

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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: Chapter 11
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In re : Case No. 08-12229 (MFW)
: (Jointly Administered)
WASHINGTON MUTUAL, INC., et al.,¹ :
: Re: Docket No. 4242
Debtors :
:
: Objection Deadline: May28, 2010 at 4:00 p.m
: Hearing Date: June 3, 2010 at 10:30 a.m.
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**SUPPLEMENTAL OBJECTIONS OF THE CALIFORNIA DEPARTMENT OF TOXIC
SUBSTANCES CONTROL TO DEBTORS' DISCLOSURE STATEMENT FOR THE
SECOND AMENDED JOINT PLAN**

The California Department of Toxic Substances Control (DTSC), submits the following objections (the Supplemental Objections) to the Debtors' "Disclosure Statement for the Second Amended Plan" and to Debtors' proposed procedures for voting and plan confirmation.² For the reasons stated herein, DTSC respectfully contends that the Disclosure Statement does not comply with 11 U.S.C. § 1125 and respectfully urges the Court not to approve the Disclosure Statement in its present form.

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98104. This document uses the following acronyms: WMI for Washington Mutual Inc.; WMB for Washington Mutual Bank; JPMC for JP Morgan Chase.

² Unless otherwise indicated herein, any reference in these Supplemental Objections to "the Disclosure Statement," "the Plan," or "the Global Settlement Agreement" refer to the second amended versions of those documents.



DTSC believes that most of the objections stated herein as they affect DTSC could be resolved and eliminated without substantial difficulty in negotiation with JPMC or in a three-way negotiation with JPMC and Debtors. Unfortunately, DTSC's repeated attempts to commence such negotiations have been unsuccessful.

I. INCORPORATION OF PRIOR OBJECTIONS.

On May 13, 2010, DTSC filed objections to Debtors' initial Disclosure. (Docket Number 3722; Exhibit 1 to these Supplemental Objections.) . These Supplemental Objections incorporate by reference the following sections and subsections of DTSC's earlier objections.³

- I. INTEREST OF DTSC AND THE OTHER BKK-RELATED CLAIMANTS.
 - A. Debtors' Relationship to the BKK Landfill.
 - B. DTSC and the other BKK-related Claimants have incurred Response Costs at the BKK Class I Landfill
- II. STANDARDS FOR DISCLOSURE STATEMENT
- IV. THE PLAN AND DISCLOSURE STATEMENT ARE REplete WITH AMBIGUITIES AND CONTRADICTIONS THAT PRECLUDE ANY MEANINGFUL DETERMINATION OF THE PLAN'S IMPACT.
- V. THE DISCLOSURE STATEMENT, MIRRORING THE PLAN, DOES NOT CLEARLY INDICATE IF, OR TO WHAT EXTENT, THE BKK LIABILITIES WILL BE ASSUMED BY JPMC AND/OR PAID.
 - A. Summary of the Provisions in the Plan and Global Settlement Agreement Regarding BKK
 - B. Examples of Fundamental Questions About the BKK Liability that the Disclosure Statement and the Plan do not Answer.
 - C. The Disclosure Statement Fails to Explain Why it is Proper or Fair for the Debtors to Cause Non-debtor WMI Rainier to be Stripped of its Insurance Assets for the Benefit of JPMC, while Leaving WMI Rainier with its and/or ADI's BKK Liability.
 - E. The Disclosure Statement Does Not Provide Adequate Information about the WMI Rainier.
 - F. The Disclosure Statement Does Not Adequately Explain Why the BKK Claims are Included in Class 12, General Unsecured Claims or Provide Any Justification for the Disparate Treatment of Such Claims.

³ Where no subsections are identified, these Supplemental Objections incorporate the entire section from the earlier objections.

VI. THE PLAN IS NOT CONFIRMABLE IN ITS CURRENT STATE.

- A. The Plan Impermissibly Redefines “Claim” a fundamental Bankruptcy Concept and May Thereby Eviscerates Many of the Limitations on the Impact of a Bankruptcy Plan.
- B. The Releases and Injunctions in the Plan are impermissible on their face and thus, the Plan is not feasible and approval of the Disclosure Statement should be denied.
- C. Potential Impacts of the Release Provisions on the BKK-related Claimants.

VII. THE DEBTORS’ PROPOSED DISCLOSURE STATEMENT, SOLICITATION AND CONFIRMATION PROCEDURES SHOULD NOT BE APPROVED.

These Supplemental Objections hereby incorporate by reference the above-listed sections from DTSC’s objections to Debtors’ first proposed Disclosure Statement, Docket Number 3722.

II. SPECIFIC OBJECTIONS TO THE DISCLOSURE STATEMENT

These Supplemental Objections identify specific instances where the Disclosure Statement fails to provide adequate information for DTSC to make an informed judgment about the Plan. In each of those instances the Disclosure Statement violates 11 U.S.C. § 1125. Each of these failures to provide adequate information is based on one or more of the following: the Disclosure Statement does not provide specific information that DTSC would need to evaluate the impact of the Plan; the Disclosure Statement fails to adequately explain the Debtors’ reason for making specific choices; or the Plan and the Disclosure Statement are unclear and the impact of the Plan is therefore uncertain. In many of latter instances in particular, the Disclosure Statement often simply repeats ambiguous language from the Plan.

The objections specified herein are in two categories. The first set of objections pertain the provisions of the Plan that are specific to the BKK-liability or that specifically impact the handling of the BKK-liability. The second set of objections concern the discharges, releases and injunctions proposed in Article 43 of the Plan. These provisions continue to be extraordinarily

vague and overbroad. Rather than making any effort to explain the releases provided in the Plan, the Disclosure reproduces the text of Article 43 essentially verbatim.

A. Objections Pertaining to BKK-Specific Impacts of the Plan.

As explained in Sections I and V.A. of DTSC's earlier objections, both WMB and WMI Rainier are successors to owners and operators of the closed BKK hazardous waste landfill.⁴ DTSC also claims that WMI is a liable party for the BKK Landfill under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601, 9607. Under the Purchase and Assumption Agreement, JPMC assumed WMB's liability for the BKK Landfill. In the Global Settlement Agreement, Section 2.21, and the Plan, Section 2.1(f)(4), JPMC assumes WMI's liability for the BKK Landfill. However, as discussed herein, the scope of JPMC's assumption of WMI's liability is unclear. What portion of that liability JPMC is assuming is one of the foundations of the Plan's impact on DTSC's interests and on the interests of the other BKK-related Claimants. DTSC cannot make an informed judgment about the Plan without clarification of the issues discussed herein.

1. Objections Asserting that the Disclosure Statement Does Not Clarify the Scope of JPMC's Assumption of the BKK Liability

Objection Number 1. It is not clear how much of the liability in DTSC's Claim JPMC is assuming. The language of JPMC's assumption of liability, in section 2.21(a)(a) of the

⁴ At various places throughout these Supplemental Objections, DTSC discusses the liability of WMI and entities related to WMI, including WMI Rainier and WMB, as if those entities had separate liability. DTSC contends and reserves the right to argue that the various entities related to WMI are jointly and severally liable for any BKK response costs and further that each of the entities have primary liability for those costs and/or are co-liable with WMI Rainier LLC.

Global Settlement Agreement is not consistent with the language of DTSC's claim.⁵ Further, Section 2.21(c) of the Global Settlement Agreement states that JPMC is not assuming any BKK liability not included in Section 2.21(a). The Disclosure Statement should clarify what portion of WMI's BKK Liability would be assumed by JPMC and what portion of that liability JPMC would not assume.

Objection Number 2. It is not clear if JPMC is assuming all of WMI's liability for Response Costs, as defined in CERCLA Section 101, 42 U.S.C. § 9601(25), at the BKK Landfill. The Disclosure Statement should clarify if JPMC is assuming all of WMI's liability for response costs at the BKK landfill.

Objection Number 3. It is not clear if JPMC is assuming all of WMI's liability for Natural Resources Damages, if any, at the BKK Landfill. The Disclosure Statement should clarify if JPMC is assuming all of WMI's liability for Natural Resource Damages at the BKK landfill.

⁵ Here is how DTSC's Proof of Claim characterizes DTSC's claim (page 12):

"DTSC claims all response costs incurred pre-petition, post-petition and such response costs which DTSC may incur in the future, including but not limited to response costs related to remedial investigation activities, Site characterization and cleanup of soil and groundwater as warranted." DTSC also claimed Natural Resource Damages.

Here is the core of JPMC's assumption of BKK liability from Paragraph 2.21 of the Global Settlement Agreement:

"any and all liabilities and obligations of the WMI Entities (other than WMI Rainier LLC) for remediation or clean-up costs and expenses (and excluding tort and tort related liabilities, if any), in excess of applicable and available insurance, arising from or relating to (i) the BKK Litigation, (ii) the Amended Consent Decree, dated March 6, 2006, entered in connection therewith, and (iii) that certain Amended and Restated Joint Defense, Privilege and Confidentiality Agreement, dated as of February 28, 2005, by and among the BKK Joint Defense Group, as defined therein."

