the Order granting the Debtors authority to conduct a Rule 2004 investigation,[23] and the Debtors' second Rule 2004 motion to further the investigation into estate claims.[24] But, there is nothing in the record establishing those claims do not exist or are not likely to generate incremental billions of dollars in value for the estates.

111. More importantly, the record has changed since December 2010. The Senate Report augments the evidentiary record about what happened at corporate headquarters. But, it also bears directly on the Court's evaluation of the "Avoidance Actions" because the Court said there are potential infirmities with the claims because (a) the Debtor's pre-petition stock capitalization suggested solvency; and (b) JPMorgan has asserted a "good faith purchaser" defense. As discussed above, the Senate Report strongly suggests that neither potential infirmity is a fair factual assumption by the Court – certainly not at this point in time, and certainly not on this new record.

---

21 Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of JPMC, Debtors' Conf. Ex. 68 (App. Z).

22 American Nat'l Ins. Co., et al. v. FDIC, No. 09-cv-0199, Plaintiffs' Original Petition, Debtors' Conf. Ex. 61 (App. CC).

23 Order Granting Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of JPMC, Debtors' Conf. Ex. 69 (App. DD).

24 Debtors' Motion for an Order Directing the Examination of Witnesses and Production of Documents from Knowledgeable Parties, Debtors' Conf. Ex. 70 (App. EE).

112. And, regarding "business torts," the Court found highly probative that the ANICO case was dismissed for the Plaintiffs' failure to exhaust administrative remedies. But, that decision has since been reversed by the D.C. Court of Appeals, which held that the claims asserted were against JPMorgan specifically for independent profit-making at Washington Mutual's expense. What evidence can now be cited to support the conclusion the Global Settlement is fair vis-à-vis the potentially significant "Business Tort" claims?

2. The Debtors Should Identify Where In The Record Evidence Exists On Which To Base Final Approval Of The Global Settlement Agreement.

113. Lawyers, not judges, should be charged with toiling with a detailing of the record. The Debtors contend the evidentiary record is present and that it trumps the Senate Report and recent developments in the ANICO litigation. As they are so confident in their position, the Debtors should be required to furnish to this Court and to all parties in interest draft findings and conclusions, with specific citations to the evidentiary record, that they believe support Plan confirmation and approval of the Global Settlement Agreement.

114. And, the Court could similarly instruct parties opposing confirmation to prepare a dueling draft proposed judgment in which they may point out how the record actually fails to establish the sufficiency of the Global Settlement, especially in light of the Senate Report and recent developments in the ANICO litigation. The Court would then be positioned to evaluate the proposed orders against the record cited. And, then, the Court can decide what, if anything, should be submitted to Chief Judge Sleet for de novo review and final Order.

IV. The Debtors Have Failed To Resolve Substantial Additional Points Of Objection Raised By The TPS Consortium.

115. In its Objections to Confirmation, the TPS Consortium raised two additional points of objection that bear repeating here.

116. First, Bankruptcy Code Section 365(c)(2) absolutely prohibits implementation of the Plan provisions providing for the assumption of the TPS documents and consummation of the Conditional Exchange. The Conditional Exchange was not consummated pre-petition and cannot be consummated post-petition. Were the Plan to be confirmed, any provision effectuating the Conditional Exchange would facially violate Bankruptcy Code Section 365(c)(2) and, in turn, Bankruptcy Code Sections 1129(a)(1) and 1129(a)(3).

117. Second, the TPS Consortium continues to believe the releases provided for in the Plan (including those summarized in Paragraph 16 of this Brief) are inordinately convoluted, can be simplified considerably, and threaten to be interpreted as prohibiting claims the TPS Consortium has against JPMorgan and others. The Plan continues to provide illegal non-consensual releases to third parties and enjoins actions against assets and properties provided to such third-parties "free and clear" through the Plan.

118. These objections are sufficiently set forth in the Objections to Confirmation, which again are incorporated herein by reference. Standing on its own, each objection provides a sufficient basis to deny confirmation of the Plan.

V. If The Court Determines To Confirm The Plan, The Case Itself And The Particular Matters Raised In Connection With Confirmation Are Sufficiently Important As To Warrant Issue Certification Directly To The Third Circuit Court Of Appeals.

119. To confirm this Plan, the Court must rule for the Debtors on the following six questions of law and fact:

(1) Does this Court have the power to confirm a Plan that incorporates provisions obviously designed to: (i) invade Chief Judge Sleet's exclusive jurisdiction over the TPS Consortium's appeal in Blackhorse Capital LP v. JPMorgan Chase Bank, N.A., Adv. No. 10-51387 (MFW), on appeal, Civ. Action No. 11-124-GWS; and (ii) moot such appeal before Chief Judge Sleet and the Third Circuit Court of Appeals have had an opportunity to review the merits? **[Answer: No]** Does the Divestiture Rule otherwise

obligate the Debtors to modify the Plan, striking those provisions that advertently or inadvertently hamper the appellate courts' ability to reverse and return the parties to the status quo ante, and adding a disputed-claims reserve to hold the TPS Securities pending ultimate conclusion of the appellate process? **[Answer: Yes]**

