IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., et al., [1]	)	(Jointly Administered)
Debtors.	)	**Hearing Date: December 1, 2010 at 1:00 p.m. (ET)**

OFFICIAL COMMITTEE OF EQUITY SECURITIES HOLDERS OBJECTION TO PLAN CONFIRMATION

The Official Committee of Equity Securities Holders of Washington Mutual Inc. ("Equity Committee") through its undersigned counsel, submits its Objection (the "Objection") to confirmation of the Debtors' proposed Sixth Amended Joint Plan of Afilated Debtors pursuant to chapter 11 of the United States Bankruptcy Code, as supplemented and as may be further supplemented and/or amended (the "Plan"). In support of its Objection the Equity Committee respectfully states as follows.

ARGUMENT

I. THE PLAN SHOULD NOT BE CONFIRMED BECAUSE IT IS CONDITIONED UPON UNREASONABLY BROAD RELEASES THAT ARE IMPROPER UNDER THIRD CIRCUIT LAW.

The Plan proposes to compromise, settle and release certain valuable actual and potential claims and causes of action against various third parties by granting extremely broad releases to non-debtor parties, many of whom have provided no value under the Plan and are not parties to the Global Settlement Agreement. (*See* Report of the Examiner dated November 1, 2010 (the "Report") [Docket No. 5735] at 19).

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

More specifically, pursuant to the Plan, the Debtors generously propose to grant extremely broad releases of all claims they, or anyone claiming through them, could assert against all of the Released Parties[2] and each of their respective Related Persons[3] that are Released Claims or otherwise related in any way to the Debtors, the Affiliated Banks or any of their respective Related Persons as well as claims in connection with the Related Actions, subject to certain limited exceptions (the "Debtors' Release"). (Plan § 43.5). As discussed below, possibly with only limited exception, the Debtors' Release is not essential to a successful reorganization, has not been granted in exchange for a substantial contribution of assets to the reorganization and is not "overwhelmingly" supported by WMI equity holders who stand to receive zero (or at most one-percent) recovery under the Plan.

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2 "Released Parties" are defined in the Plan as "Collectively, 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).

3 "Related Persons" are defined in the Plan as "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, parents, 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).

Pursuant to the Modification of Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code filed on October 29, 2010 [Docket No. 5714], "Related Persons" for purposes of the Debtors' Release in Section 43.5 of the Plan "shall not include the Debtors' retained financial advisors, attorneys, accountants, investment bankers, consultants, agents, and professionals with respect ot Claims and Causes of Action relating to the period prior to the Petition Date, with any Claims and Causes of Action against such Entities assigned or otherwise transferred to the Liquidating Trust on the Effective Date." (Modified Plan § 6).

The Debtors also seek to strip away claims of third parties by seeking approval of broad non-consensual releases of claims third parties (and their respective Related Persons) may hold against other third parties (the "Third-Party Releases"). (Plan § 43.6). Under the Plan, all creditors and equity interest holders will be deemed to have released the Released Parties, which include the Debtors, JPMC, the FDIC and the Receivership, among others, and each of their respective Related Persons (including the Debtors' officers and directors) from any and all Released Claims[4] in connection with or related to, among others, any of the Debtors, the Reorganized Debtors, the Affiliated Banks, the assets to be received by JPMC under the Global Settlement Agreement, the JPMC Claims, the FDIC Claim and the Purchase and Assumption Agreement as well as any claim in connection with the Actions or the Texas Litigation, subject to certain limited exceptions. (Plan § 43.6). In fact, the Plan proposes to force expansive releases upon the holders of the Debtors' equity securities – including common (no recovery) and preferred (perhaps one-percent recovery) equity holders – regardless of whether they affirmatively opt out of the Third-Party Releases, and, to the extent that they do elect the opt-out option, proposes to withhold any distribution they otherwise would have received under the Plan.

[4] "Released Claims" are defined in the Plan, in relevant part, as: "Collectively, to the extent provided in the Global Settlement Agreement, (a) any and all WMI Released Claims, JPMC Released Claims, FDIC Released Claims,Settlemetn Note Released Claims and Creditors' Committee Released Claims, in eachcase to the extent provided and defined in the Global Settlement Agreement and (b) any and all Claims released or deemed to be released pursuant to the Plan, in eachcase pursuant to clauses (a) and (b) above, **to the extent any such Claims arise in, related to or have been or could have been asserted (i) in the Chapter 11 Cases, the Receivership or the Related Actions, (ii) that otherwise arise from or relate to any act, omission, event or circumstance relating to any WMI Entity, or any current or former subsidiary of any WMI Entity, or (iii) that otherwise arise from or related to the Receivership, the Purchase and Assumption Agreement, the Chapter 11 Cases, the 363 Sale and Settlement as defined in the Global Settlement Agreement, the Plan and the negotiations and compromises set forth in the Global [Settlement] Agreement and the Plan….**

(DS at 15; Plan § 43.6).[5] That is, despite a preferred equity holder's election to not grant the Third-Party Releases by checking the "opt out" box on its respective ballot, the Debtors will nevertheless seek to bind and enforce the Third-Party Releases against such holder. (DS at 15). And of course the death-trap is meaningless for the holders of common equity who receive no recovery in return for the releases imposed upon them whether they opt out or not. In sum, and to echo the words of the Examiner, "the Releases are unduly broad and inappropriate." (Report at 20).

To demonstrate the breadth of the releases that the Plan proposes to impose, both the Debtors' Release and the Third-Party Release propose to release the WMI Entities (including WMI, WMI Investment, Ahmanson Obligation Company, H.S. Loan Corporation, WAMU 1031 Exchange, WM Mortgage Reinsurance Company, Inc., WM Citation Holdings, LLC, WMI Rainer LLC, Washington Mutual Capital), WMB, each of the Debtors' estates (including WMI's estate and WMI Investment's estate), the Reorganized Debtors, the Creditors' Committee and each of its members in their capacity as members of the Creditors' Committee, the Trustees (including the Senior Notes Indenture Trustee, Senior Subordinated Notes Indenture Trustee, CCB-1 Trustee, CCB-2 Trustees, PIERS Trustee and Trust Preferred Trustees), the Liquidating Trust, the Liquidating Trustee (including William Kosturos), the JPMC Entities, the Settlement Note Holders (including the Appaloosa Parties, the Centerbridge Parties, the Owl Creek Parties and the Aurelius Parties), the FDIC Receiver and FDIC Corporate. (Plan §§ 1.73, 1.123, 1.160, 1.184, 1.204, 1.228, 43.5, 43.6). The startling scope of the releases is further amplified by the proposal to release each of the foregoing entities' respective Related Persons, which includes

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[5] The Plan also provides that those who elect to opt out of the releases and forego any distribution they may otherwise have received will nevertheless receive such distribution and be bound by the releases. (Plan § 43.6). However, because holders of WMI common equity will receive no recovery, the

"any Entity" and "present and former Affiliates" of any Entity, and extends to current and former officers, directors, financial advisors, attorneys, accountants, and investment bankers, among others.[6] (Plan §§ 1.158, 1.160); *see also* Report at 21 ("Reasonably interpreted, [the Plan releases] result[] in a waiver of all claims relating to WMI or WMB against any professional now or previously retained by WMI, WMB, JPMC, or the FDIC, be it a law firm, investment banker, underwriter, auditor, or otherwise. WMB's former officers and directors would also receive releases, and any potential malpractice claims against former attorneys, accountants, and auditors would be extinguished.")). Even though the Debtors' recent modification to the Plan proposes to exclude from the Debtors' Release certain of the Debtors' professionals with regard to prepetition claims, it still proposes to release present and former Affiliates and each of their current and former members, partners, equity holders, officers, directors, employees, managers, shareholders and partners. (Modification § 6). In any event, the limited exclusion embodied in the modification does not apply to claims released by the Third-Party Releases.