Objection Number 4. It is not clear if JPMC is assuming any BKK liability for which WMI is derivatively liable as the sole shareholder of WMI Rainier and its predecessors, i.e. alter ego liability. Section 2.21(c) of the Global Settlement Agreement states that “Nothing in Section 2.21 is intended to transfer to JPMC . . . any liabilities of WMI Rainier.” The Disclosure Statement should clarify if JPMC is assuming BKK liability for which WMI is derivatively liable as the parent of WMI Rainier.

Objection Number 5. The scope of “tort and tort-related liabilities” in BKK Liabilities is unclear. In section 1.41 of the Plan, “tort and tort-related liabilities” are excluded from BKK Liabilities. JPMC therefore does not assume the tort-related liabilities. However, the scope of “tort and tort-related liabilities” is unclear. Disclosure Statement should clarify what is included in “tort and tort-related liabilities.”

Objection Number 6. It is not clear why Debtors agreed to the restrictions on the scope of JPMC’s assumption of BKK Liability. As discussed above, under the Plan, JPMC is not assuming the tort-related portion of the BKK Liability and possibly other aspects of the BKK Liability. The Disclosure Statement should explain why Debtors agreed to an incomplete assumption of the BKK Liability by JPMC. In addition, the Disclosure Statement should disclose the reason why WMI Rainier’s liability at the BKK Site is carved out of the assumed BKK-Liabilities and the consideration provided to the Debtors for agreeing to such limitation

Objection Number 7. The relationship between JPMC’s agreement to pay the BKK Liabilities and DTSC’s rights to seek payment in the bankruptcy is unclear under the terms of the Global Settlement Agreement. Section 2.21 of the Global Settlement Agreement seems to contemplate that DTSC and other BKK-related claimants can (1) litigate and negotiate with

JPMC outside the bankruptcy for payment of the BKK Liabilities and (2) pursue its claim for BKK response costs in this Bankruptcy. These actions by the BKK-related claimants would have both overlapping and distinct components. The Disclosure Statement should clarify Debtors' view of any impact from pursuing the overlapping portions in both forums.

Objection Number 8. The impact of “applicable and available insurance” on “BKK Liabilities” as defined in the Plan is not clear. Mirroring Section 2.21(a) of the Global Settlement Agreement, Section 1.41 of the Plan defines “BKK Liabilities” as “liabilities and obligations . . . in excess of applicable and available insurance.” The exclusion from BKK Liabilities of the insurance is unclear in the respects indicated in this and the following objection. DTSC recognizes that the general intent of the exclusion may be appropriate and understandable, It is not clear, nonetheless, how the amount of “applicable and available insurance” would be determined, whether for example, the term refers to policy limits or amounts actually paid by insurers. The Disclosure Statement should clarify what is meant by “applicable and available insurance.”.

Objection Number 9. It is unclear if “applicable and available insurance” is limited to WMI's share of any such insurance. WMI, WMB, WMI Rainer and possibly other entities may each be insureds under the BKK-Related Policies. The Disclosure Statement should clarify if “applicable and available insurance” in Section 1.41 of the Plan is limited to WMI's share of any such insurance or includes the shares of all of each policy's insureds.

Objection Number 10. The Disclosure Statement should specify who is required to prosecute recovery of proceeds from the BKK-Related Policies; and whether and to what extent claims on the BKK-Related Policies have heretofore been made by the Debtors (or others)

and if any notices required under the BKK-Related Policies have been complied with. In short, with no disclosures regarding the status of claims made under the BKK-Related Policies, the BKK related claimants cannot evaluate the extent or value of the JPMC assumption.

Objection Number 11. It is unclear whether under the Plan JPMC is entitled to argue that (1) JPMC, under the Purchase and Assumption Agreement, did not assume all of WMB's BKK- liability and/or (2) that, despite the Purchase and Assumption Agreement, some of WMB's BKK liability remains with the FDIC. Notably, Section 3.8 of the Global Settlement Agreement arguably preserves JPMC's "right to assert that liabilities remained with the FDIC." The Plan, including through section 1.156, seems to incorporate Section 3.8 of the Global Settlement Agreement. The Disclosure Statement should clarify whether the Plan, including the Global Settlement Agreement, entitles JPMC to assert that JPMC did not assume all of WMB's BKK Liability.

Objection Number 12. It is unclear whether the Plan releases FDIC's or JPMC's BKK Liabilities arising from their successor interests in WMB, is released. Notably, JPMC and the FDIC are preserving their claims against each other under the Purchase and Sale Agreement. The Disclosure Statement should clarify whether to what extent, if any, JPMC's and FDIC's BKK related liabilities are being released.

2. Objections Asserting that the Disclosure Statement Does Not Provide Essential Financial Information Related to the BKK Liabilities.

Objection Number 13. The value of JPMC's assumption of the BKK Liabilities is not clear. The Plan describes that assumption of liability as an "Additional Consideration[]" to

Debtors.” Section 2.1(f)(4). However the value of that consideration to Debtors is nowhere specified, either qualitatively or quantitatively. The Disclosure Statement should specify the value of JPMC’s assumption of the BKK Liabilities.

Objection Number 14. The net worth of WMI Rainier is nowhere specified. Nor is it specified what amount of its BKK liabilities WMI Rainier could pay. These questions are of key importance to DTSC and the other BKK-related claimants. It appears likely that the releases specified in Article 43 of the Plan would immunize JPMC and various WMI insiders from any responsibility for causing the collapse of WMB. Prior to that collapse, WMB, on behalf of other WMI Entities, presumably including WMI Rainier, was paying response costs at the BKK landfill, in effect assuming all of WMI’s liability for response costs at the landfill. The Disclosure Statement should provide financial information about WMI Rainier. The Disclosure Statement should also disclose to what extent Debtors believe WMI Rainier has BKK liability, how such liability came to rest in WMI Rainier and the basis for the Debtors’ agreement to consent to a carve out of WMI Rainier’s from other BKK Liabilities to be assumed by JPMC.

Objection Number 15. It is not clear in either dollar amount or percentage, what amount or portion of any funds that WMI Rainier or its predecessor ADI had on deposit at WMB at the time of the FDIC seizure will be returned to WMI Rainier. Reportedly, ADI had significant cash on deposit in WMB at the time of the takeover and the extent to which such funds will or will not be available or dedicated to satisfy BKK liabilities should be disclosed. The Disclosure Statement should specify the amount of money that will be returned to WMI Rainier under the Plan.

Objection Number 16. The statement, on page 115, of the Disclosure Statement that “For the avoidance of doubt, nothing in the Plan or Global Settlement Agreement is intended to release WMI Rainier from claims asserted against WMI Rainier and its assets relating to the BKK Litigation” is unclear and unsupported. Section 1.157 explicitly identifies WMI Rainier as a Released Party. Several provisions within Article 43, including provisions in Sections 43.2(b), 43.6, 43.9, and 43.12, release claims, such as those related to the BKK Litigation, against Released Parties. A statement of intention in the Disclosure Statement that is not supported by the language of the Plan is not adequate. The Disclosure Statement should explain the basis for the assertion on page 115.

Objection Number 17. It is not clear how JPMC or Debtors are accounting for any BKK-related funds possessed or owed to NAMCO, a subsidiary of WMB. DTSC is informed that NAMCO lent money to BKK Corporation in or around 2003 and that some or all of that money, including substantial interest payments, has been returned to NAMCO. The Disclosure Statement should specify the amount of funds that NAMCO received from BKK Corporation and the amount of any liability BKK Corporation has to NAMCO and should specify how those funds and liabilities are accounted for.

B. Objections Pertaining to the Discharges, Releases, and Injunctions Specified in Article 43 of the Plan.

Article 43 is of fundamental importance to DTSC because the discharges, releases and injunctions it contains may determine the impact of the Plan on future actions DTSC may bring. Language in Article 43, if confirmed and subsequently upheld, could for example restrict DTSC’s ability to seek regulatory injunctions against the reorganized Debtors. Likewise, Article

43, if confirmed and subsequently upheld, could restrict DTSC's ability to seek payment from non-Debtors. Therefore, unless the scope of the discharges, releases and injunctions proposed in Article 43 are clear, DTSC cannot make an informed judgment of the impact of Plan confirmation on DTSC's rights and interests. Unfortunately, the Disclosure Statement does not explain any of the provisions of Article 43. Rather, on pages 114 to 120, it merely incorporates the provisions of Article 43 essentially verbatim. This is an abdication of responsibility. The goal of the Disclosure Statement is to disclose and clarify, not to repeat.