(2) Following Stern v. Marshall, does this Court have the Constitutional power to issue a final order approving the Global Settlement Agreement (and the Plan, as its bankruptcy "wrapping"), given that: (a) the settlement involves substantial non-core litigation that otherwise must be adjudicated elsewhere; and (b) the settlement is hotly-contested, resulting in an extended trial over whether it should be forcibly imposed on thousands of disaffected parties-in-interest? **[Answer: No]** Is this Court only authorized by the Constitution to deliver proposed findings of fact and conclusions of law for Chief Judge Sleet's final consideration? **[Answer: Yes]**

(3) In the particular circumstances of this case, can "the legal rate" of post-petition interest (as those words are used in Bankruptcy Code Section 726(a)(5)) refer to any rate other than the federal judgment rate? **[Answer: No]** If it is the federal judgment rate, can the reference date for calculating post-petition interest be any date other than the confirmation date, the most obvious and logical analogue to the date of "judgment" in federal civil litigation? **[Answer: No]**

(4) Can the Plan "death-trap" the TPS Consortium's right to participate in the proceeds of unsettled estate causes of action without the Debtors providing this Court one iota of evidence proving, by a preponderance of the evidence: (1) that the value of all such causes of action is less than the amount needed for the TPS Securities to be "in-the-money"; and, therefore, (2) that the holders of TPS Securities are not otherwise legally entitled to any such value? **[Answer: No]** Absent such evidence, is the Plan "fair and equitable" with respect to the post-consummation governance of such unsettled estate litigation, given that: (1) the litigation is controlled by creditor representatives that have absolutely no interest in that litigation; and (2) disaffected holders of TPS Securities are not afforded any right to participate in future litigation governance? **[Answer: No]**

(5) Does the law allow the Debtors to establish the sufficiency of the Global Settlement Agreement, covering fact-intensive avoidance and business tort claims exceeding $6 billion, with only pleadings (i.e., absolutely no admissible evidence going to the underlying merits of the claims)? **[Answer: No]** Does the law impose a heightened evidentiary burden on the Debtors in light of: (x) the findings contained in the Senate Report (including, especially, findings giving strong challenge to any factual

contention that the Debtors were solvent pre-petition); (y) the ANICO reversal (now enabling the business tort claims to proceed); and (z) substantial new evidence that the Global Settlement was negotiated without any analysis of the value of such claims, by conflicted professionals that turned a blind eye to such claims to enable the deal to finalize? **[Answer: Yes]**

(6) Does Bankruptcy Code Section 365(c)(2) prohibit post-petition "completion" of the Conditional Exchange of TPS Securities for WMI preferred stock that was not issued pre-petition and, today, does not exist? **[Answer: Yes]**

120. As explained herein, the law does not allow the Court to render a ruling in the Debtors' favor on all six of these issues and, therefore, the Plan is not confirmable. The TPS Consortium respectfully submits that, to confirm this Plan, the Court would need to dramatically bend applicable legal principle or establish new ways of thinking about the law, and to ignore incontrovertible fact. Any such ruling would be highly controversial.

121. Under that circumstance, direct certification to the Third Court of Appeals pursuant to 28 U.S.C. § 158(d)(2) would be appropriate. Indeed, each of these issues: (i) is a matter for which there is no controlling precedent; (ii) involves a significant question of public policy; (iii) would, presuming an adverse ruling by the Court, produce severely conflicted case authority; and/or (iv) would be materially advanced by direct, immediate Circuit Court level ruling, rather than years of anticipated appellate proceedings.

122. Indeed, it seems appropriate at this juncture to pause, reset perspective, and take due notice of the fact that this is not just another run-of-the-mill large Chapter 11 case. This bankruptcy involves Washing Mutual, Inc. This company was at the epicenter of nation's recent macro-economic collapse. For very good reason, there was a deep-dive Senate investigation of this Company, culminating in a massive Senate Report (at tremendous expense to American taxpayers). This is a very important and closely-watched bankruptcy case. Should this Court

find it appropriate to confirm the Plan, parties-in-interest (including the many who oppose the Global Settlement and the Plan) are deserving of far better appellate process than the otherwise anticipated Jarndyce v. Jarndyce, with litigation obstruction backed by the largess of JPMorgan and the Settlement Noteholders. Moreover, the law would be advanced greatly by a Circuit-level decision, establishing precedent, on the very difficult issues now before this Court.

REMAINDER OF PAGE INTENTIONALLY BLANK

CONCLUSION

WHEREFORE, for all the foregoing reasons, the TPS Consortium respectfully asks this Court to: (1) sustain the Objections; (2) deny confirmation of the Plan; and (3) provide the TPS Consortium such other and further relief as is just and proper.