And the claims being released are equally broad. The Released Claims include any and all WMI Released Claims, JPMC Released Claims, FDIC Released Claims, Settlement Note Released Claims and Creditors' Committee Released Claims (as those terms are defined in the Global Settlement Agreement). (Plan §§ 1.159, 43.5, 43.6; *see also* GSA §§ 3.1, 3.2, 3.3, 3.4, 3.5). By way of example, these include claims related to any assets to be received by the releasees under the Global Settlement Agreement, the Plan Contribution Assets, the Debtors'

Debtors' imposed distribution mechanic cannot support the propriety of releases relating to WMI common equity holders.

[6] Pursuant to the Modification of Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code filed on October 29, 2010 [Docket No. 5714], the Debtors' Release does not propose to release certain of the Debtors' professionals with regard to prepetition claims. Notably, however, this limited exclusion, which applies only to the Debtors' Release, does not apply to claims released by the Third-Party Releases or otherwise limit the breadth of the releases in general. (Modified Plan § 6).

Claims, the JPMC Claims, the FDIC Claim, the Purchase and Assumption Agreement, the Intercompany Claims, the WMI Accounts, the Disputed Accounts, the creation of the Trust Preferred Securities, the financing associated therewith, the requested assignment of the Trust Preferred Securities by the OTS, the transfer and the asserted assignment of the Trust Preferred Securities subsequent thereto, the Chapter 11 Cases, the negotiation and confirmation of the Plan and Global Settlement Agreement as well as any intercompany claims on the books of WMI or WMB related to the WaMu Pension Plan and the Lakeview Plan and claims related to the Trust Preferred Securities. (GSA §§ 3.1, 3.2, 3.3, 3.4, 3.5). The Released Claims further include any and all claims released or deemed to be released pursuant to the Plan, claims that relate to any WMI Entity or any current or former subsidiary of any WMI Entity as well as claims that "relate to" the Receivership, the Purchase and Assumption Agreement, the Chapter 11 Cases, the 363 Sale and Settlement as defined in the Global Settlement Agreement, the Plan and the negotiations and compromises set forth in the Global Settlement Agreement and the Plan, with limited exceptions. (Plan § 1.159). On top of that, the releases also apply to any claim in connection with the WMI Action, the JPMC Action, the Turnover Action, the Record Requests, the Rule 2004 Inquiry, the Bankruptcy Stay Motions and the Texas Litigation. (Plan §§ 1.3, 1.157, 43.5, 43.6; *see also* GSA at 6, 14).

In short, the Plan proposes to impose upon the holders of the Debtors' equity security holders a release any derivative or direct claims any such holder might have against a host of non-Debtor entities and individuals, some of whom have not been at all involved in these cases, and in any event in return for no consideration, or next to no consideration.

It is the Debtors' burden to prove that the proposed releases are appropriate under the Bankruptcy Code and applicable Third Circuit law. *See In re Cont'l Airlines*, 203 F.3d 203, 214

(3d Cir. 2000); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 43 (Bankr. D. Del. 2000) (debtors did not meet their burden of establishing that the releases were appropriate). Presumably, the Debtors will attempt to make the requisite evidentiary showing at the confirmation hearing and will trumpet their claim that all of the releases are a condition to the Global Settlement Agreement, the approval of which is a condition to confirmation of the Plan. In short, the Debtors are presenting the Court with an ultimatum – approve the proposed releases (regardless of whether they are permissible under applicable law), or the Plan will fall apart. Even if the Debtors, JPMC and other parties to the Global Settlement Agreement are willing to follow through on their threat, applicable law dictates that the Debtors must still satisfy their evidentiary burden. For the following reasons, they cannot.

A. The Third-Party Releases Imposed Upon Holders of Claims and Equity Interests Are Impermissible Non-Consensual Third-Party Releases.

Section 43.6 of the Plan contains a draconian provision that proposes to release, among others, the Debtors, the Reorganized Debtors, the Creditors' Committee, JPMC, the Settlement Note Holders and the FDIC and each of their respective Related Persons from any and all claims a holder of a Claim or Equity Interest may have against such Released Parties. (Plan § 43.6; *see also id.* § 43.2(b)). Notably, assuming that the Plan is confirmed, the Third-Party Releases will be binding on all of the claimholders and equity interest holders regardless of whether they affirmatively vote to grant the releases. (Plan §§ 43.6, 43.10). These broad and sweeping releases – third-party releases that non-consenting releasors will be involuntarily forced to accept without consideration from the Released Parties – simply do not pass muster under applicable Third Circuit law.

Despite the absence of explicit authority in the Bankruptcy Code permitting the release of and permanent injunction against the pursuit of claims against non-debtors, the Third Circuit has stated that "there [may be] circumstances under which [it] might validate a non-consensual release that is both necessary and given in exchange for fair consideration." *In re Cont'l Airlines*, 203 F.3d at 214 & n.11; *see also* 11 U.S.C. § 524. And even though the Third Circuit ultimately declined to establish a "blanket rule" prohibiting all non-consensual releases of claims and permanent injunctions in favor of non-debtors, it articulated certain hallmarks of permissible non-consensual releases, including fairness, necessity to the reorganization and specific factual findings to support those conclusions. *In re Cont'l Airlines*, 203 F.3d at 214. The Third Circuit recognized that approval of such releases is the rare exception, rather than a general rule,, "non-consensual releases by a non-debtor of other non-debtor third parties are to be granted only in 'extraordinary cases.'" *Id.* at 212; *see In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2001) (denying approval of a settlement proposed in plan of reorganization that included **debtors'** releases of, among others, the debtors officers and directors for prepetition conduct where unsecured creditors who opposed the settlement were to receive only minimal recovery); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001)); *see also In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-42 (2d Cir. 2005) (holding that non-debtor releases are proper only in rare cases and may be "tolerated if the affected creditors consent"). Along those same lines, courts have warned against the exercise of "unfettered discretion to discharge non-debtors from liability," explaining that a "permanent injunction limiting the liability of non-debtor parties is 'a rare thing' that should not be considered absent 'a showing of exceptional circumstances.'" *In re Cont'l Airlines*, 203 F.3d at 213 n.9 (citations omitted); *see also In re Magn Entm't. Corp.*, Bankr. Case No. 09-10720 (MFW) (April 26, 2010, confirmation hearing transcript) at 112-13 ("But with respect to the third party releases, I, quite simply, don't think I have any authority to grant them for the third parties. The third parties, to the extent they have any claim against any party in this case, I just don't have jurisdiction over that.....I think you need to get afffirmative consent of the creditor")..

To be sure, this is not an extraordinary case presenting exceptional circumstances that would justify validation of non-consensual Third-Party Releases. They are neither necessary to the Debtors' reorganization nor given in exchange for fair (indeed, any) consideration. "The question of necessity requires demonstration that the success of the debtors' reorganization bears a relationship to the release of the non-consensual parties, and that the releasees have provided a critical financial contribution to the debtors' plan that is necessary to make the plan feasible in exchange for receiving a release of liability." *In re Genesis Health Ventures, Inc.*, 266 B.R. at 607. Here, the Debtors merely state that "the Plan and Global Settlement Agreement are conditioned upon the Releases, and, as such, the Releases are essential for the successful reorganization of the Debtors." (DS at 15). The threat that the Global Settlement will collapse is simply insufficient to impose sweeping releases upon parties-in-interest who were not invited to participate in the negotiations of the Global Settlement, are not party to the Global Settlement, and are getting nothing, or next to it, under the Plan based upon the Global Settlement. *See, e.g., Exide,* 303 B.R. at 68-75.

It is illogical to condition the success of the Debtors' reorganization (i.e. emergence), which, according to the Debtors, hinges on Court approval of the Global Settlement Agreement, upon the release of Released Parties who are not parties to the Global Settlement Agreement as the Debtors seek to do in the Plan. (*See* Report at 19 (noting that many non-debtor parties receiving releases are not parties to the Global Settlement Agreement)).

By way of example, under Section 12.1 of the Purchase and Assumption Agreement, the FDIC agreed to indemnify JPMC for, among other things, claims asserted by shareholders on behalf of WMI arising from the agreement in an amount up to $500 million. (Purchase and Assumption Agreement § 12.1(a)(9)). The Plan, however, proposes to release these potential shareholder claims against JPMC for no consideration, even though the FDIC (not JPMC) is responsible for satisfying the first $500 million. So in addition to the non-consensual release of these claims against JPMC in return for nothing, the FDIC is relieved from its contractual obligation to non-debtor third-party JPMC.