1. Objections Asserting that the Disclosure Statement Fails to Explain the Plan's Definition of "Claim," Which is Inconsistent from that in the Code and is Ambiguous

Section 1.62 of the Plan defines the term "Claim" in a manner inconsistent with Section 101(5) of the Bankruptcy Code. . As described herein, the Plan's definition of Claim introduces fundamental uncertainties. Without clarification, DTSC cannot make an informed judgment on the Plan. Unfortunately, the Disclosure Statement does not discuss the consequences of Debtors' choice to substitute their own definition of Claim for that specified in 11 U.S.C. § 101(5).

Objection Number 18. It is unclear if "Claims" as defined in the Plan includes a right to an equitable remedy for breach of performance where that breach does not "give rise to a right to payment." If so, "Claim" as used in the plan would include rights that are not "Claims" as that term is used in the Bankruptcy Code. The Disclosure Statement should state clearly whether "Claim" as used in the plan would include rights that are not "Claims" as that term is used in the Bankruptcy Code. Without that clarification, DTSC cannot determine the impact of the Plan Confirmation on its rights.

Objection Number 19. It is unclear if the term “Cause of Action” defined at Section 1.51 of the Plan includes only actions that could be brought by Debtors. In other words it is unclear whether “Cause of Action” as defined therein includes any actions that a non-Debtor could bring against either a Debtor or other non-Debtor. The term “Cause of Action” is used throughout Article 43 of the Plan and therefore its definition affect the scope of the releases and prohibitions specified in that Article. The Disclosure Statement should clarify if “Cause of Action” includes any actions brought by non-Debtors. Without that clarification, DTSC cannot determine the impact of the Plan Conformation on its rights.

2. Objections Asserting that the Disclosure Statement Does not Address Inherent Ambiguities in the Definition of “Released Claim.”

Section 1.156 of the Plan defines the term “Released Claims,” which determines the scope of the discharges, releases and injunctions proposed throughout Article 43, particularly those proposed specified in sections 43.6, 43.7, 43.9, and 43.12⁶. As described herein, the term “Released Claims” is ambiguous in certain fundamental respects. Without clarification, and resolution of those ambiguities, DTSC cannot make an informed judgment on the Plan. Unfortunately, the Disclosure Statement, at page 116, simply repeats verbatim the language of Section 1.156 of the Plan and therefore does not resolve the ambiguity or otherwise clarify the meaning of “Released Claim.”

Subpart	Text from Section 1.156 of the Plan ⁷
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⁶ “Released Claims” is also defined in the Global Settlement Agreements, although the definitions appear dissimilar.

⁷ Where it is helpful to explain the ambiguities and uncertainties in the Plan and Disclosure Statement, these Supplemental Objections reproduce long, complex plan provisions, dividing them up into Subparts for ease of reference.

A	[Released Claims are] Collectively, to the extent provided in the Global Settlement Agreement, (a) any and all WMI Released Claims, JPMC Released Claims, FDIC Released Claims, Settlement Note Released Claims and Creditors' Committee Released Claims, in each case to the extent provided and defined in the Global Settlement Agreement and
B	(b) any and all Claims released or deemed to be released pursuant to the Plan,
C	in each case pursuant to clauses (a) and (b) above, to the extent any such Claims arise in, relate 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 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 Agreement and the Plan,
D	excluding however, in the case of clauses (a) and (b) hereof, and subject to the provisions of Section 3.8 of the Global Settlement Agreement, any and all claims that the JPMC Entities, the Receivership, the FDIC Receiver and the FDIC Corporate are entitled to assert against each other or any other defenses thereto pursuant to the Purchase and Assumption Agreement, which claims and defenses shall continue to be governed by the Purchase and Assumption Agreement,
E	and any and all claims held by Entities against WMB, FDIC Corporate, and/or FDIC Receiver in the Receivership;
F	provided, however that "Released Claims" shall not include any avoidance action or claim objection regarding an Excluded Party or the WMI Entities, WMB, each of the Debtors' estates, the Reorganized Debtors and their respective Related Persons.

Objection Number 20. In Subpart B of Section 1.156, inclusion of the phrase "Claims released . . . pursuant to the Plan" renders the definition tautological and therefore unclear. The Plan defines "Released Claims" to include "any and all Claims . . . released pursuant to the Plan." Boiled down further, the Plan defines "Released Claims" to include all "Claims . . . released" by the Plan. Definitions embodying tautologies are inherently unclear. With this tautology at its core, the Plan's definition of "Released Claim" is meaningless. The many succeeding words in the definition, in subparts, C, D, E and F, add no clarity. The Disclosure Statement should, if possible, clarify why this tautology does not render "Released Claim" meaningless.

Objection Number 21. In Subpart B of Section 1.156, the phrase “Claims . . . deemed to be released pursuant to the Plan” is unclear. In particular, the word “deemed,” by incorporating unspecified future interpretations of the Plan, add uncertainty. Further, the incorporation of future interpretations implicitly acknowledges that Plan does not fully specify which Claims are Released. The Disclosure Statement should, if possible, clarify this uncertainty in the definition of “Released Claims.”

Objection Number 22. The relationship of Subpart C of Section 1.156 to the rest of the definition of “Released Claim” is unclear. Indeed, it is unclear whether Subpart C has any impact on the definition. Further it is unclear whether the inclusion of Subpart C in the definition expands or contracts the set of “Released Claims.” The Disclosure Statement should explain clearly how Subpart C clarifies how the meaning of “Released Claim.”

Objection Number 23. It is not clear whether Subpart E of Section 1.156 is attached to Subpart D or to Subparts A and B. In other words, it is unclear whether (i) Subpart E specifies additional claims that, along with those Claims specified in Subparts A and B, are Released Claims or (ii) Subpart E species additional Claims, with those described in Subpart D, are excluded from the class of Released Claims. This is a question of significant import. If the latter were correct, no claims against the FDIC would be released. Unless the Disclosure Statement clarifies how the meaning of “Released Claim” despite this uncertainty, DTSC will not be adequately informed about the impact of Plan Confirmation.

3. Objections Asserting that the Disclosure Statement Does not Clarify Ambiguities in Section 43.2

Section 43.2 of the Plan is the first of at least three sections (43.2, 43.5, 43.6) that purport to provide releases and discharges to debtors and non-debtors. As described herein, Section 43.2 is ambiguous in certain fundamental respects. Without clarification, and resolution of those ambiguities, DTSC cannot make an informed judgment on the Plan.

Objection Number 24. The phrase “any *other or further* Claims or any *other* obligations, suits, judgments, damages, debts, rights, remedies, causes of action or liabilities” in the first sentence of Section 43.2(b) is unclear. (Emphasis added.) This sentence prohibits Entities from asserting these *other* Claims against “Released Parties.” However the prior paragraph discharges Claims against “Debtors and Reorganized Debtors” only, not against all “Released Parties.” In each of these two paragraphs, certain Claims are the direct objects and certain parties who will be protected from those Claims are the indirect objects. Because the paragraphs explicitly pertain to different indirect objects (Debtors and Released Debtors only versus all Released Parties) the terms “other” and “further” in Section 43.2(b) introduce a fundamental uncertainty. The Disclosure Statement should clarify exactly what Claims are affected by Section 43.2(b).

Objection Number 25. The referent of the phrase “such Claims” in the second sentence of Section 43.2(b) is unclear. In part because of the ambiguity described in the previous objection, it is not clear what Claims are included in the term “such Claims.” The Disclosure Statement should clarify what Claims are included in “such Claims.”

Objection Number 26. It is unclear how the last sentence of Section 43.2(b), and other release provisions in Section 43.2, relates to the “opt-out” provisions specified in Section 43.6 and elsewhere. The last sentence of Section 43.2(b) states that “each holder of a Claim,” in

other words all creditors, are deemed to release and waive a wide set of Claims against the “Released Parties.” Yet Section 43.6 and other provisions of the Plan and the ballots purport to allow creditors to opt-out of the releases. The Disclosure Statement should indicate whether the opt out provisions of Section 43.6 pertain to the releases specified in Section 43.2.

Objection Number 27. It is unclear if section 43.2(c) releases any claims that WMI Rainier has against JPMC or WMI related to BKK liability remaining with WMI Rainier. Prior to its collapse, WMB was paying response costs at the BKK landfill on behalf of WMI and other WMI Entities. Following Plan confirmation, WMI Rainier might be forced to bear a larger share of the BKK liabilities and therefore might have a claim against JPMC to the extent, as alleged by others, that JPMC contributed to the collapse of WMB. The Disclosure Statement should indicate whether Section 43.2(c) would release any claims WMI Rainier might have against either JPMC or other WMI Entities related to the collapse of WMB and WMI Rainier’s subsequent responsibility to pay BKK Liabilities.