Dated: Wilmington, Delaware
August 10, 2011

Respectfully submitted,

CAMPBELL & LEVINE LLC

/s/ Kathleen Campbell Davis

Marla Rosoff Eskin, Esq. (DE 2989)
Bernard G. Conaway, Esq. (DE 2856)
Kathleen Campbell Davis, Esq. (DE 4229)
800 North King Street, Suite 300
Wilmington, DE 19809
(302) 426-1900
(302) 426-9947 (fax)

– and –

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Martin S. Siegel, Esq.
Seven Times Square
New York, NY 10036
(212) 209-4800
(212) 209-4801 (fax)

– and –

Jeremy B. Coffey, Esq.
Daniel J. Brown, Esq.
One Financial Center
Boston, MA 02111

Counsel for the TPS Consortium

EXHIBIT A

EXHIBIT 301-A

Supplemental List of Nominal Weekly Average
1-Year Constant Maturity Yield: The Federal Judgment Rate
For the Dates June 24, 2011 Through July 22, 2011

Date	FJR
6/24/2011	0.17
7/1/2011	0.19
7/8/2011	0.19
7/15/2011	0.16
7/22/2011	0.18

EXHIBIT 301-B

Waterfall Impact Applying Contract and Federal Judgment Rate ("FJR"): August 31, 2011 Emergence

Waterfall Impact Applying Contract and Federal Judgment Rates ("FJR"): August 31, 2011 Emergence

(Dollars in Millions)

Deficiency / Excess After Defined Claims

	Contract Rate				Federal Judgment Rate at Filing[a]				Federal Judgment Rate at 7/15/11[b]			
	Claim Amount[c]	Recovery Amount	Recovery Percent	Cumulative Net Distributable Assets [d]	Claim Amount [c]	Recover Amount	Recovery Percent	Cumulative Net Distributable Assets[d]	Claim Amount[c]	Recovery Amount	Recovery Percent	Cumulative Net Distributable Assets[d]
Senior Notes												
Pre-Petition	$4,132.0	$4,132.0	100.0%		$4,132.0	$1,432.0	100.0%		4,132.0	$4,132.0	100.0%	
Post-Petition	452.0	129.6	28.7%		241.0	183.4	76.1%		19.7	19.7	100.0%	
Total	$4,584.0	$4,261.6	93.0%	$2,762.0	$4,373.0	$4,315.4	98.7%	$2,973.0	$4,151.7	100.0%	100.0%	$3,194.3
Senior Subordinated Notes												
Pre-Petition	$1,666.0	$1,666.0	100.0%		$1,666.0	$1,666.0	100.0%		$1,666.0	$1,666.0	100.0%	
Post-Petition	341.0	97.8	28.7%		97.0	73.8	76.1%		7.9	7.9	100.0%	
Total	$2,007.0	$1,763.8	87.9%	$755.0	$1,763.0	$1,739.8	98.7%	$1,210.0	$1,673.9	$1,673.9	100.0%	$1,520.4
General Unsecured Claims												
Pre-Petition	$375.0	$375.0	100.0%		$375.0	$375.0	100.0%		$375.0	$375.0	100.0%	
Post-Petition	82.0	23.5	28.7%		22.0	16.7	76.1%		1.8	1.8	100.0%	
Total	$457.0	$398.5	87.2%	$298.0	$397.0	$391.7	98.7%	$813.0	$376.8	$376.8	100.0%	$1,143.6
CCB Guarantees												
Pre-Petition	$70.0	$70.0	100.0%		$70.0	$70.0	100.0%		$70.0	$70.0	100.0%	
Post-Petition	10.0	2.9	28.7%		4.0	3.0	76.1%		0.3	0.3	100.0%	
Total	$80.0	$72.9	91.1%	$218.0	$74.0	$73.0	98.7%	$739.0	$70.3	$70.3	100.0%	$1,073.3
PIERS	$789.0	$789.0	100.0%		$789.0	$789.0	100.0%		$789.0	$789.0	100.0%	
Pre-Petition	210.0	60.2	28.7%		46.0	35.0	76.1%		3.8	3.8	100.0%	
Post-Petition	$999.0	$849.2	85.0%	($781.0)	$835.0	$824.0	98.7%	($96.0)	$792.8	$792.9	100.0%	$280.5
Total												

(a) Federal Judgment Rate, as determined by the Weekly Average 1-Year Constant Maturity Treasury, was 1.95% on September 26, 2008. Calculation reflects daily compounding from September 26, 2008 through August 31, 2011 (1,069 days).

(b) Federal Judgment Rate, as determined by the Weekly Average 1-Year Constant Maturity Treasury, was 0.16% on July 15, 2011. Calculation reflects daily compounding from September 26, 2008 through August 31, 2011 (1,069 days).

(c) Claim amounts per Goulding Declaration dated July 8, 2011.

(d) Net Proceeds amount to $7,346.0 mm; Cumulative Net Distributable Assets are net of Pre- and Post-Petition Claim Amounts. Other Subordinated Claims that could arise from the outcome of various litigation, but for which no estimate has been included in the July 6, 2011 Updated Liquidation Analysis, are <u>excluded</u> from this analysis. Brackets indicate a deficiency.