In any event, the Plan is not a plan of "reorganization" at all. The reality is that the primary purpose of the Debtors' bankruptcy proceeding has been to determine ownership of, monetize and distribute the most valuable of the Debtors' assets, rather than reorganize the Debtors' business as a going concern. Undeniably, the Debtors will not be continuing in the business in which they were engaged prior to the Petition Date, but rather the Reorganized Debtors' operations are represented to be limited to a runoff of WMRRC over a ten year period:

> As of September 25, 2008, the Debtors were no longer able to accept new mortgage insurance business from the MI companies since new reinsured loans (WMB-originated or acquired loans) would no longer be affiliated with the Debtors. As a result, no additional or new business has been added to the Debtors' reinsurance captive since such date and *no new business is anticipated nor forecasted in the Projections*.

(DS at 146-47 (emphasis added)). The assets of the Reorganized Debtors will be limited to the equity interests in WMMRC and WMI Investment, and the cash received on account of the Rights Offering, discussed below. And, even if the Plan truly contemplated the Reorganized Debtors operating as a going concern (which it does not), in a last minute amendment, the Debtors revised the Plan to include an option referred to as the Retention/Sale Transaction, pursuant to which the Debtors have the option to sell "all or a portion of the equity interests in WMMRC or substantially all of the assets of WMMRC pursuant to one or more transactions." (Plan § 1.167). Thus, the Debtors have written out of the Plan any appearance of a real "reorganization." In fact, WMMRC is understood in the Plan as a liquidating trust (the lowest possible valuation) given that the Plan proposes to make available to the holders of Allowed PIERS Claims (which include the Settlement Note Holders the Rights Offering, under which shares of Additional Common Stock will be offered in return for a Subscription Price of $100 million, proceeds of which will presumably be used to acquire additional earning assets. It cannot credibly be argued that the Settlement Note Holders do not expect a credible return on their $100 million, Moreover, the interests of the Settlement Note Holders have been the subject of a specific request to the Internal Revenue Service by the Debtors for an expedited ruling related to WMI's substantial net unrealized built-in loss following the Effective Date substantiating the efforts of the Settlement Note Holders to potentially enhance their return.[7]

Similarly, the Debtors cannot establish that the Released Parties have provided any financial contribution, let alone a critical financial contribution, to the Plan in return for the non-consensual release of claims held by the holders of the Debtors' equity interests who receive nothing or next to it under the Plan. The Debtors only summarily state that the releases are "based on a critical financial contribution of the Released Parties . . . and necessary to make the Plan feasible." (DS at 15). And with respect to JPMC, the FDIC and the Settlement Note Holders, who appear to be the only Released Parties that arguably provide any financial contribution under the Plan, each are receiving at least as much (and likely significantly more) in terms of "value" from the estate than they are providing to the estate, none of which flows to the holders of common equity and next to nothing of which flows to the holders of preferred. The

[7] Addressed to the Internal Revenue Service by counsel to the Settlement Note Holders in a Pre-Submission Conference Memorandum of April 16, 2010, the formal request for expedited handling by the Debtors of May 7, 2010, acknowledges that "the requested rulings could have significant impact on decisions" leading to a Plan given the value to the estate of the subject tax losses.

FDIC stands to recover approximately $850 million; JPMC's recovery will be in the multiples of billions; and in return for a relatively modest investment, the Settlement Note Holders (who also hold a majority of the PIERS Claims) will obtain a majority equity interest in the Reorganized Debtors that will own, upon emergence, the Debtors' $5 billion net operating loss carryforward. (DS at 157). Finally, any supposed contribution provided by JPMC must be discounted by $500 million, which is the amount the FDIC has agreed to indemnify JPMC for claims asserted against JPMC related to the failure of WMB. (Purchase and Assumption Agreement § 12.1(a)(9)).

As to the fairness prong, the issue is whether the non-consenting claimants have been given reasonable consideration in exchange for the releases. *In re Genesis Health Ventures, Inc.*, 266 B.R. at 608. It is undisputed that they have not. By way of example, common equity interests, including holders of WMI common stock, receive absolutely nothing under the Plan, yet will be bound by the Third-Party Releases nonetheless.[8] *See In re Spansion, Inc.*, *In re Spansion, Inc.*, 426 B.R. 114, 145 (Bankr. D. Del. 2010) (proposed plan could not include non-consensual third-party releases that applied to all holders of claims or interests where the objecting parties were to receive nothing under the plan). Similarly, preferred equity interests will be bound by the Third-Party Releases despite receiving only minimal consideration, estimated by the Debtors to be between zero and one-percent of allowed claims. (DS at 33). And perhaps most troubling is the fact that holders of claims and preferred equity interests that are entitled to vote under the Plan will be bound by the Third-Party Releases notwithstanding their lack of consent thereto. (Plan §§ 43.6, 43.10). *See In re Coram Healthcare Corp.*, 315 B.R. at 337 (disallowing non-consensual third-party releases as part of plan of reorganization);

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[8] To the extent that certain release provisions purport to provide complete and total releases to the Released Parties as against the world, it goes without saying that these unidentified releasors have not consented and have not received adequate consideration. (*See* Report at 22 (citing Plan § 43.2(b) ("all Entities shall be precluded from asserting against any and each of the Released Parties . . . .")).

see also In re Exide Techs., 303 B.R. at 74 (holding that exculpation provision releasing third-party claims fails for lack of consideration because it binds creditors and equity holders who receive no distribution under the plan without their consent).[9] For instance, pursuant to Section 43.6 of the Plan, holders of claims and equity interests that choose to opt out of the releases nevertheless release all claims against the Debtors, the Reorganized Debtors, the Trustees, the Creditors' Committee and each of their Related Persons. (Plan § 43.6; *see also* Report at 22). And, although previously mentioned, it is worth reiterating that the Debtors admittedly "will seek at the Confirmation Hearing to bind and enforce the [full] Releases against any parties who opt out." (DS at 15; *see also* Report at 23). As noted by this Court, the release of third-party claims against non-debtor third parties "cannot be accomplished without the affirmative agreement of the creditor affected." *In re Zenith Elecs. Corp.*, 241 B.R. at 111. Accordingly, the Debtors' attempt to enforce the Third-Party Releases against certain claimants without their affirmative agreement – and even worse, against claimants that have expressly and affirmatively elected to not grant the releases – is clearly impermissible and contrary to applicable law.

In sum, if the Court were to confirm the Plan and grant the releases contained therein, it would foreclose recovery on potentially valuable claims and causes of action to the detriment of holders of the Debtors' equity securities without providing these parties with any, or at best inadequate, consideration. (Report at 19-20; *see also id.* at 23 ("Generally, the Examiner believes that no release should be given without consideration from the released party.")).

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9 Similarly, here, Section 43.8 of the Plan provides that the Released Parties and their Related Persons shall not have any liability to "any Entity" for "any act taken or omitted to be taken in connection with the Chapter 11 Cases," among other things. (Plan § 43.8). This exculpation provision necessarily provides the Releasing Parties with releases as against the world. (*See* Plan § 1.85). Therefore, because the exculpation provision binds claimants who will not receive any distribution under the Plan without their consent, it likewise fails for lack of consideration to these parties. *See In re Exide Techs.*, 303 B.R. at 74.

Accordingly, claimants receiving no or minimal consideration under the Plan should not be deemed to release third-party claims absent their express consent.

B. The Debtors' Release Is Too Broad, Inappropriate in This Case and Cannot Be Justified.

Relying on defined terms that themselves rely on generalities, the Debtors seek to release all possible claims held by them and the estates, and anyone claiming through them (such as derivative claims capable of assertion by the holders of equity securities) against all of the Released Parties or any of their respective Related Persons[10] that in any way relate to the Debtors, the Affiliated Banks or any of their respective Related Persons. (Plan § 43.5).