Objection Number 28. It is unclear, why Section 43.2(b) incorporates a prohibition into a Section that otherwise contains only releases or discharges. Generally, Article 43 of the Plan separates releases and discharges, (43.2, 43.5, 43.5), on one hand, from injunctions, bars and prohibitions (43.3, 43.7, 43.9 and 43.12), on the other. However, although section 43.2 is identified as containing discharges and releases, section 43.2(b) “precludes” “all Entities” from asserting various claims. This drafting suggests that Section 43.2 initially sufficed for the entirety of Article 43. Nonetheless, numerous additional releases and injunctions have been added to Article 43 and the impact of including a prohibition within a release is unclear.

**4. Objections Asserting that the Disclosure Statement Does not Clarify
Ambiguities in Section 43.3**

Section 43.3 of the Plan is one of at least four sections that enjoin creditors and other entities from bringing actions against the Debtors, Released Parties or Related Entities. As described herein, Section 43.3 is ambiguous in certain fundamental respects. Without clarification, and resolution of those ambiguities, DTSC cannot make an informed judgment on the Plan.

Subpart	Text from Section 43.3 -- Injunction on Claims:
A	Except as otherwise expressly provided in the Plan, the Confirmation Order or such other order of the Bankruptcy Court that may be applicable, all Entities, and each Related Person of such Entities, who have held, hold or may hold Claims or any other debt or liability that is discharged or Equity Interests or other right of equity interest that is terminated or cancelled pursuant to the Plan or the Global Settlement Agreement, or who have held, hold or may hold Claims or any other debt or liability that is discharged or released pursuant to Sections 43.2 or 43.6 hereof, respectively, are permanently enjoined, from and after the Effective Date, from (a) commencing or continuing, directly or indirectly, in any manner, any action or other proceeding (including, without limitation, any judicial, arbitral, administrative or other proceeding) of any kind on any such Claim or other debt or liability or Equity Interest that is terminated or cancelled pursuant to the Plan against any of the Released Parties or any of their respective assets, property or estates,
B	(b) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree or order against any of the Released Parties or any of their respective assets, property or estates, (c) creating, perfecting, or enforcing any encumbrance of any kind against any of the Released Parties or any of their respective assets, property or estates, and
C	(d) except to the extent provided, permitted or preserved by sections 553, 555, 556, 559 or 560 of the Bankruptcy Code or pursuant to the common law right of recoupment, asserting any right of setoff, subrogation or recoupment of any kind against any obligation due from any of the Released Parties or any of their respective assets, property or estates, with respect to any such Claim or other debt or liability that is discharged or Equity Interest or other right of equity interest that is terminated or cancelled pursuant to the Plan;
D	provided, however, that such injunction shall not preclude the United States of America, any state or any of their respective police or regulatory agencies from enforcing their police or regulatory powers; and,
E	provided, further, that, except in connection with a properly filed proof of Claim, the foregoing proviso does not permit the United States of America, any State or any of their respective police or regulatory agencies from obtaining any monetary recovery from any of the Released Parties or any of their respective assets, property or estates, with respect to any such Claim or other debt or liability that is discharged or Equity Interest or other right of

	equity interest that is terminated or cancelled pursuant to the Plan, including, without limitation, any monetary claim or penalty in furtherance of a police or regulatory power;
F	and, provided, further that, subject to Section 3.8 of the Global Settlement Agreement, such injunction shall not preclude the JPMC Entities, the Receivership, the FDIC Receiver and the FDIC Corporate from pursuing any and all claims against each other or any other defenses thereto pursuant to the Purchase and Assumption Agreement. Such injunction shall extend to all successors and assigns of the Released Parties and their respective assets, property and estates.

Objection Number 29. It is unclear whether clauses (b) and (c), in Subpart B of Section 43.3 would enjoin actions against “Released Parties” that are unrelated to this Bankruptcy. Clauses (b) and (c), on their face bar the Entities identified in Subpart A from enforcing any judgment or encumbrance against any of the Related Parties without regard to the basis for that judgment or encumbrance or the timing of the enforcement action. No other provisions in Section 43.3 act in any obvious way to limit the scope of clauses (b) and (c). The Disclosure Statement should explain the scope of clauses (b) and (c).

Objection Number 30. In Subpart E of Section 43.3 it is unclear how the phrase “or any of their respective assets, property or estates” modifies the prohibition stated in this Subpart. Prior to this phrase, the text would prohibit any governmental entity of the United States from obtaining any money recovery from any “Released Party” with respect to any discharged Claim. The extension of this prohibition to the Released Parties’ assets either adds nothing to the prohibition or, in some fashion, extends the prohibition beyond the bankruptcy. The Disclosure Statement should clarify this provision.

Objection Number 31. The provision in Subpart E of Section 43.3 that prohibits any governmental entity of the United States from “obtaining . . . any monetary claim or penalty in furtherance of a police or regulatory power” is unclear. On its face, this provision prohibits

any state or federal court from imposing any monetary penalty against a “Released Party” who failed to comply with an otherwise permissible injunction. This prohibition thus would appear to prohibit other courts from exercising their inherent authority to enforce otherwise valid injunctions they have issued. By merely incorporating the words of section 43.3 verbatim, without any further explanation, the Disclosure Statement fails to provide the essential information Creditors require. The Disclosure Statement should clarify the meaning of Subpart E.

5. Objections Asserting that the Disclosure Statement Does not Clarify Ambiguities in Section 43.5

Section 43.5 of the Plan also purports to provide releases and discharges to debtors and non-debtors. As described herein, Section 43.5 is ambiguous in certain fundamental respects. Without clarification, and resolution of those ambiguities, DTSC cannot make an informed judgment on the Plan.

In section 43.5, Debtors and their Related Persons “fully, finally and forever waive, release, acquit, and discharge the Released Parties and each of their respective Related Persons, from any and all Claims or Causes of Action [that are] based upon, relate to, or arise out of or in connection with, in whole or in part, any act, omission, transaction, event or other circumstance relating to the Debtors, ... or any of their respective Related Persons, taking place or existing on or prior to the Effective Date.”

Objection Number 32. It is unclear if Section 43.5 of the Plan would apply to claims that WMI Rainier might have against either WMI, JPMC or “their respective Related

Parties.” The Disclosure Statement should clarify whether Section 43.5 would release any contribution claims related to the BKK Landfill that WMI Rainier might have against JPMC.

Objection Number 33. The Disclosure Statement should clarify whether Section 43.5 releases any claims WMI Rainier might have against JPMC related to the collapse of WMB.

6. Objections Asserting that the Disclosure Statement Does not Clarify Ambiguities in Section 43.6

Section 43.6 of the Plan also purports to provide releases and discharges to debtors and non-debtors. As described herein, Section 43.6 is ambiguous in certain fundamental respects. Although the Bankruptcy Code contemplates a discharge for Debtors, it does not follow that Reorganized Debtors and non-debtors are entitled to be released for any and all liability even remotely related to the case, over the objection of creditors. Without clarification, and resolution of those ambiguities, DTSC cannot make an informed judgment on the Plan.

Subpart	Text of 43.6 Releases by Holders of Claims and Equity Interests.
A	Except as otherwise expressly provided in the Plan, the Confirmation Order, or the Global Settlement Agreement, on the Effective Date, for good and valuable consideration, each Entity that has held, currently holds or may hold a Released Claim or any Equity Interest that is terminated, and each of its respective Related Persons, on their own behalf and on behalf of anyone claiming through them, on their behalf, or for their benefit, shall be deemed to have and hereby does irrevocably and unconditionally, fully, finally and forever waive, release, acquit and discharge each and all of the Released Parties from any and all Released Claims
B	in connection with or related to any of the Debtors, the Reorganized Debtors, the Affiliated Banks, or their respective subsidiaries, assets, liabilities, operations, property or estates, the Chapter 11 Cases or the Plan or the Disclosure Statement, the assets to be received by JPMC pursuant to the Global Settlement Agreement, the Plan Contribution Assets, the Debtors’ Claims, the JPMC Claims, the FDIC Claim, the Purchase and Assumption Agreement, the WMI/WMB Intercompany Claims, any intercompany claims on the books of WMI or WMB related to the WaMu Pension Plan or the Lakeview Plan, claims related in any way to the Trust Preferred Securities (including, without limitation, the creation of the Trust Preferred Securities, the financing associated therewith, the requested assignment of the Trust Preferred Securities by the Office of Thrift Supervision and the transfer and the asserted assignment of the Trust Preferred

	Securities subsequent thereto), and/or any claim, act, fact, transaction, occurrence, statement, or omission in connection with or alleged in the Actions or in the Texas Litigation, or that could have been alleged in respect of the foregoing or other similar proceeding, including, without limitation, any such claim demand, right, liability, or cause of action for indemnification, contribution or any other basis in law or equity for damages, costs or fees incurred by the releasors herein arising directly or indirectly from or otherwise relating thereto;
C	provided, however, that each Entity that has submitted a Ballot may elect, by checking the appropriate box on its Ballot, not to grant the releases set forth in Section 43.6 of the Plan with respect to those Released Parties other than (i) the Debtors, (ii) the Reorganized Debtors, (iii) the Trustees, and (iv) the Creditors' Committee and its members in such capacity and for their actions as members, their respective Related Persons, and their respective predecessors, successors and assigns (whether by operation of law or otherwise), in which case, such Entity that so elects to not grant the releases will not receive a distribution hereunder;
D	and provided, further, that, because the Plan and the Global Settlement Agreement, and the financial contributions contained therein, are conditioned upon the aforementioned releases, and, as such, these releases are essential for the successful reorganization of the Debtors, pursuant to the Confirmation Order, those Entities that opt out of the releases provided hereunder shall be bound and shall receive the distributions they otherwise would be entitled to receive pursuant to the Plan.