EXHIBIT B

CORPORATE WASTE, MISMANAGEMENT,
AND BREACHES OF FIDUCIARY DUTY

- "The first chapter focuses on how high risk mortgage lending contributed to the financial crisis, using as a case study Washington Mutual Bank (WaMu). . . . This case study focuses on how one bank's search for increased growth and profit led to the origination and securitization of hundreds of billions of dollars in high risk, poor quality mortgages that ultimately plummeted in value, hurting investors, the bank, and the U.S. financial system. WaMu had held itself out as a prudent lender, but in reality, the bank turned increasingly to higher risk loans. Over a four-year period, those higher risk loans grew from 19% of WaMu's loan originations in 2003, to 55% in 2006, while its lower risk, fixed rate loans fell from 64% to 25% of its originations. At the same time, WaMu increased its securitization of subprime loans sixfold, primarily through its subprime lender, Long Beach Mortgage Corporation, increasing such loans from nearly $4.5 billion in 2003, to $29 billion in 2006. From 2000 to 2007, WaMu and Long Beach together securitized at least $77 billion in subprime loans." (Senate Report at 2-3)

- "In connection with the hearing, the Subcommittee released a joint memorandum from Chairman Carl Levin and Ranking Member Tom Coburn summarizing the investigation to date into Washington Mutual and the role of high risk home loans in the financial crisis. The memorandum contained the following findings of fact, which this Report reaffirms.

  1. **High Risk Lending Strategy.** Washington Mutual (WaMu) executives embarked upon a High Risk Lending Strategy and increased sales of high risk home loans to Wall Street, because they projected that high risk home loans, which generally charged higher rates of interest, would be more profitable for the bank than low risk home loans.

  2. **Shoddy Lending Practices.** WaMu and its affiliate, Long Beach Mortgage Company (Long Beach), used shoddy lending practices riddled with credit, compliance, and operational deficiencies to make tens of thousands of high risk home loans that too often contained excessive risk, fraudulent information, or errors.

  3. **Steering Borrowers to High Risk Loans.** WaMu and Long Beach too often steered borrowers into home loans they could not afford, allowing and encouraging them to make low initial payments that would be followed by much higher payments, and presumed that rising home prices would enable those borrowers to refinance their loans or sell their homes before the payments shot up.

  4. **Polluting the Financial System.** WaMu and Long Beach securitized over $77 billion in subprime home loans and billions more in other high risk home loans, used Wall Street firms to sell the securities to investors worldwide, and polluted the financial system with mortgage backed securities which later incurred high rates of delinquency and loss.

5. **Securitizing Delinquency-Prone and Fraudulent Loans.** At times, WaMu selected and securitized loans that it had identified as likely to go delinquent, without disclosing its analysis to investors who bought the securities, and also securitized loans tainted by fraudulent information, without notifying purchasers of the fraud that was discovered.

6. **Destructive Compensation.** WaMu's compensation system rewarded loan officers and loan processors for originating large volumes of high risk loans, paid extra to loan officers who overcharged borrowers or added stiff prepayment penalties, and gave executives millions of dollars even when their High Risk Lending Strategy placed the bank in financial jeopardy." (Senate Report at 50-51)

MANAGEMENT KNEW THAT IT WAS IMPOSING UNSUSTAINABLE RISK AND HARM ON THE COMPANY

- "For most of the five-year period reviewed by the Subcommittee, WaMu was led by its longtime Chairman of the Board and Chief Executive Officer (CEO) Kerry Killinger who joined the bank in 1982, became bank president in 1988, and was appointed CEO in 1990." Other "key" executives include: "President Steve Rotella who joined the bank in January 2005; Chief Financial Officer Tom Casey; President of the Home Loan Division David Schneider who joined the bank in July 2005; and General Counsel Faye Chapman. David Beck served as Executive Vice President in charge of the bank's Capital Markets Division, oversaw its securitization efforts, and reported to the head of Home Loans. Anthony Meola headed up the Home Loans Sales effort. Jim Vanasek was WaMu's Chief Credit Officer from 1999 until 2004, and was then appointed its Chief Risk Officer, a new position, from 2004-2005. After Mr. Vanasek's retirement, Ronald Cathcart took his place as Chief Risk Officer, and headed the bank's newly organized Enterprise Risk Management Division, serving in that post from 2005 to 2007." (Senate Report at 52)

- "In 2004, before WaMu implemented its High Risk Lending Strategy, the Chief Risk Officer Jim Vanasek, expressed internally concern about the unsustainable rise in housing prices, loosening lending standards, and the possible consequences. On September 2, 2004, just months before the formal presentation of the High Risk Lending Strategy to the Board of Directors, Mr. Vanasek circulated a prescient memorandum to WaMu's mortgage underwriting and appraisal staff, warning of a bubble in housing prices and encouraging tighter underwriting." (Senate Report at 65)

- "Mr. Vanasek was the senior-most risk officer at WaMu, and had frequent interactions with Mr. Killinger and the Board of Directors. While his concerns may have been heard, they were not heeded." (Senate Report at 66)

- "Mr. Vanasek told the Subcommittee that, because of his predictions of a collapse in the housing market, he earned the derisive nickname 'Dr. Doom.' But evidence of a housing

bubble was overwhelming by 2005. Over the prior ten years, housing prices had skyrocketed in an unprecedented fashion . . . ." (Senate Report at 66)