To justify the Debtors' Release, the Debtors must demonstrate:

> (1) an identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;
> (2) substantial contribution by the non-debtor of assets to the reorganization;
> (3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;
> (4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and
> (5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

In re Zenith Elecs. Corp., 241 B.R. 92, 110 (Bankr. D. Del. 1999) (citing *Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D.Mo. 1994)); *see also In re Spansion, Inc.*, 426 B.R. at 142-43 & n.47. The Debtors cannot meet their burden.

(i) The Debtors Cannot Demonstrate an Identity of Interest Between the Debtors and the Released Parties.

Among the Released Parties who are the beneficiaries of the Debtors' Release are the JPMC Entities, the Settlement Note Holders, the FDIC Receiver and FDIC Corporate and each of their respective Related Persons. (Plan § 1.160). . There has been no suggestion that any of these entities share an identity of interest with the Debtors such that assertion of a claim against any of these entities would result in depletion of assets of the Debtors' estate. For instance, the Debtors have not alleged the existence of indemnity obligations with respect to any of the Released Parties. *See In re Congoleum Corp.*, 362 B.R. 167, 192 (Bankr. D.N.J. 2007) (no identity of interest where the debtors were under no obligation to indemnify the released parties). Moreover, and as discussed *infra*, the Debtors are not reorganizing as a going concern, but, in reality, are liquidating. Thus, the Debtors and the Released Parties do not (and cannot) share a common goal of *reorganization*. *See In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (finding identity of interest where releasees and debtors "share common goal of achieving a reorganization of the Debtors"); *In re Zenith Elecs. Corp.*, 241 B.R. at 110 (certain releasees and debtor share an identity of interest "in seeing that the Plan succeed and the company reorganize"). Indeed, the Debtors have filed and litigated (to a limited extent) certain very sizeable claims against both JPMC and the FDIC. (*See* DS at 2-7). While assertion of new claims, or the continued prosecution of those claims already asserted, may result in the continued accrual of litigation expenses, those expenses are not of the type that justify releasing potential derivative claims with a value of potentially multi-billions of dollars.

(ii) **The Released Parties Have Not Made a Substantial Contribution to the Debtors' Estate to Justify the Debtors' Release.**

As set forth more fully above, the Debtors' officers and directors, among others, are within the wide range of Released Parties that the Debtors propose to release under the Plan. However, many of these Released Parties – individuals and entities that are not parties to the Global Settlement Agreement – have failed to provide a substantial contribution to the Debtors'

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[10] *See* supra, note 3.

estate in exchange for the releases. In fact, many of the Released Parties have provided absolutely no consideration to the Debtors' estate at all, and have certainly not provided any consideration to the holders of equity securities in return for the forced releases. For instance, the directors and officers of the Debtors have made absolutely no contribution to the estate pursuant to the Global Settlement Agreement or otherwise.

With regard to the Released Parties who are parties to the Global Settlement Agreement, undoubtedly, the Debtors will point to the millions of dollars of assets divvied up among the Debtors, JPMC and the FDIC under the Global Settlement Agreement as evidence to support the Debtors' Release. In fact, the Plan states at Section 43.2(b) that "in consideration for the value provided under the Global Settlement Agreement to effectuate the Plan, each holder of a Claim or Equity Interest in any Class under [the] Plan shall be and hereby is deemed to release and forever waive and discharge as against each and any of the Released Parties, and their respective assets, property and estates, all such Claims and Equity Interests." (Plan § 43.2(b)). Significantly, however, none of the parties to the Global Settlement is contributing anything to the holders of the Debtors' common securities, and next to nothing to holders of the Debtors' preferred securities. In fact, neither JPMC nor the FDIC is contributing assets to the Debtors' estates. As the Debtors' Disclosure Statement makes clear, both JPMC and the FDIC have asserted various claims of ownership of those assets as a result of the Purchase and Assumption Agreement (DS at 2-12) – neither JPMC nor the FDIC is voluntarily giving anything to the Debtors' estate (certainly not to the holders of equity interests) above and beyond what the parties have agreed among themselves is the appropriate distribution of assets. And with respect to those additional assets of WMI that JPMC is purchasing under the Plan (for example, WMI's 3.147 million Class B shares of Visa Inc. (Plan § 2.1(c))), JPMC will surely take the position that it is paying fair consideration in exchange for such assets. Indeed, even JPMC cannot dispute that it will receive far more from WMI than it will ever contribute to the Debtors' estate.[11]

With respect to the FDIC, under the Plan and the Global Settlement Agreement, the Debtors and the FDIC will exchange releases; however, the FDIC will also recover approximately $0.85 billion of the Tax Refund otherwise receivable by the Debtors' estate. (DS at 11). Thus, it appears more likely that the Debtors' estate is making a substantial contribution to the FDIC, rather than the FDIC making a substantial contribution to the Debtors' estate.

(iii) **The Debtors Have Made No Showing That the Debtors' Release Is Essential to the Plan.**

Nor can the Debtors demonstrate that the Debtors' Release is essential to the Plan. While the exchange of mutual releases among the parties to the Global Settlement Agreement is justifiable, there can be no justification for extending those releases to possible derivative claims held by parties-in-interest who do not share in the benefit of the Global Settlement Agreement or the Plan. Additionally, the FDIC has argued that any claims that could be asserted against it relating to WMI, which have not already been timely asserted, are now time barred. Thus, it is unclear why any release of the FDIC is necessary to consummation of the Plan.

(iv) **WMI Equity Holders Do Not Support Granting the Debtors' Release.**

WMI equity holders, as holders of derivative claims assertable through WMI, will be significantly prejudiced by the Debtors' Release. Holders of WMI common equity will receive nothing through the Plan and holders of WMI preferred equity will receive, at most, a one-percent recovery. For WMI equity holders, who have had multiples of billions stripped from

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[11] Soon after the acquisition, JPMC reported negative goodwill, indicating that JPMC paid well below book value of WMB. In his Chairman's Letter in the 2008 Annual Report, JPMC's CEO stated that the WMB acquisition would generate over $2 billion to 2009's results and increasing amounts annually, thereafter. JPMC was quoted later that spring that the WMB acquisition could result in a gain of $29.1

them and handed over to JPMC, the Debtors' Release is nothing more than the final slap in the face.

The Debtors cannot make the requisite showing, and this Court should not approve the Debtors' Release.

C. The Debtors' Attempt to Make Distributions Under the Plan Contingent on Acceptance of the Third-Party Releases Violates the Bankruptcy Code.

The correlation that the Plan purports to make between the opt-out election and receipt of distributions is likewise improper under the Bankruptcy Code. Pursuant to Section 43.6 of the Plan, entities that elect not to grant the Third-Party Releases by checking the "opt out" box on their respective ballots will not receive a distribution under the Plan. (Plan § 43.6). By that same token, entities that do elect to grant the Third-Party Releases will receive a distribution under the Plan (except, of course, for holders of equity interests who get nothing or the next best thing in either event). The treatment of and distribution to claimants choosing the opt-out option as compared to similarly situated claimants foregoing the opt-out option and thereby granting the Third-Party Releases violates the equal treatment mandate codified in Section 1123(a)(4) of the Bankruptcy Code. That provision guarantees that each claim or interest of a particular class will be treated equally regardless of how it voted on the proposed plan. 11 U.S.C. § 1123(a)(4). For instance, the fact that some members of the preferred class will receive distributions while other members of the same class will not, depending on whether they opt out or vote to grant the releases, is exactly the sort of unequal and disparate treatment that Section 1123(a)(4) is meant to prevent. Accordingly, the Court should not allow the Debtors to discriminate against entities that opt out of the releases, and prefer entities that grant the releases, in violation of statutory confirmation requirements. The Debtors' plan to force distributions upon those who opt out of

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billion over the life of WMB's loans. *.See* **Exhibit A**, Ari Levy and Elizabeth Hester, *JPMorgan's WaMu* the releases notwithstanding their election to forego a distribution in order to not grant the releases (*see* Plan § 43.6) is unavailing with respect to WMI common equity holders, who will not receive any recover under the Plan, and with respect to WMI preferred equity holders, who will receive a one-percent recovery at most.