Objection Number 34. It is unclear how Subpart B of Section 43.6 modifies Subpart A. On its face, Subpart B appears to specify which Released Claims or terminated Equity Interests are subject to release provided by Section 43.6. The Disclosure Statement should clarify if there are Released Claims that do not meet any of the criteria of Subpart B. If there are not any such Released Claims, the Disclosure Statement should explain why Subpart B is included in Section 43.6.

Objection Number 35. The impact of the opt out provisions of Subpart C of Section 43.6 on other provisions of Article 43 is unclear. The Disclosure Statement should clarify whether the opt out provisions of Section 43.6 apply to the various releases and prohibitions specified in Sections 43.2, 43.3, 43.5, 43.7, 43.9 and 43.12.

Objection Number 36. The meaning of the following clause from Subpart C of Section 43.6 is unclear: "other than (i) the Debtors, (ii) the Reorganized Debtors, (iii) the

Trustees, and (iv) the Creditors' Committee and its members in such capacity and for their actions as members, their respective Related Persons, and their respective predecessors, successors and assigns (whether by operation of law or otherwise).” One possible interpretation of this clause is that even if a creditor successfully exercises the opt out provision of Subpart C, the creditor has still granted releases to the parties identified in items (i) to (iv), including their “respective Related Persons.” Whether that interpretation is correct would substantially affect the value of the opt-out provision. The Disclosure Statement should clarify if a creditor opting out of the releases in Section 43.6 would still be releasing the parties identified in this objection.

Objection Number 37. The meaning of Subpart D of Section 43.6 is unclear. Subpart C purports to create an opt-out option for creditors entitled to vote who chose not to “grant the releases set forth in Section 43.6 of the Plan.” However, Subpart D suggests that because “the aforementioned releases . . . are essential for the successful reorganization of the Debtors,” Debtors intend for the Confirmation Order to provide that Entities opting out of the releases shall be “bound” to the releases anyway. This is an essential question for creditors considering whether to support the Plan. The absence of an opportunity to opt out of the releases would for some creditors be an important reason to vote against confirmation of the Plan , or for those not entitled to vote, to object to confirmation on the grounds that either the opt-out was not provided to them or that the releases cannot be imposed without their consent.. The Disclosure Statement should clarify Subpart D and in particular whether the term “bound” therein refers to creditors being bound by the releases and, if so, identify which creditors are so bound.

Objection Number 38. The impact of Section 43.10 on Entities that opt out pursuant to Subpart C of Section 43.6 or who are not entitled to vote but would, if given the

opportunity, opt out, is unclear. Section 43.10 states that certain holders of Claims “shall be deemed, to the fullest extent permitted by applicable law, to have *specifically consented* to the releases set forth in Section 43.6 of the Plan.” (Emphasis added.) Section 43.10 further indicates that holders of Claims who elect not “to withhold consent to the releases” would be deemed to have specifically consented. However, Section 43.10 includes the phrase “or by order of the Bankruptcy Court.” The significance of this phrase within Section 43.10 is unclear. One possible interpretation is that the quoted phrase references parties who are “bound” under Subpart D of Section 43.6. If that interpretation governed, Section 43.10 would be saying that Entities who “by order of the Bankruptcy Court” “receive a distribution or any benefit under this Plan” shall be “deemed . . . to have specifically consented” to the releases set forth in Section 43.6. The Disclosure Statement should clarify if this Orwellian construction—wherein Entities who have opted out of the releases are ordered by the Bankruptcy Court to have “specifically consented” to those releases—is correct. The Disclosure Statement should in any case clarify the significance of the phrase “by order of the Bankruptcy Court.”

Objection Number 39. The relationship of Sections 43.2 and 43.6 are unclear. Each of these sections purports to provide broad releases and discharges. Without understanding the relative roles of these two sections, Creditors cannot make an informed judgment whether to support the Plan with both provisions in it. The Disclosure Statement should explain the relationship of Sections 43.2 and 43.6

7. Objections Asserting that the Disclosure Statement Does not Clarify Ambiguities in Section 43.7

Section 43.7 of the Plan is one of at least four sections that enjoin creditors and other entities from bringing actions against the Debtors, Released Parties or Related Entities. As described herein, Section 43.7 is ambiguous in certain fundamental respects. Without clarification, and resolution of those ambiguities, DTSC cannot make an informed judgment on the Plan.

Objection Number 40. It is unclear if Section 43.7 enjoins actions to prosecute or enforce Claims that are released under provisions of Article 43 other than those provisions included in Section 43.6. The Disclosure Statement should clarify if Section 43.7 enjoins actions that would assert or enforce any Claim that is released by a provision of Article 43 outside of Section 43.6.

Objection Number 41. The scope of Section 43.7, as expressed in its ultimate clause is unclear. Section 43.7 seeks to enjoin any action, in one of five broad categories of actions, “that does not comply with or is inconsistent with the provisions of the Global Settlement Agreement, the Plan or the Confirmation Order.” The quoted language is extraordinarily broad and seems to go far beyond the ostensible purpose of Section 43.7, which is to enjoin actions that would assert or enforce any Claim that was released by Section 43.6. The Disclosure Statement should clarify if Section 43.7 enjoins any actions beyond those that seek to assert or enforce a Claim that was released by Section 43.6. If so, the Disclosure Statement should further clarify those additional enjoined actions.

Objection Number 42. It is not clear if Section 43.7 is subject to the police power exception provided in Subsection D of Section 43.3. The Disclosure Statement should clarify if

Section 43.7 would “preclude the United States of America, any state or any of their respective police or regulatory agencies from enforcing their police or regulatory powers.”

**8. Objections Asserting that the Disclosure Statement Does not Clarify
Ambiguities in Section 43.9**

Section 43.9 of the Plan is entitled the “Bar Order” of the Plan also purports to enjoin creditors and other entities from bringing actions against the Debtors, Released Parties or Related Entities. As described herein, Section 43.9 is ambiguous in certain fundamental respects. Without clarification, and resolution of those ambiguities, DTSC cannot make an informed judgment on the Plan.

Subpart	Text from 43.9 Bar Order:
A	Each and every Entity is permanently enjoined, barred and restrained from instituting, prosecuting, pursuing or litigating in any manner
B	any and all claims, demands, rights, liabilities, or causes of action of any and every kind, character or nature whatsoever, in law or in equity, known or unknown, direct or derivative, whether asserted or unasserted,
C	against any of the Released Parties,
D	based upon, related to, or arising out of or in connection with any of the Released Claims, the Debtors’ Claims, the JPMC Claims, the FDIC Claim, the Purchase and Assumption Agreement (other than any rights or claims the JPMC Entities, the Receivership, the FDIC Receiver or the FDIC Corporate may have under the Purchase and Assumption Agreement), confirmation and consummation of the Plan, the negotiation and consummation of the Global Settlement Agreement, or any claim, act, fact, transaction, occurrence, statement or omission in connection with or alleged or that could have been alleged in the Related Actions,
E	including, without limitation, any such claim, demand, right, liability, or cause of action for indemnification, contribution, or any other basis in law or equity for damages, costs or fees incurred arising directly or indirectly from or otherwise relating to the Related Actions, either directly or indirectly by any Person for the direct or indirect benefit of any Released Party arising from or related to the claims, acts, facts, transactions, occurrences, statements or omissions that are, could have been or may be alleged in the Related Actions or any other action brought or that might be brought by, through, on behalf of, or for the benefit of any of the Released Parties (whether arising under federal, state or foreign law, and regardless of where asserted).