- "Despite Mr. Killinger's awareness that housing prices were unsustainable, could drop suddenly, and could make it difficult for borrowers to refinance or sell their homes, Mr. Killinger continued to push forward with WaMu's High Risk Lending Strategy." (Senate Report at 68)

- "In August 2007, more than a year before the collapse of the bank, WaMu's President Steve Rotella emailed CEO Kerry Killinger saying that, aside from Long Beach, WaMu's prime home loan business 'was the worst managed business I had seen in my career.'" (Senate Report at 86)

MANAGEMENT IGNORED AND AT TIMES EVEN REWARDED SHODDY LENDING PRACTICES AND LOAN FRAUD

- "Perhaps the clearest evidence of WaMu's shoddy lending practices came when senior management was informed of loans containing fraudulent information, but then did little to stop the fraud." (Senate Report at 95)

- **"Downey and Montebello Fraud Investigations.** The most significant example involves an internal WaMu investigation that, in 2005, uncovered substantial evidence of loan fraud involving two top producing loan offices in Southern California. WaMu management was presented with the findings, but failed to respond, leading to the same fraud allegations erupting again in 2007." (Senate Report at 96)

- "Despite the year-long effort put into the investigation, the written materials prepared, the meetings held, and the fraud rates in excess of 58% and 83% at the Downey and Montebello offices, no discernable actions were taken by WaMu management to address the fraud problem in those two offices. No one was fired or disciplined for routinely violating bank policy, no anti-fraud program was installed, no notice of the problem was sent to the bank's regulators, and no investors who purchased RMBS securities containing loans from those offices were alerted to the fraud problem underlying their high delinquency rates." (Senate Report at 98)

- "Over the next two years, the Downey and Montebello head loan officers . . . continued to issue high volumes of loans and continued to win awards for their loan productivity, including winning trips to Hawaii as members of WaMu's 'President's Club.' One of the loan officers even suggested to bank President Steve Rotella ways to further relax bank lending standards." (Senate Report at 98)

- "Questionable compensation practices did not stop in the loan offices, but went all the way to the top of the company. WaMu's CEO received millions of dollars in pay, even when his high risk loan strategy began unraveling, even when the bank began to falter, and even when he was asked to leave his post. From 2003 to 2007, Mr. Killinger was

paid between $11 million and $20 million each year in cash, stock, and stock options. In addition, WaMu provided him with four retirement plans, a deferred bonus plan, and a separate deferred compensation plan. In 2008, when he was asked to leave the bank, Mr. Killinger was paid $25 million, including $15 million in severance pay." (Senate Report at 153)

- "In February 2008, the Human Resources Committee approved a bonus plan for executive officers that tried to shield the executive bonuses from any impact caused by WaMu's mounting mortgage losses. . . . WaMu filed its executive compensation plan with the SEC, as required. The exclusion of mortgage related losses and expenses in the plan attracted notice from shareholders and the press. . . . Mr. Killinger sought to respond to the controversy in a way that would placate investors without alienating executives. His solution was to eliminate bonuses for the top five executives, and make cash payments to the other executives, without making that fact public. . . . In other words, WaMu would announce publicly that none of the Executive Committee members would receive bonuses in 2008, while quietly paying 'retention grants' rather than 'bonuses' to the next tier of executives. . . . There would be no disclosure of the retention cash payments." (Senate Report at 154)

WAMU'S PRE-PETITION STOCK PRICE (SUGGESTING SOLVENCY) WAS BASED ON MARKET MISINFORMATION

"At the April 16, 2010 hearing of the Subcommittee, Senator Coburn had the following exchange with Inspectors General Thorson and Rymer, which explains in part why OTS failed as regulator to address WaMu's harmful lending policies:

> Senator Coburn: As I sat here and listened to both the opening statement of the Chairman and to your statements, I come to the conclusion that actually investors would have been better off had there been no OTS because, in essence, the investors could not get behind the scene to see what was essentially misled by OTS because they had faith the regulators were not finding any problems, when, in fact, the record shows there are tons of problems, just there was no action taken on it. . . . I mean, we had people continually investing in this business on the basis – as a matter of fact, they raised an additional $7 billion before they collapsed, on the basis that OTS said everything was fine, when, in fact, OTS knew everything was not fine and was not getting it changed. Would you agree with that statement or not?
>
> Mr. Thorson: Yes, sir. I think . . . basically assigning a 'satisfactory' rating when conditions are not is contradictory to the very purpose for which regulators use a rating system. I think that is what you are saying.
>
> Senator Coburn: Any comments on that Mr. Rymer?
>
> Mr. Rymer: I would agree with Mr. Thorson . . . ." (Senate Report at 208)

MANAGEMENT'S WHEREWITHAL TO
SATISFY JUDGMENTS ON ESTATE CLAIMS
(IN ADDITION TO D&O INSURANCE)

- "Altogether, from 2003 to 2008, Washington Mutual paid Mr. Killinger nearly $100 million, on top of multi-million-dollar corporate retirement benefits." (Senate Report at 153)