D. Third Parties Should Not Be Enjoined From Seeking Discovery From the Released Parties.

The releases are accompanied by a parallel permanent injunction, pursuant to which third parties are prevented from commencing or continuing any proceeding of any kind with respect to claims against the Released Parties. (Plan at §§ 43.3, 43.7; Report at 21-22). Specifically, Section 43.3 of the Plan provides that all entities that hold claims or equity interests are permanently enjoined from commencing or continuing any action or proceeding of any kind against any of the Released Parties or enforcing any judgment against any of the Released Parties. (Plan § 43.3). Other injunction provisions in the Plan are even broader. For example, Section 43.7 applies to all entities that hold claims or equity interests and all other parties in interest, as well as the Related Persons of each, and Section 43.9 applies to "[e]ach and every Entity." (Plan §§ 43.7, 43.9). Arguably, and as noted by the Examiner, the injunction provisions would prevent a claimant from taking discovery from any of the Released Parties in aid of claims against non-released parties. (Report at 22 & n.30). The example given by the Examiner is spot on – the injunction provisions in the Plan would prevent a plaintiff from taking discovery of JPMC in connection with an antitrust claim against another bank for allegedly colluding with JPMC in connection with the acquisition of WMB. (Report 22 n.30). As a result, the injunction provisions embodied in the Plan are unreasonably broad and should be modified so as not to

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Windfall Turns Bad Loans Into Income, Bloomberg News, May 26, 2009.

preclude the prosecution of future litigation unrelated to this chapter 11 case against non-Released Parties.

E. The Debtors' Release Does Not (and Should Not) Preclude the Debtors From Asserting Antitrust and Similar Claims.

The releases in the Global Settlement Agreement only extend to the Debtors, JPMC, the FDIC, the Settlement Note Holders, the Creditors' Committee and certain of their respective related parties. (GSA § 3; *see also* Report at 265). Even though the Debtors' Release in the Plan, and the releases in the Global Settlement, preclude the Debtors from bringing claims (or shareholders from asserting derivative claims) against JPMC for allegedly conspiring to restrain bidding on WMI or WMB, the release provisions of either the Plan or the Global Settlement do not reach individuals and institutions that may have conspired with respect to the acquisition of WMB. As such, and assuming there is evidence of claims, the Debtors are permitted to bring bid-rigging or other antitrust claims against such individuals and entities. Moreover, settlement of all claims against JPMC pursuant to the Plan will not eliminate the estates' ability to pursue claims against co-conspirators for the entire amount of damages. (Report at 265 & n.1045).

The Equity Committee believes, as does the Examiner who noted in his Report, that the Debtors' Release embodied in the Plan and the release provisions in the Global Settlement will not preclude the Debtors from asserting antitrust claims against non-Released Parties that may have combined to restrain bidding on WMI.[12] The Plan should be revised to limit the scope and make clear that such claims are not within the scope of the Debtors' Release.

II. THE PLAN SHOULD NOT BE CONFIRMED BECAUSE IT IS PREDICATED ON A SETTLEMENT THAT HAS NOT BEEN SHOWN TO BE FAIR AND REASONABLE.

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[12] The Examiner noted in his Report that such entities may include Banco Santander, China Construction Bank, Wells Fargo, Citigroup, Blackstone Group, Carlyle Group and TD Bank. (Report at 265 & n.145).

It is no coincidence that the Global Settlement pays off all creditors virtually in full but leaves Equity holding an empty bag. Under the Global Settlement, preferred shareholders are just barely out of the money, and may well receive a minimal recovery even under the current Plan. This Plan does not satisfy Section 1129(a)(3) of the Bankruptcy Code because the Global Settlement on which the Plan is based does not satisfy Fed. R. Bank. P. 9019. *See In re Nutraquest, Inc.,* 434 F.3d 639, 644 (3rd Cir. 2006) (setting out criteria for approval of a settlement under Fed. R. Bank. P. 9019.) The Debtors failed to investigate the claims sufficiently to be able to value them for purposes of settlement, and instead were seduced by an early offer from JPMC that would provide a rich recovery for certain of the Debtors' creditors. Rather than curing the problem with a thorough investigation into the claims, the Examiner had insufficient time and relied on unsworn and self-serving statements from likely co-defendants as primary evidence. The fundamental work necessary to value these claims, and thus judge the reasonableness of the proposed settlement, has not yet been done. As a result, the Plan should not be confirmed.

A. The Debtors Must Offer Sufficient Evidence For The Court To Determine The Likelihood Of Success For All Settled Claims.

The Debtors' acknowledge that confirmation of this Plan turns on approval of the Global Settlement agreement. For this Court to approve the Global Settlement, the Debtors must demonstrate that it is "fair, reasonable, and in the best interest of the estate." *In re TSIC, Inc.*, 393 B.R. 71, 78 (Bankr. D. Del. 2008) (quoting *In re Louise's, Inc.*, 211 B.R. 798, 801 (D.Del. 1997). This standard requires that the Court consider "the fairness of the settlement to the other persons, i.e. the parties who did not settle." *Nutraquest*, 434 F.3d at 645.

In the Third Circuit, a court must consider four factors when determining the reasonableness of a settlement proposal: (1) the probability of success in the 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 interest of creditors. *In re Martin*, 91 F.3d 389, 393 (3rd Cir. 1996). The inquiry into the first factor, probability of success, does not require the Court to make final findings of fact or conclusions of law with respect to the claims, but does require that the Court have sufficient information to "canvass the issues to assess the risks associated with prosecuting the [claims]." *In re Cellular Information Systems, Inc.*, 171 B.R. 926, 950 (Bankr. S.D.N.Y. 1994); *see also In re Exide Technologies*, 303 B.R. 48, 68 (Bankr. D. Del. 2003) (first factor requires the Court to "canvass the issues.") Failure of the proponent to provide sufficient evidence for the Court to determine the likelihood of success justifies the Court's refusal to approve the settlement. *See, e.g., In re Spansion, Inc.*, 2009 WL 1531788 at *9 (Bankr. D. Del. June 2, 2009) (refusing to approve a settlement based on the "largely conclusory record with which I am presented to evaluate likelihood of success" because "there is not enough evidence before me to conclude whether the proposed settlement amount is within the 'range of reasonableness.'")

While the judgment of the debtor should be given some deference, the Court must make an independent determination and should not simply rubber stamp the debtor's proposal. *See In re Nat'l Health & Safety Corp.*, 2000 WL 968778, at *2 (Bankr. E.D. Pa. July 5, 2000); *In re Sidney Spielfogel*, 211 B.R. 133, 143 (Bankr. E.D.N.Y. 1997). Simply put, under Rule 9019, the Court has a duty to make an informed, independent judgment that the compromise is fair and equitable. *In re Key3Media Group, Inc.*, 336 B.R. 87, 92 (Bankr. D. Del. 2005). To be informed, the Court "must be apprised of all relevant information that will enable it to determine what course of action will be in the best interest of the estate." Id. That is, the Court's judgment must be based upon an "adequate factual record." *See Arkoosh Produce*, 2003 WL 25273746, at

*8 (Bankr. D. Idaho 2003); *In re Lion Capital Group*, 49 B.R. 163, 176, 189 (Bankr. S.D.N.Y. 1985) (requirement that record contains adequate information set forth in sufficient detail to enable approval of settlement).