Objection Number 43. Taken as a whole, Section 43.9 is unclear. One possible interpretation is that Subpart A of Section 43.9 is the enforcement prohibition; Subpart B identifies what kinds of claims or other rights are subject to the enforcement prohibition and Subpart D, as augmented by Subpart E, identifies which rights are subject to the enforcement prohibition. The Disclosure Statement should state if this interpretation is correct. If it is not the Disclosure Statement should specify the intended interpretation.

Objection Number 44. It is unclear if the rights identified in Subparts B, D and E of Section 43.9 are limited to “Released Claims” as defined in Section 1.156 of the Plan. The Disclosure Statement should clarify if the enforcement prohibition of Section 43.9 applies to any rights that are not Released Claims.

Objection Number 45. It is unclear if the prohibitions in Section 43.9 are limited by other provisions of the Plan. Most of the sections in Article 43 begin some variation of “Except as otherwise expressly provided in the Plan, the Confirmation Order, or the Global Settlement Agreement.” *See, e.g.*, Section 43.5. However, Section 43.9 has no such restriction. The Disclosure Statement should clarify if there is a reason for not including the otherwise standard restriction in Section 43.9. The Disclosure Statement should likewise clarify if Section 43.9 is intended to trump potentially contrary provisions elsewhere in “the Plan, Confirmation Order, or the Global Settlement Agreement.”

Objection Number 46. It is unclear if the terms “claims” and “causes of action” [*sic.*] in Subpart B of Section 43.9, though not capitalized, are intended to be the defined terms “Claims” and “Causes of Action.”

Objection Number 47. It is unclear if Section 43.9 would prohibit a party from suing JPMC for obligations it assumed under the Purchase and Assumption Agreement. Section 43.9 seems to include the following prohibition: “Each and every Entity is permanently [enjoined] from [prosecuting or litigating] any and all [claims, demands or rights] based upon, related to ...the Purchase and Assumption Agreement” Nothing else in Section 43.9 seems to limit that prohibition. DTSC, for example, contends that under the Purchase and Assumption Agreement, JPMC assumed WMB’s liability for response costs at the BKK landfill. DTSC needs to know, therefore, if the Section 43.9, or any other provision of Article 43 or of the Plan, would release JPMC from that liability or bar DTSC from enforcing that liability. The Disclosure Statement should clarify if Section 43.9 bars an Entity from suing JPMC for obligations the Entity contends JPMC assumed under the Purchase and Assumption Agreement.

Objection Number 48. It is not clear if Section 43.9 is subject to the police power exception provided in Subsection D of Section 43.3. The Disclosure Statement should clarify if Section 43.9 would “preclude the United States of America, any state or any of their respective police or regulatory agencies from enforcing their police or regulatory powers.”

9. Objections Asserting that the Disclosure Statement Does not Clarify Ambiguities in Section 43.12.

Section 43.12 of the Plan, styled as a further injunction, also purports to enjoin creditors and other entities from bringing actions against the Debtors, Released Parties or Related Entities. As described herein, Section 43.3 is ambiguous in certain fundamental respects. Without clarification, and resolution of those ambiguities, DTSC cannot make an informed judgment on the Plan.

Objection Number 49. It is unclear if the prohibitions in Section 43.12 are limited by other provisions of the Plan. Most of the sections in Article 43 begin some variation of “Except as otherwise expressly provided in the Plan, the Confirmation Order, or the Global Settlement Agreement.” *See, e.g.,* Section 43.5. However, Section 43.12 has no such restriction. In fact, it states “Notwithstanding anything contained herein to the contrary . . .” The Disclosure Statement should likewise clarify if Section 43.12 is intended to trump potentially contrary provisions elsewhere in “the Plan, Confirmation Order, or the Global Settlement Agreement.”

Objection Number 50. It is not clear if Section 43.12 is subject to the police power exception provided in Subsection D of Section 43.3. The Disclosure Statement should clarify if Section 43.12 would “preclude the United States of America, any state or any of their respective police or regulatory agencies from enforcing their police or regulatory powers.”

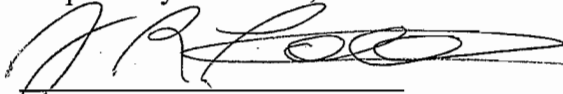
Objection Number 51. It is not clear if the injunction in Section 43.12 is limited to actions to recover or receive monetary payment or to capture property. Section 43.12 seems to enjoin only actions taken against the Released Parties “for the purpose of directly or indirectly collecting, recovering or receiving any payment or recovery.” The Disclosure Statement should clarify if Section 43.12 bars any actions for an equitable remedy for a breach of performance where that breach does not give rise to a right to payment.

CONCLUSION

DTSC therefore respectfully submits that the Disclosure Statement should be rejected along with the Plan and the Debtor ordered to cure the deficiencies and renote the hearing on the Disclosure Statement to comport with section 1125. DTSC reserves the right to join in objections filed by other creditors or parties in interest and to supplement this objection.

Dated: May 28, 2010

Respectfully Submitted,



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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

	-X		
	:		Chapter 11
<i>In re</i>	:		
	:		Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., et al.,¹	:		
	:		(Jointly Administered)
Debtors	:		
	:		Re: Docket No. 2623
	:		Objection Deadline: May 13, 2010 at 4:00 p.m.
	-X		Hearing Date: May 19, 2010 at 11:30 a.m.

OBJECTIONS OF THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL TO DEBTORS’ MOTION FOR AN ORDER (I) APPROVING THE PROPOSED DISCLOSURE STATEMENT AND THE FORM AND MANNER OF THE NOTICE OF THE DISCLOSURE STATEMENT HEARING, (II) ESTABLISHING SOLICITATION AND VOTING PROCEDURES, (III) SCHEDULING A CONFIRMATION HEARING, AND (IV) ESTABLISHING NOTICE AND OBJECTION PROCEDURES FOR CONFIRMATION OF THE DEBTORS’ JOINT PLAN AS PROPOSED

The California Department of Toxic Substances Control (DTSC), submits the following objections (the Objections) to the Debtors’ proposed “Disclosure Statement for the Joint Plan of Affiliated Debtors” and to Debtors’ proposed procedures for voting and plan confirmation.² The grounds for the Objections are as follows. First, Debtors’ request for approval of the Disclosure Statement is premature. Debtors have admitted that the Disclosure Statement is deficient and that the Joint Plan is not final. Asking the creditors to review and the Court to approve

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98104.

² Debtors distributed the proposed Disclosure Statement on March 26, 2010 as Document 2623. Debtors’ motion for an order “(I) Approving The Proposed Disclosure Statement And The Form And Manner Of The Notice Of The Disclosure Statement Hearing, (II) Establishing Solicitation And Voting Procedures, (III) Scheduling A Confirmation Hearing, And (IV) Establishing Notice And Objection Procedures For Confirmation Of The Debtors’ Joint Plan.” is Document 3658 and was filed on April 23, 2010. In this memorandum the terms “Joint Plan” and “Global Settlement Agreement” refer to the versions of those documents included in the March 26 version of the Disclosure Statement



documents that Debtors have not yet completed is an abuse of the bankruptcy process and should not be sanctioned. Second, the Disclosure Statement does not provide “adequate information” that would enable creditors to make an “informed judgment” about the plan as required by 11 U.S.C. § 1125, subdivisions (a) and (b). Not only is the Disclosure Statement missing essential elements and information, much of what is in the Disclosure Statement, and the Joint Plan, is internally inconsistent or convoluted to the point of incoherence. These deficiencies infect both the structural elements of the Joint Plan and the provisions of specific interest to DTSC and the other BKK-related Claimants. Third, the Joint Plan as presented cannot be confirmed and therefore the Disclosure Statement should not be approved. The Joint Plan, for example, impermissibly rewrites the Bankruptcy Code, beginning with the definition of “claim.” (Compare paragraph 1.60 of the Joint Plan with 11 U.S.C. § 101(5).) Further, the Joint Plan includes sweeping releases of third-party liability that extend far beyond even what the Third Circuit’s pertinent holdings allow. Although the applicable provisions are anything but clear, Debtors seem to be asking the Court to release Debtors, JP Morgan Chase Bank (JPMC), and the Federal Deposit Insurance Corporation (FDIC) and all of their insiders and affiliates from virtually any liability even tangentially related to this bankruptcy and the events that gave rise to it. Fourth, the Debtors’ proposed disclosure statement approval, solicitation and voting and confirmation procedures are improper because, inter alia, the requested dates for objections, voting and the confirmation hearing are premature; creditors are being denied due process by being asked to review an admittedly deficient disclosure statement; the proposed method for determining the allowed amount of a claim for voting purposes and for reserves are contrary to the procedures established in the Bankruptcy Code and Rules; and the proposed ballots are

improper given the inconsistent provisions regarding the releases, injunctions and the opt out election, and other reasons provided below.