TARGETS FOR AIDING AND
ABETTING LIABILITY: INVESTMENT BANKS

A. General Findings

- "Another group of financial institutions active in the mortgage market were securities firms, including investment banks, broker-dealers, and investment advisors. These security firms did not originate home loans, but typically helped design, underwrite, market, or trade securities linked to residential mortgages, including RMBS and CDO securities that were at the heart of the financial crisis. Key firms included Bear Stearns, Goldman Sachs, Lehman Brothers, Merrill Lynch, Morgan Stanley, and the asset management arms of large banks, including Citigroup, Deutsche Bank, and JPMorgan Chase." (Senate Report at 38)

- "Investment banks were a major driving force behind the structured finance products that provided a steady stream of funding for lenders to originate high risk, poor quality loans and that magnified risk throughout the U.S. financial system. The investment banks that engineered, sold, traded, and profited from mortgage related structured finance products were a major cause of the financial crisis." (Senate Report at 320)

- "If an investment bank agrees to act as an 'underwriter' for the issuance of a new security to the public, such as an RMBS, it typically purchases the securities from the issuer, holds them on its books, conducts the public offering, and bears the financial risk until the securities are sold to the public. . . . Underwriters help issuers prepare and file the registration statements filed with the SEC, which explain to potential investors the purpose of a proposed public offering, the issuer's operations and management, key financial data, and other important facts. . . . If a security is not offered to the general public, it can still be offered to investors through a 'private placement.' Investment banks often act as the 'placement agent,' performing intermediary services between those seeking to raise money and investors. Placement agents often help issuers design the securities, produce the offering materials, and market the new securities to investors. . . . Whether acting as an underwriter or placement agent, a major part of the investment bank's responsibility is to solicit customers to buy the new securities being offered. Under the securities laws, investment banks that act as an underwriter or placement agent for new securities are liable for any material misrepresentation or omission of a material

fact made in connection with a solicitation or sale of those securities to investors." (Senate Report at 322-23)

- "Broker-dealers also have affirmative disclosure obligations to their clients. With respect to the duties of a broker-dealer, the SEC has held: '[W]hen a securities dealer recommends a stock to a customer, it is not only obligated to avoid affirmative misstatements, but also must disclose material adverse facts to which it is aware. That includes disclosure of 'adverse interests' such as 'economic self-interest' that could have influenced its recommendation.'" (Senate Report at 324, quoting In the Matter of Richmark Capital Corporation, Securities Exchange Act Rel. No. 48758 (Nov. 7, 2003))

- "Investment banks that designed, obtained credit ratings for, underwrote, sold, managed, and serviced CDO securities, made money from the fees they charged for these and other services. Investment banks reportedly netted from $5 to $10 million in fees per CDO. Some also constructed CDOs to transfer the financial risk of poorly performing RMBS and CDO securities from their own holdings to the investors they were soliciting to buy the CDO securities. By selling the CDO securities to investors, the investment banks profited not only from the CDO sales, but also eliminated possible losses from the assets removed from their warehouse accounts. In some instances, unbeknownst to the customers and investors, the investment banks that sold them CDO securities bet against those instruments by taking short positions through single name CDS contracts. Some even took the short side of the CDO they constructed, and profited when the referenced assets lost value, and the investors to whom they had sold the long side of the CDO were required to make substantial payments to the CDO." (Senate Report at 328-29)

- "From 2000 to 2007, Washing Mutual and Long Beach securitized at least $77 billion in subprime and home equity loans. WaMu also sold or securitized at least $115 billion in Option ARM loans. Between 2000 and 2008, Washington Mutual sold over $500 billion in loans to Fannie Mae and Freddie Mac, accounting for more than a quarter of every dollar in loans WaMu originated. . . . WaMu and Long Beach worked with a variety of investment banks to arrange, underwrite, and sell its RMBS securitizations, including Bank of America, Credit Suisse, Deutsche Bank, Goldman Sachs, Lehman Brothers, Merrill Lynch, Royal Bank of Scotland, and UBS." (Senate Report at 116-118)

B. Goldman Sachs

- "From 2004 to 2008, Goldman was a major player in the U.S. mortgage market. In 2006 and 2007 alone, it designed and underwrote 93 RMBS and 27 mortgage related CDO securitizations totaling about $100 billion, bought and sold RMBS and CDO securities on behalf of its clients, and amassed its own multi-billion-dollar proprietary mortgage related holdings." (Senate Report at 8-9)

- "WaMu, Long Beach, and Goldman had collaborated on at least $14 billion in loan sales and securitizations. In February 2006, Long Beach had a $2 billion warehouse account with Goldman, which was the largest of Goldman's warehouse accounts at that time." (Senate Report at 513)

- "Long Beach was known within the industry for originating some of the worst performing subprime mortgages in the country. . . . Nevertheless, in May 2006, Goldman acted as co-lead underwriter with WaMu to securitize about $532 million in subprime second lien mortgages originated by Long Beach." (Senate Report at 513-14)