The proponent bears the burden of persuasion that the proposed settlement is fair and equitable and in the best interest of the estate. *See Spansion*, 2009 WL 1531788, at *4; *Arkoosh Produce*, 2003 WL 25273746, at *8. In satisfying this burden, the debtor must provide sufficient information and enough detail for the Court to evaluate the settlement, including the legal and factual reasons therefore. *In re Warwick Lumber & Supply Co.*, 153 B.R. 12, 13 (Bankr. D.R.I. 1993); *see also Nat'l Health & Safety*, 2000 WL 968778, at *3 ("However, the void in the record as to Debtor's business and legal justifications for the settlement provides little basis for conducting even this limited evaluation."); *Arkoosh Produce*, 2003 WL 25273746, at *13 ("While the Court concludes the Trustee had sufficient information available to him to satisfy the minimum requirements of the business judgment rule, that is not to say the Trustee should not have been better informed, and should not have provided the Court with a much better record in this case."). To that end, mere conclusory or boilerplate language is not sufficient. *Warwick Lumber*, 153 B.R. at 13; *Spansion*, 2009 WL 1531788, at *9 (refusing to approve settlement where the record was largely conclusory and there was not enough evidence in the record before the court). Rather, a reviewing court must have some "basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." *Spansion*, 2009 WL 1531788, at *8 (quoting *Protective Comm. for Independent Stockholders of TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414, 434 (1968)).

B. The Debtors Have Not Completed An Investigation Into The Merits Of The Claims

The Debtors cannot meet their burden to prove the reasonableness of the Global Settlement because the decision was made to settle and dismiss, and in some cases simply abandon, claims potentially worth billions without fully investigating their merits or value. After months of representing to the Court that the estate had strong claims against JPMC and the FDIC, and gearing up for the substantial discovery efforts that proving these claims would require, the Debtors suddenly announced last March that they had agreed to settle all claims on terms that would provide no recovery whatsoever for the shareholders.

Discovery into many of the claims had only barely begun when the settlement was announced. Counsel for the Debtors performed preliminary analysis of the legal basis of some claims and obtained documents from a few interested parties, but no depositions had been taken, meet and confer negotiations regarding initial document productions had not been completed (and neither had the productions themselves), an early summary judgment motion on one of the Debtors' claims had yet to be resolved. Indeed, the Debtors' investigation into some of the claims—including the potentially gargantuan antitrust claims against JPMC and other banks—had not even progressed sufficiently for the Debtors to determine if the claim should be filed or abandoned.

The Debtors were prompted to settle prematurely by a carefully calibrated proposal from JPMC. The terms of this proposal were determined by a calculation of the amount necessary to satisfy creditors and make the case go away rather than by a reasonable analysis of the merits of the individual claims. JPMC bought peace, and avoided any real discovery into its misconduct, by offering settlement terms that appear likely to obtain overwhelming support from the creditors.

It is no coincidence that this complex set of claims and counter claims settled for an amount exactly at the line that will make nearly all creditors whole but will provide no shareholder recovery. The settling parties have made no secret of their belief that the tide of support for a settlement at this level will sweep this Plan to approval regardless of the details. The Debtors advocate for the settlement by insisting that this level of recovery by creditors is almost unprecedented. True or not, that representation is irrelevant—the reasonableness of the settlement is not based solely on the recovery it will provide to creditors, but must also consider an analysis of the likelihood of success for each of the individual claims. *See, e.g., In re Spansion, Inc.*, 2009 WL 1531788 at *9. As any litigator knows, JPMC's willingness to offer this amount at the very beginning of the case, before meaningful discovery has begun, suggests strongly that the merits of the claim may justify an even larger recovery.

The Court's ability to evaluate the likelihood of success is hampered by the Debtors' insistence on cloaking its own analysis of this issue under a claim of attorney-client privilege. As WMI Chief Restructuring Officer William Kosturos explained to the Examiner, the WMI board of directors made the decision to settle the litigation based on advice from the Debtors' law firm Quinn Emmanuel. Report at p. 345. Yet the Debtors have repeatedly represented to the Court that they will not waive the privilege and will not present any privileged information in support of their motions to approve the Settlement and Plan. *See* September 24, 2010 Transcript at 30 (attached here to as Exhibit B). The Court denied a motion to compel the Debtors to produce privileged material on the ground that the Debtors have stipulated that they will not rely on it for purposes of confirmation. *Id.*

C. Examiner's Limited Investigation Does Not Cure the Debtors' Deficiencies

1. The Time Allotted for the Examiner's Investigation Was Not Sufficient.

The Examiner's investigation does not cure the problems with the Debtors' premature settlement. Given an unrealistically short time frame to investigate such a broad range of complex claims, it is clear from the Examiner's report that he was forced to take shortcuts and rely on untested and unreliable evidence to reach his conclusions. He did not take a single sworn deposition. He was unable to interview a number of crucial witnesses and could not have fully digested the millions of pages of relevant documents.

The Equity Committee proposed a one-hundred and fifty day initial examination period, with an option for the Examiner to extend the time if he felt it was warranted. Instead the Examiner was given three months to produce his Report. Not surprisingly, the Report contains a number of serious flaws that seem to be traceable this abbreviated time frame. The Examiner's investigation addressed a series of complex legal claims, including anti-trust, business tort, and financial regulatory claims, in the even more complex and still-obscure factual context of the 2008 financial maelstrom. Just the core litigation claims that the Debtors have already filed and that have already been filed against the Debtors involve at least four primary parties, a much larger number of crucial third-party witnesses and potential defendants, and a host of novel legal issues. It was simply not possible for the Examiner to master this entire universe of information in the time he was given. Compounding the problem, time constraints apparently forced the Examiner to rely on unsworn and unverified statements from witnesses rather than depositions. At many of these interviews, counsel for the Debtors were present, even though the Equity Committee was not informed or given the opportunity to attend. At least one witness who offered opinions on which the Examiner relies was employed by JPMC and Debtors' counsel as a consultant, although this conflict of interest is not acknowledged by the Examiner.

2. *The Examiner Relied On Privileged Material That The Debtors Have Shielded From Discovery.*

As an initial matter, the Debtors should not be permitted to rely on the Examiner's report to establish the reasonableness of the Global Settlement because the Examiner reviewed and relied on evidence that the Debtors have withheld from other parties.[13] As mentioned above, the Debtors represented to the Court that they will not rely on privileged material in support of the Plan. Based on this representation the Debtors have refused to waive attorney-client privilege and make their attorneys' analysis of the plan and settlement available and subject to discovery.[14] However, the Examiner's report states that the Debtors provided "materials concerning their evaluations of legal claims" and "candidly shared their analyses of the strength of their legal positions." Report at 14. The Debtors' representatives confirmed at depositions taken in conjunction with Plan confirmation that they shared claims analysis material with the Examiner. Similarly, the Creditors Committee apparently provided the Examiner with access to privileged claims analysis documents generated by Committee counsel. But both the Debtors and the Creditors Committee have refused to permit their witnesses to testify about the contents of these communications on the basis of privilege.

The Court previously indicated in no uncertain terms that it would hold the Debtors to their representation that privileged material would not be used to support the Plan. [Exhibit B, September 24, 2010 hearing, at 30.] Yet, if the Debtors are permitted to rely on the Examiner's

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[13] The Report itself is hearsay and not admissible as evidence supporting the Plan. *Cf. In re Monus*, 1995 WL 469694 at *9 (Bankr. N.D. Ohio, May 18, 1995.); *In re Baldwin United Corp.* 46 B.R. 314, 316 (Bank. D..Ohio,1985)("While § 1106 requires the Examiner to file a 'statement' of his investigation, his findings do not have the binding effect on the Court or parties of those of a special master, arbitrator or magistrate; nor do they have the evidentiary character of an opinion by a Court expert appointed pursuant to Rule 706 of the Federal Rules of Evidence. ")

[14] The Debtors have produced some of their attorneys' work product related to the litigation to the Equity Committee. Those materials do not include privileged settlement analysis. Nor have they been produced to other parties in the bankruptcy.

conclusions to support the Global Settlement, that is precisely what they will be doing. By his own admission, the Examiner's investigation was shaped and focused by privileged material provided by the Debtors. Report at 14 n. 14. Particularly because the Examiner agreed to keep the contents of these analyses confidential, there is simply no way to distinguish portions of his report that were guided by undisclosed privileged documents from portions that were not. With no access to the privileged material the parties have no way to test the representations in that material through discovery or even to determine how it impacted the Examiner's conclusions. This back-door attempt to use privileged material while simultaneously shielding it from discovery should not be permitted and the Court should hold the Debtors to their agreement that they would rely solely on non-privileged information in support of the settlement and Plan.