I. INTEREST OF DTSC AND THE OTHER BKK-RELATED CLAIMANTS.³

The proofs of claim numbered 2138, 2213, 2233, 2405, 2467, 2693, and 3148, designated in section 1.41 of the Joint Plan as the “BKK Proofs of Claim,” concern a closed hazardous waste landfill in California that was created, owned and operated by the corporate predecessors of Debtor Washington Mutual Inc. (WMI) and its pre-bankruptcy affiliates. Specifically, DTSC and the other BKK-related Claimants seek response costs that they incurred and continue to incur at the closed BKK Class I (hazardous waste) Landfill in West Covina California (the BKK Landfill). “Response Costs,” as defined under applicable federal and state environmental laws, are costs that the BKK-related Claimants incur conducting either “removal actions” or “remedial actions” at the BKK Class I Landfill. Comprehensive Environmental Response Cleanup and Liability Act (CERCLA), 42 U.S.C. §§ 9601(25), 9607(a); California Hazardous Substances Account Act (HSAA) Cal. Health and Safety Code § 25323.3. Debtor WMI and certain of its affiliates are “liable persons” because their predecessors owned and operated the landfill. at the time of a release or threatened release of hazardous substances. 42 U.S.C. § 9607(a)(2); Cal. Health and Safety Code § 25323.5.

DTSC is a California state government agency mandated to enforce laws related to the cleanup of hazardous substances in California. Cal. Health and Safety Code § 58000 et seq. The laws that DTSC enforces the HSAA, which establishes a comprehensive program for the cleanup of hazardous substances that have been released, or are threatened to be released, into the

³ Documents supporting the facts presented in this discussion are attached to the Supplemental Statement DTSC submitted with its Proof of Claim, Number 2213.

environment. The HSAA directs DTSC to recover any costs it incurs in connection with such clean-up activities from the liable parties. Cal. Health & Safety Code § 25360. DTSC may utilize either the state HSAA or the federal CERCLA to recover its response costs.

A. Debtors' Relationship to the BKK Landfill.

In the early 1960's, Home Savings and Loan (Home Savings) sought to create a housing development, including a waste disposal facility, on land it had purchased in the City of West Covina, in Los Angeles County. In 1963, Home Savings obtained land use authorization from the City and regulatory authorization from the Regional Water Quality Control Board for the Los Angeles Region (Regional Board) to construct and operate the landfill. In 1964, after obtaining those authorizations, Home Savings engaged BKK Corp. to operate the landfill. In approximately 1967, BKK Corp. and Home Savings sought and obtained permission to accept chemical wastes, now commonly called hazardous wastes, at the landfill. In 1973, Home Savings transferred title to the BKK Class I Landfill to Oxford Investment Corporation (Oxford), which at the time was a subsidiary of Home Savings. In 1976, Oxford and/or Home Savings sold the operating landfill and surrounding land to BKK Corp., which continued operating the landfill.

Between 1962 to 1987, more than four million tons of liquid and solid hazardous wastes, and a much larger volume of nonhazardous solid waste (municipal trash), were disposed of at the 190-acre Landfill.⁴ The landfill was located directly on a bedrock surface. There was no liner between the wastes and the bedrock. The operators reportedly covered disposed solids daily

⁴ The hazardous waste landfill that Home Savings created and operated is part of a larger complex. In the late 1970's BKK Corp. opened a "Class III" landfill for non-hazardous waste adjacent to the closed "Class I" hazardous waste landfill. There are also facilities to process landfill gas and leachate from both landfills. The leachate treatment plant in particular is itself a hazardous waste treatment facility, under the regulatory authority of DTSC.

with soils or other material, thereby forming sequences of soil-bounded cells. Operators disposed of liquids by a variety of methods, including placing drums in the landfill, ponding (forming depressions within the solid waste, filling the depressions with liquids, then mixing in solids when the ponds stopped draining adequately), and injection into the solid waste prism. The types of hazardous wastes disposed of at the BKK Class I Landfill included acid solutions, alkaline solutions, contaminated soil and sand, drilling muds, oil and oil sludge, paint waste, solvents and tank bottom sediments. These hazardous wastes include known, and suspected, carcinogens and mutagens which can affect the central nervous system and damage internal organs at low levels if exposure occurs at certain concentration levels and over a certain period of time.

In roughly 1995, H.F. Ahmanson (Ahmanson), the parent corporation of Home Savings, transferred ownership of Oxford from Home Savings to itself. In 1998, Ahmanson merged into WMI. As part of that transaction Home Savings merged into WMI's subsidiary Washington Mutual Bank (WMB) and Oxford, which had changed its name to Ahmanson Developments Inc., became a WMI subsidiary. In December of 2008, after filing for bankruptcy – for reasons Debtors have never made clear – Debtors caused WMI's non-debtor subsidiary Ahmanson Development Inc. to merge with another of its non-debtor subsidiaries, WMI Rainier, LLC.⁵ DTSC contends that WMB, WMI, WMI Rainier LLC, and other WMI affiliates are each jointly and severally liable for environmental response costs DTSC incurred and continues to incur at the BKK Class I Landfill.⁶ 42 U.S.C. §§ 9601(25), 9607; Cal. Health and Safety Code §

⁵ There is no evidence in the docket that WMI sought prior bankruptcy court approval of this transfer.

⁶ At various places throughout this objection, DTSC discusses the liability of WMI and entities related to WMI, including WMI Rainier and WMB, as if those entities had separate liability. DTSC contends and reserves the right

25323.3. DTSC is informed that other BKK-related Claimants also contend that WMB, WMI, WMI Rainer LLC and other WMI affiliates are liable to them for response costs in connection with the environmental clean up of the BKK Facility.

B. DTSC and the other BKK-related Claimants have incurred Response Costs at the BKK Class I Landfill

In October 2004, BKK Corp. informed DTSC that BKK Corp. no longer had sufficient funds to conduct necessary maintenance activities at the Class I Landfill.⁷ DTSC thereafter began emergency response actions at the facility along with enforcement actions against liable parties. The enforcement actions included issuing an Imminent and Substantial Endangerment Determination and Order and Remedial Action Order (IS&E Order) No. 1/SE-D 04/05-004 pursuant to DTSC's regulatory authority under the HSAA which requires WMB and other respondents to that IS&E Order to perform response actions and to reimburse DTSC for response costs. DTSC is informed that WMB and others entered into a Joint Defense Agreement pursuant to which, among other things, WMB agreed to fund a portion of costs and expenses incurred with respect to, and otherwise assist with the performance of, the response activities of the group, including costs and expenses under the Consent Decree described below.

WMB, on behalf of itself and its parent WMI and other Affiliates as identified therein reached a settlement with DTSC, which was memorialized in an Amended Consent Decree approved and entered by the United States District Court in 2006 ("Consent Decree") in the case

to argue that the various entities related to WMI are jointly and severally liable for any BKK response costs and further that each of the entities have primary liability for those costs and/or are co-liable with WMI Rainier LLC.

⁷ In 2003, a subsidiary of WMB, NAMCO Securities Corp. agreed to loan money to BKK Corp. Because BKK Corp. was known to be in financial distress, as an isolated transaction this loan was not commercially justifiable. Rather the loan was an attempt by WMB to protect itself and WMI from the greater liability they would incur in the event of a default by BKK Corp. The loan did not prevent BKK Corp.'s default.

of *California Department of Toxic Substances Control, et al. v. American Honda Motor Co., et al.*, USDC, Central District of California, Case No. CV05-7746 CAS (JWJ) which case is defined in the Debtors' proposed Plan as the "BKK Litigation."⁸ Joint Plan at § 1.41. The Consent Decree was originally set to expire by on March 15, 2008, but the parties to the Consent Decree have extended that date into July 2010.

The Consent Decree required WMB, WMI and its other Affiliates to perform certain operating, maintenance, and monitoring activities at the BKK Facility and to pay response costs. DTSC is informed that WMI and WMB did not formally withdraw from the joint defense group or the joint defense agreement, if at all, before April 3, 2009, i.e. after this bankruptcy filing.

II. STANDARDS FOR DISCLOSURE STATEMENT

Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing "adequate information" to "enable a creditor to make 'an informed judgment' about the Plan." 11 U.S.C. § 1125(a)(1); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. GMC*, 337 F.3d 314, 321-323 (3d Cir. 2003). "Disclosure is the 'pivotal' concept of a Chapter 11 reorganization." *Ibid.* (Citations omitted.) The importance of full disclosure is underlain by the reliance placed upon the disclosure statement by the creditors and the court. "We cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of adequate information." *Ibid.* (Citations omitted.) "[C]reditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization plan, [therefore] the importance of full and honest disclosure cannot be overstated." *Id.* at 323.

⁸ WMI and the other Affiliates received consideration in exchange for their participation in the Consent Decree in that, among other things, they were provided contribution protection and other benefits as provided therein.