- "The evidence discloses troubling and sometimes abusive practices which show, first, that Goldman knowingly sold high risk, poor quality mortgage products to clients around the world, saturating financial markets with complex, financially engineered instruments that magnified risk and losses when their underlying assets began to fail. Second, it shows multiple conflicts of interest surrounding Goldman's securitization activities, including its use of CDOs to transfer billions of dollars of risk to investors, assist a favored client making a $1 billion gain at the expense of other clients, and produce its own proprietary gains at the expense of the clients to whom Goldman sold its CDO securities." (Senate Report at 476)

- "Under Goldman's sales policies and procedures, an affirmative action by Goldman personnel to sell a specific investment to a specific customer constituted a recommendation of that investment." (Senate Report at 476)

- "In 2006 and 2007, when selling subprime CDO securities to customers, Goldman did not always disclose that the securities contained or referenced assets Goldman believed would perform poorly, and that the securities themselves were rapidly losing value. Goldman also did not disclose that the firm had built a large net short position betting that CDO and RMBS securities similar to the ones it was selling would lose value." (Senate Report at 476)

- "Throughout 2007, Goldman twice built up and cashed in sizeable mortgage related short positions. At its peak, Goldman's net short position totaled $13.9 billion. Overall in 2007, its net short position produced record profits totaling $3.7 billion for Goldman's Structured Products Group, which when combined with other mortgage losses, produced record net revenues of $1.1 billion for the Mortgage Department as a whole. Throughout 2007, Goldman sold RMBS and CDO securities to its clients without disclosing its own net short position against the subprime market or its purchase of CDS contracts to gain from the loss in value of some of the very securities it was selling to its clients." (Senate Report at 9)

C. Deutsche Bank

- "Both Goldman Sachs and Deutsche Bank underwrote securities using loans from subprime lenders known for issuing high risk, poor quality mortgages, and sold risky securities to investors across the United States and around the world. They also enabled the lenders to acquire new funds to originate still more high risk, poor quality loans. Both sold CDO securities without full disclosure of the negative views of some of their employees regarding the underlying assets and, in the case of Goldman, without full disclosure that it was shorting the very CDO securities it was marketing, raising questions about whether Goldman complied with its obligation to issue suitable investment recommendations and disclose material adverse interests. The case studies also illustrate how these two investment banks continued to market new CDOs in 2007, even as U.S. mortgage delinquencies intensified, RMBS securities lost value, the U.S. mortgage market as a whole deteriorated, and investors lost confidence. Both kept producing and selling high risk, poor quality structured finance products in a negative market, in part because stopping the 'CDO machine' would have meant less income for structured finance units, smaller executive bonuses, and even the disappearance of CDO desks and personnel, which is what finally happened." (Senate Report at 11)

- "In the face of a deteriorating market, Deutsche Bank aggressively sold a $1.1 billion CDO, Gemstone 7, which included RMBS securities that the bank's top CDO trader had disparaged as 'crap' and 'pigs,' and which produced $1.1 billion of high risk, poor quality securities that are now virtually worthless." (Senate Report at 333)

- "A substantial portion of the cash and synthetic assets included in Gemstone 7, 30% in all, involved subprime residential mortgages issued by three subprime lenders, Long Beach, Fremont, and New Century, all known for issuing poor quality loans and securities." (Senate Report at 358)

- "Email [from Deutsche Bank's top CDO trader] responding to a hedge fund trader at Mast Capital: 'Long Beach is one of the weakest names in the market.'" (Senate Report at 339)

- "On another occasion in March 2007, a Moody's analyst emailed a colleague about problems she was having with someone at Deutsche Bank after Moody's suggested adjustments to the deal: '[The Deutsche Bank investment banker] is pushing back dearly saying that the deal has been marketed already and that we cam back 'too late' with this discovery. . . . She claims it's hard for them to change the structure at this point.'" (Senate Report at 280)

TARGETS FOR AIDING AND
ABETTING LIABILITY: RATINGS AGENCIES

- "Between 2004 and 2007, Moody's and S&P issued credit ratings for tens of thousands of U.S. residential mortgage backed securities (RMBS) and collateralized debt obligations (CDO). Taking in increasing revenue from Wall Street firms, Moody's and S&P issued AAA and other investment grade credit ratings for the vast majority of those RMBS and CDO securities, deeming them safe investments even though many relied on high risk home loans. In late 2006, high risks mortgages began incurring delinquencies and defaults at an alarming rate. Despite signs of a deteriorating mortgage market, Moody's and S&P continued for six months to issue investment grade ratings for numerous RMBS and CDO securities." (Senate Report at 6)

- "Traditionally, investments holding AAA ratings have had a less than 1% probability of incurring defaults. But in 2007, the vast majority of RMBS and CDO securities with AAA ratings incurred substantial losses; some failed outright. Analysts have determined that over 90% of the AAA ratings given to subprime RMBS securities originated in 2006 and 2007 were later downgraded by the credit rating agencies to junk status. In the case of Long Beach, 75 out of 75 AAA rated Long Beach securities issued in 2006, were later downgraded to junk status, defaulted, or withdrawn." (Senate Report at 6)

- "Inaccurate AAA ratings introduced risk into the U.S. financial system and constituted a key cause of the financial crisis. In addition, the July mass downgrades, which were unprecedented in number and scope, precipitated the collapse of the RMBS and CDO secondary markets, and perhaps more than any other single event triggered the beginning of the financial crisis." (Senate Report at 6)