At depositions taken the week of this filing, representatives of the Debtors have been instructed not to testify about the contents of their interviews with the Examiner, including the contents of non-privileged discussions with the Examiner. *See* Exhibit C, excerpts from deposition transcripts. These representatives were further instructed not even to reveal what topics they discussed with the Examiner, or what documents were reviewed, on the ground that this Court ordered the entire interviews confidential. The instruction was plainly incorrect: this Court did not cloak the witness interviews with a confidentiality protection, but simply ordered that the delivery of information to the Examiner did not waive otherwise confidential or privileged information. This instruction was also harmful: it precludes any meaningful review of the conclusions reached by the Examiner because the Equity Committee has no access to some of the crucial facts upon which the Examiner relied – the witness interviews. Further, refusing to disclose the contents of the witness interviews contradicts the primary purpose of the examination, which is to uncover and reveal to estate representatives all the facts relating to possible causes of actions. *See In re Carnegie Intern. Corp.*, 51 B.R. 252, 258 (Bkrtcy. Ind. 1984) ("Both under the Act and the Code everything uncovered by an examiner including facts reported to the court regarding possible causes of action, is to be made available to estate representatives.").

Moreover, in at least one instance, a witness interviewed by the Examiner was subject to potential bias from a conflict of interest that does not appear to have been disclosed. Peter Freilinger had been a Senior Vice President and Assistant Treasurer at Washington Mutual. The Examiner relied on statements made by Mr. Freilinger in an unsworn interview for much of his analysis of Washington Mutual's claimed liquidity crisis in the final days before seizure. Report at 67-68, 71 notes 239-241, 259. The Examiner quotes Mr. Freilinger as saying—contrary to the other Washington Mutual employees interviewed—that the OTS "did the right thing" in closing the bank. Report at 74. Counsel for the Equity Committee learned in a deposition of Mr. Freilinger that he was hired by JPMC following the acquisition and that he is currently employed as a consultant to Weil Gotshal, Debtors counsel. This conflict of interest was apparently not disclosed to the Examiner and, in any event, is not acknowledged in his report.

3. The Examiner Provides No Individual Assessment Of Key Claims.

The Examiner failed to segregate the claims and value them independently, instead lumping them together and opining that the settlement of the conglomerate appears reasonable. He identifies a number of strengths and weakness for tort and contract claims against JPMC, but does not provide any more concrete evaluation based on the details of each. Report at 230-245 (discussing potential claims for breach of contract, tortious interference, and trade libel.) In at least one important instance, the antitrust claims, the Examiner freely acknowledges that he lacks sufficient information to even be able to speculate as to the value of the claims. Report at 265.

Nevertheless, he concludes that the settlement of these antitrust claims in a package along with all of the other claims at issue appears reasonable.

Aggregating the claims in this fashion blurs the issues and converts the always imprecise exercise of valuing litigation claims into sheer guesswork. Neither the Debtors nor the Examiner make any effort to tie the amount of the settlement to a separate assessment of each of its component claims. By the same token, the Examiner fails to consider the significance of the correlation between the supposedly "reasonable" settlement amount and the amount necessary to provide full recovery to the creditors, a fact that strongly suggests that the settlement is *not* derived from any meaningful valuation of the litigation. Because the Examiner's conclusion is not based on a thorough assessment of each individual claim, it should be given little weight by the Court.

4. The Examiner Ignores Or Glosses Over Significant Claims.

The Examiner failed to consider significant claims brought by the Debtors. For example, the Debtors have an already pending claim against JPMC for infringement of intellectual property rights, including copyrights, patents, and trademarks. [redacted]

REDACTED

[redacted]

Yet the Examiner ignores this claim entirely in his Report, despite his mandate to investigate all potential assets of the Estate.

Similarly, the Examiner frankly acknowledges that he did not even attempt to determine whether the present and former Directors and Officers of WMI and WMB might be liable to the estate for mismanagement or other misconduct. Report at 348. He decided to omit this entire area from his investigation because he did not have sufficient time given "the magnitude of such an inquiry." *Id.* He made this decision despite the existence of an insurance policy for $500 million that would potentially cover these claims.

The Examiner's only analysis of these claims on the merits is a footnote suggesting that they may be barred by the doctrine of *in pari delicto*. Report at 348 n. 1347. Washington State law, however, takes a very restrictive view of the imputation doctrine necessary for an *in pari delicto* defense to apply. *See, e.g. Plywood Marketing Assoc. v. Astoria Plywood Corp.*, 558 P.2d 283, 290 (Wa. Ct. App. 1976) (holding that a manager's falsification of financial records with the intent of benefitting the entity would not be imputed to the entity because members of the entity's board were not aware of the misstatements.) The Examiner does not consider *Plywood Marketing* or any other case law relevant to these claims and seems to have dismissed them for reasons including *in pari delicto* without actually researching the controlling law.

5. *The Examiner's Analysis Relies On Unverified and Inherently Unreliable Evidence.*

In key areas, the Examiner's conclusions are based solely on unsworn interviews with witnesses who themselves face potential liability to the estate. This problem is most acute in the Examiner's consideration of the Debtor's antitrust claims against JPMC and a number of other banks. The gravamen of this claim is JPMC's collusion with the other banks to divide the market for troubled banks or their assets by agreeing that only one bank from the group would make a serious bid for each target. The Examiner's investigation into these claims appears to have consisted of contacting several of the potential co-conspirator banks and asking them, essentially, "Did you conspire with JPMC to restrict bidding for Washington Mutual?" It should have come as no surprise when the answer to that question (in an *unsworn* interview) was "No." Nevertheless, the Examiner takes these self-serving statements at face value.

For example, Banco Santander expressed an interest in using an acquisition of Washington Mutual as an entrée in to the United States market as early as March 2008. Santander contacted JPMC's investment banking division about representation for such an acquisition in March and was told that JPMC could not provide that service due to a conflict of interest, a clear signal that Washington Mutual had already been spoken for. Both JPMC and Santander acknowledge that very senior executives of the two banks, including JPMC CEO Jamie Dimon, met in June and discussed possible acquisition targets in the United States. Following the meeting, JPMC confirmed in writing that "Santander would not pursue any of these opportunities if [JPMC] were to do the same." When the FDIC contacted Santander about a potential acquisition of Washington Mutual in September, Santander indicated it would bid only if it received a government guarantee against losses, a promise which Santander knew the FDIC was not offering.

This plainly suspicious course of conduct was addressed by the Examiner in two unsworn interviews with senior Santander executives. Report at 248-255. Those executives made representations to the Examiner that he cites as evidence that no conspiracy existed. For example, the written confirmation of the June meeting was not "actually saying [Santander] would not pursue targets in the United States if JPMC was pursuing the same target," but was instead indicating that it would be "unlikely" to pursue such targets because of a competitive disadvantage. Report at 251. This explanation is inherently implausible. First of all, it is not consistent with the document itself which doesn't mention competitive advantage or say

Santander would be "unlikely" to bid, but instead makes an unequivocal representation that "Santander would not pursue any of these opportunities." Second, the suggestion that one competitor would volunteer to another that it believed it could not bid competitively is counter-intuitive. Why was it in Santander's interest to let JPMC know it had this kind of advantage? The Examiner provides no indication that he did anything to test this explanation beyond the interviews he conducted with the parties in question.

Similarly, Santander's claim that it determined in September that it would not bid for WMB without a guarantee against losses from the FDIC was verified by the Examiner through unsworn interviews. Report at 253-54. The Examiner cites only interviews for key facts such as Santander's "substantial concerns about WMI's assets", its management's willingness to take on the risk only with a guarantee, the content of discussions at a Santander board meeting addressing a possible WMB acquisition, and the course of negotiations with the FDIC. Report at 253-54. None of these representations were verified with documents or tested by deposing a witness under oath.