- "Evidence gathered by the Subcommittee shows that the credit rating agencies were aware of problems in the mortgage market, including an unsustainable rise in housing prices, the high risk nature of the loans being issued, lax lending standards, and rampant mortgage fraud. Instead of using this information to temper their ratings, the firms continued to issue a high volume of investment grade ratings for mortgage backed securities." (Senate Report at 7)

- "It is not surprising that credit rating agencies at times gave into pressure from investment banks and accorded them undue influence in the ratings process. . . . Ratings shopping inevitably weakens standards as each credit rating agency seeks to provide the most favorable rating to win business. It is a conflict of interest that results in a race to the bottom . . . ." (Senate Report at 287)

- "Internal Moody's and S&P emails further demonstrate that senior management and ratings personnel were aware of the deteriorating mortgage market and increasing credit risk. In June 2005, for example, an outside mortgage broker who had seen the head of S&P's RMBS Group, Susan Barnes, on a television program sent her an email warning

about the ‘seeds of destruction’ in the financial markets. He noted that no one at the time seemed interested in fixing the looming problem:

> ‘I have contacted the OTS, FDIC and others and my concerns are not addressed. I have been a mortgage broker for the past 13 years and I have never seen such a lack of attention to loan risk. I am confident our present housing bubble is not from supply and demand of housing, but from money supply. In my professional opinion the biggest perpetrator is Washington Mutual. 1) No income documentation loans. 2) Option ARMS (negative amortization) . . . 5) 100% financing loans. I have seen instances where WAMU approved buyers for purchase loans; where the fully indexed interest only payments represented 100% of borrower’s gross monthly income. We need to stop this madness!!!’” (Senate Report at 269)

TARGETS FOR AIDING AND
ABETTING LIABILITY: OUTSIDE APPRAISERS

- “On November 1, 2007, the New York Attorney General issued a complaint against WaMu’s appraisal vendors, LSI and eAppraiseIT, alleging fraud and collusion with WaMu to systematically inflate real estate values.” (Senate Report at 189)

- “The OTS investigation uncovered many instances of improper appraisals. After reviewing 225 loan files, the OTS appraisal expert found that ‘[n]umerous instances were identified where, because of undue influence on the [outside] appraiser, values were increased without supporting documentation.’ OTS also found that WaMu had violated the agency’s appraisal regulations by failing to comply with appraisal independence procedures after they outsourced the function. The OTS investigation concluded that WaMu’s appraisal practices constituted ‘unsafe or unsound banking practices.’ The OTS investigation also concluded that WaMu was not in compliance with the Uniform Standards of Professional Appraisal Practice and other minimum appraisal standards.” (Senate Report at 190)

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

CERTIFICATE OF SERVICE

I, Mark T. Hurford, of Campbell & Levine, LLC, hereby certify that on February 7, 2012, I caused a copy of the foregoing ***Objection of the Consortium of Trust Preferred Security Holders to Confirmation of Debtors' Plan of Liquidation*** to be served upon the attached service list via First Class Mail.

Dated: February 7, 2012

/s/ Mark T. Hurford
Mark T. Hurford, Esquire (No. 3229)

In re: Washington Mutual, Inc., et al
08-12229
Objection/Response Service List

Charles Edward Smith, Esq.
Washington Mutual, Inc.
1201 Third Avenue, Suite 3000
Seattle, Washington 98101

VIA HAND DELIVERY

Jane Leamy, Esquire
Office of the U.S. Trustee for the District of Delaware
844 King Street, Suite 2207, Lockbox 35
Wilmington, Delaware 19899-0035

Brian Rosen, Esquire
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

VIA HAND DELIVERY

Mark David Collins, Esquire
Richards, Layton & Finger, PA
One Rodney Square
920 N. King Street
Wilmington, DE 19801

Peter Calamari, Esquire
Quinn Emanuel Urquhart & Sullivan, LLP
55 Madison Avenue, 22nd Floor
New York, NY 10010

VIA HAND DELIVERY

Neil R. Lapinski, Esquire
Elliott Greenleaf
1105 Market Street, Suite 1700
Wilmington, Delaware 19801

Fred S. Hodara, Esquire
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036-6745

VIA HAND DELIVRY

David B. Stratton, Esquire
Pepper Hamilton LLP
1313 N. Market Street, Suite 5100
P.O. Box 1709
Wilmington, DE 19899-1709

Edgar G. Sargent, Esquire
Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle, Washington 98101

VIA HAND DELIVERY

William P. Bowden, Esquire
Ashby & Geddes, P.A.
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899

Robert A. Sacks, Esquire
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

VIA HAND DELIVERY

Adam G. Landis, Esquire
Landis Rath & Cobb LLP
919 Market Street, Suite 1800
P.O. Box 2087
Wilmington, DE 19899

Thomas R. Califano, Esq.
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, NY 10020

VIA HAND DELIVERY

M. Blake Cleary, Esquire
Young Conaway Stargatt & Taylor, LLP
1000 West Street, 17th Floor
Wilmington, DE 19801