The Examiner's investigation into each of the other competitor banks suffers from precisely the same weakness. He states that no documents he reviewed evidenced communications with JPMC and, when asked, executives for each denied wrongdoing: "every witness for the respective companies stated that no improper communication occurred with other bidders." Report at 257. Particularly given that these were informal, unsworn interviews with executives facing antitrust liability that could potentially run into the billions of dollars, this evidence is thin indeed.

Unsworn interviews also serve as the sole support for the Examiner's frequently repeated finding that no bank other than JPMC was willing to acquire WMB assets without a government guarantee. In addition to Santander, the Examiner obtained oral representations to that effect from executives at Wells Fargo (Report at 257 n. 1011); Citigroup (Report at 239 n. 905); TD Bank (Report at 240 n. 915, interested only in an acquisition of certain assets); and the Blackstone Group (Report at 241 n. 917.) For some of these potential bidders, he cites to offers provided to the FDIC seeking government guarantees, but if the antitrust theory is correct these are the product of the conspiracy, not evidence that it did not exist. In discussing the FDIC's communication to JPMC of information about WMB's assets not available to other bidders, the Examiner goes so far as to accept apparently off-the-cuff comments from executives at the other banks that even the existence of an additional $6 billion in assets would not have been sufficient to eliminate their insistence on a government guarantee. Report at 322.

The finding that JPMC was the only bidder interested in acquiring WMB assets on terms acceptable to the FDIC receiver is crucial to the Examiner's conclusion not only that there was no antitrust conspiracy, but also to his determination that WMI suffered no damages as a result of torts JPMC may have committed during the process leading to the acquisition. *See, e.g.*, Report at 241, 322. The Examiner also downplays the viability of a potential claim against JPMC for tortious interference because "there is no evidence that JPMC was aware of, or communicated with, any of the other potential bidders on WMI." Report at 241. This statement ignores the acknowledged discussions with Banco Santander and, again, appears to be based only on interviews.

Conditions were ripe for antitrust conspiracy and similar business torts at the time WMB was seized and sold. There were not a large number of potential bidders and those that did exist had long-established business relationships that would have facilitated unlawful collusion, such as JPMC's representation of Santander. In such conditions, and in a transaction of such complexity with so much at stake, the unverified and unsworn interviews relied on by the Examiner are not sufficient to provide a reasonable assessment of the potential value of these claims.

6. *The FDIC Refused To Provide Discovery To The Examiner.*

In addition to the severe time constraints imposed on his investigation, the Examiner's efforts to obtain relevant material from the FDIC were met with a stone wall. This discovery is crucial to developing an accurate understanding of the events leading to the seizure and sale of WMB and thus to an informed judgment about the likelihood of success of the Debtors' claims.

In the Examiner's words, obtaining discovery from the FDIC was "slow and difficult." Report at 268. The FDIC refused to comply with document requests and threatened to move to quash any attempt to serve a formal subpoena. *Id.* The Examiner abandoned any attempt to obtain documents reflecting the FDIC's internal deliberations because he did not have sufficient time to challenge the FDIC's assertion of privilege with respect to these documents. *Id.* Documents ultimately obtained by the Examiner from the FDIC were mostly irrelevant or dealt exclusively with the settlement process. *Id.* at 269. The FDIC also refused to make important witnesses available for interviews, including Shelia Bair. *Id.* at 270. Of the five witnesses interviews requested by the Examiner, the FDIC only permitted two. *Id.* Time constraints were placed on those interviews and both witnesses lacked personal knowledge of key events. *Id.*

Despite these constraints on the investigation, evidence disclosed in this case, some of which is addressed by the Examiner and some of which is not, gives rise to legitimate suspicions about the nature of the FDIC's interactions with Washington Mutual and with JPMC in the period leading up to the seizure and sale:

- In late March 2008, FDIC Chair Shelia Bair contacted the OTS, which was the primary regulator of Washington Mutual, and insisted that OTS pressure WaMu to accept any acquisition offer it received. At deposition, Darrel Dochow, head of the OTS for the western states, admitted that he had never before heard of the FDIC applying that type of pressure on the OTS.

- At about the same time, JPMC made a presentation to the FDIC concerning its potential acquisition of Washington Mutual. JPMC failed to make the same information available to OTS despite OTS's role as primary regulator.

- JPMC met with the FDIC in mid July. Witnesses interviewed by the Examiner stated that they could not recall who attended the meeting or what was discussed. However, within a few weeks, JPMC began to run internal scenarios for acquisition of WMB through a receivership.

- JPMC CEO Jamie Dimon had a phone conference with FDIC Chair Shelia Bair on September 5th. Dimon told the Examiner he does not recall what was discussed. According to the FDIC's written responses to questions posed by the Examiner, Bair acknowledges that she discussed JPMC's interest in acquisition of Washington Mutual at about this time but does not recall raising the possibility of a receivership.

- Ms. Bair contacted Mr. Dimon on September 16th and asked about JPMC's willingness to acquire WMB out of receivership. Apparently, other potential bidders were not notified about the receivership until the weekend of September 21st and 22nd.

- During the week of September 23rd, when bidders were putting together their submissions to the FDIC to buy WMB out of receivership, the FDIC had private discussions with JPMC discussing the inclusion in the sale of tax credits and the Trust Preferred Securities collateral, both of which were worth billions of dollars to the acquiring bank. There is no evidence that either of these assets was clearly disclosed to the other bidders.

The Examiner downplays the significance of this course of conduct and of the FDIC's refusal to provide discovery because he concludes that there are substantial legal obstacles to any claim against the FDIC. Report at 266. The Examiner fails to take into account that the discovery from the FDIC would shed light not only on potential claims against the FDIC, but also on claims against others, particularly against JPMC. FDIC documents and witnesses may describe JPMC's communications with other bidders. They may demonstrate an information disparity between JPMC and the other bidders that motivated JPMC to engage in tortious conduct in an effort to obtain WMB assets. They may contain information about communications between the other bidders and the FDIC that support the claim of collusion between bidders. Until this discovery is taken and these documents have been reviewed, assumptions about what they show are no more than guesses and neither the Examiner, the Debtors, nor the Court can determine the litigation's true likelihood of success.

C. On This Record, The Court Lacks A Basis To Evaluate The Likelihood Of Success On Each Of The Claims Covered By The Proposed Settlement.

The Debtors can make no demonstration of its likelihood of success should it proceed to litigate several of the most significant claims they seek to settle. Although some of the claims covered by the settlement, including the claim for $4 billion in deposits on which a summary judgment motion has been briefed and argued, have been sufficiently well developed for the Court to evaluate the merits of the Debtors' position, others have not. In particular, discovery into the merits of nascent claims against JPMC for antitrust violations, tortious interference, and other business torts has barely begun. The Examiner conducted a very limited investigation into these claims, but by his own admission he is unable to evaluate the antitrust claims. He failed to take a single deposition relied heavily on unsworn interviews with executives from other banks that themselves bear potential liability. *See In re Exaeris*, 380 B.R. 741, 746 (Bankr. D. Del. 2008) (rejecting a proposed settlement because the showing on the likelihood of success was based almost entirely on uncorroborated evidence from the defendant.) In investigating the claims, the Examiner was guided by claims analysis apparently created by the Debtors' lawyers and provided by the Debtors to the Examiner that has never been shared with the Equity Committee or any other party.

For claims this complex, with billions of dollars at stake for hundreds of thousands of shareholders, the record developed by the Debtors is simply too flimsy to support a finding that the settlement amount offered by JPMC is reasonable. Determination that a settlement satisfies

Fed. R. Bank. Pr. 9019 requires an adequate record for the Court to make an informed judgment about the claims. *Arkoosh Produce*, 2003 WL 25273746, at *8; *In re Lion Capital Group*, 49 B.R. at 176, 189. Such a determination cannot be made here and the Global Settlement and Plan proposed by the Debtors should not be approved.

CONCLUSION

Because the proposed Global Settlement contains unreasonable and unlawful release provisions and because it would settle claims that have not been sufficiently developed to evaluate the likelihood of their success, the proposed settlement is unreasonable and the Equity Committee respectfully requests that the Court reject the Debtors' proposed plan of reorganization.

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