Adequate information is defined as information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361-362 (3d Cir. 1996). These disclosure requirements are crucial to the effective functioning of the federal bankruptcy system. *Id.* Adequate information will be determined by the facts and circumstances of each case. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988). Where a disclosure statement omits some information and misrepresents other information, it should not be approved. *In re National Health & Safety Corp.*, 2000 Bankr. LEXIS 745 (Bankr. E.D. Pa. 2000).

Even where the disclosure statement fairly and accurately recapitulates the terms of the plan, objection can properly be made at the disclosure statement stage if the plan is allegedly defective. *In re McCall*, 44 B.R. 242, 244 (Bankr. E.D. 1984); *In re Atlanta West VI*, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988); *In re Valrico Square Ltd. Partnership*, 113 B.R. 794, 795-796 (Bankr. S.D. Fla. 1990).

On the facts before this court, it is clear that the Disclosure Statement fails to meet the requirements of section 1125(a). Debtors admitted as much in their applications for a financial advisor. Document Nos. 3557 and 3558. Further, the Disclosure Statement shows that the Plan itself as currently presented is fatally defective and thus, the court should reject both the Disclosure Statement and Plan.

III. THE JOINT PLAN IS NOT FINAL AND THE DISCLOSURE STATEMENT IS INADEQUATE; THEREFORE THE MOTION FOR APPROVAL IS PREMATURE

Debtors' motion for approval of the Disclosure Statement is premature and puts the Court and all of creditors and interested parties in an unreasonable position. Accordingly the Court should summarily reject the Disclosure Statement or, alternatively, withhold consideration of it and the proposed disclosure, solicitation and confirmation procedures until it appears that the plan to which it relates is feasible. The problem here is two-fold. First, because the FDIC has not agreed to the so-called "Global Settlement Agreement" that is the very core of the Joint Plan, the Joint Plan is not feasible, and may indeed not ever be feasible unless substantially and materially revised. Second, Debtors freely admit that the Disclosure Statement they submitted on March 26, 2010, fails to comport with the requirements of section 1125(a). If the March 26 version is all that is before the Court, DTSC respectfully submits that the Court should take Debtors at their word and reject the Disclosure Statement. Even if the Debtors file last minute amendments correcting the most glaring deficiencies, the Court should not approve or reject the amended Disclosure Statement until the creditors and other interested parties have had a fair and reasonable opportunity to review and fully consider the amended plan and disclosure statement. Creditors rights under section 1125(a) should not be illusory.

A. The Chapter 11 Plan Cannot be Deemed Final Until the FDIC Agrees to the Global Settlement Agreement

As stated in the Disclosure Statement, the Joint Plan is "premised on the Bankruptcy Court's approval of the Global Settlement Agreement." Page 8. Without the Global Settlement Agreement there is no Joint Plan. Although called the "Global Settlement Agreement," it is apparently not yet global, a settlement, or an agreement.

As of this date, the FDIC Receiver, and the FDIC Corporate have not agreed to all of the provisions contained in the proposed Global Settlement Agreement. However, the Debtors... are *hopeful that such agreement and requisite approval shall be obtained in the very near future.*

Disclosure Statement at 7 (Emphasis Added). Furthermore at the May 5th hearing on the Equity Committee's Motion to Appoint an Examiner in this Case, counsel for the FDIC informed the Court that there were still significant unresolved issues. They may yet get resolved, but if those issues were not significant and difficult, surely they would be resolved already.⁹ Moreover, if they are resolved after the date objections are due, creditors are entitled to due process and a reasonable amount of time to review any amended disclosure statement and plan that is submitted to the court to evaluate under the pertinent Code provisions.

It is shameful that the creditors and other parties in interest are having to spend surely hundreds of thousands of dollars collectively in transactional and other costs to analyze and identify issues and irregularities in the, at best, *hoped-for* Global Settlement Agreement, the place-holding Joint Plan, and the admittedly inadequate Disclosure Statement. Even if the FDIC ultimately agrees to a global settlement, the chances at this point that it will be identical to what the Debtors have put forth, are at best slim, and the court, creditors, and other parties in interest will have to incur additional sums to pour over new documents.

⁹ News reports indicate that one of the issues preventing a settlement is whether JPMC is entitled to approximately \$1.4 billion in tax refunds. See, e.g., Dan Fitzpatrick, *FDIC Stands Between J.P. Morgan and a WaMu Payoff*, Wall Street Journal, March 29, 2010, available at <http://online.wsj.com/article/SB10001424052702304434404575150150787973606.html>. By contrast, the Disclosure Statement represents that the Global Settlement Agreement would provide \$7 billion to the creditors. Page 1. A loss of \$1.4 billion would likely require substantial revisions of the plan Joint Plan Debtors need to explain how the \$1.4 billion dollar tax refund impacts the payout to creditors.

The purpose of a disclosure statement is to inform the creditors about the impact of a proposed Chapter 11 plan for reorganization or liquidation. Where there is not yet a plan there should be not yet be a disclosure plan.

B. The Disclosure Statement’s Analysis of the Joint Plan is Inadequate and Incomplete.

On April 21, almost a full month after circulating the Disclosure Statement, Debtors applied to the Court for permission to hire Blackstone Advisory Partners (the Blackstone Motion), admitting to the Court that the March 26 version of the Disclosure Statement was inadequate under law and that Debtors needed additional financial analysis to rectify the problems.

“Debtors submit that in order to satisfy the requirement in section 1125 of the Bankruptcy Code that the Disclosure Statement provide 'adequate information,' the *Debtors must supplement* the Disclosure Statement with information regarding the value of certain assets of the Debtors The Debtors intend to provide this additional information *in an amended version of the Disclosure Statement* to be filed prior to the Disclosure Statement hearing.”

Docket No. 3558, Page 2. (Emphasis added.) Further, “the Debtors submit that neither approval of the Disclosure Statement nor confirmation of the Plan can occur absent such valuation.”

Docket No. 3557, page 6. In the Blackstone Motion, Debtors represented that \$1.35 million was a fair price for the sought-for services, a clear indication of how extensive and material Debtors believe the deficiencies to be.

In fact, the Disclosure Statement is missing numerous elements. As described below, some are mandatory in every disclosure statement. Some are promised elsewhere in this Disclosure Statement. Some are both.

The Disclosure Statement does not include a Liquidation Analysis. The Disclosure Statement asserts, on page 127 that "the Debtors have determined that confirmation of the Plan will provide each creditor and equity holder with a recovery that is not less than it would receive pursuant to a liquidation of the Debtors under chapter 7 of the Bankruptcy Code." Yet, later on the same page, the Debtors admit that the liquidation analysis "will be filed at a later date." One wonders on what basis Debtors made the earlier statement. (See also Disclosure Statement, page 106.) *See also, In re Diversified Investors Fund XVII*, 91 B.R. 559, 561 (Bankr. C.D. Cal. 1988).

The Disclosure Statement does not include necessary financial information and projections. These too will be "provided at a later date." Page 104. Information that must be included in the financial information and projections *when they are available* are estimates of the pay out formulas for the various creditor classes and the size of the Liquidating Trust Claims Reserve and any other reserves of creditor cash. With this information is missing from the Disclosure Statement, creditors do not have "adequate information" as they are entitled under the Code.

There is no feasibility analysis. Other than conclusory statements on page 127 of the Disclosure Statement, there is no analysis of feasibility. This deficiency renders the Disclosure Statement wholly inadequate.

The Disclosure Statement does not include the BKK Litigation in the list of material litigation. DTSC estimates that the total response costs for the BKK Landfill will exceed \$600,000,000. DTSC alleges both that Debtors are jointly and severally liable to it for that

amount and that under any equitable allocation Debtors would still bear a large share of that liability.

The Disclosure Statement does not include other promised information regarding the Class 12 General Unsecured Claims. The Disclosure Statement states that the relative priorities among the holders of unsecured claims and the order in which such holders are entitled to receive payment – a question of paramount importance to holders of unsecured claims – “are set forth in more detail in the Plan.” Page 64. The Joint Plan, at Art. XVI, 16.1, states that those relative priorities, “are set forth in more detail in the Subordinated Model attached hereto as Exhibit ‘H’.” However, there is no Exhibit H attached to the Joint Plan. Other promised but missing information include the list of executory contracts and unexpired leases to be rejected; the list of Plan Contribution Assets (purportedly, but not attached, as Exhibit “G” to the Global Settlement Agreement); and for the list of JPMC Claims attached as Exhibit “A” to the Global Settlement Agreement the amounts that are deemed allowed under the Joint Plan as Class 12 General Unsecured Claims.¹⁰

IV. THE JOINT PLAN AND DISCLOSURE STATEMENT ARE REplete WITH AMBIGUITIES AND CONTRADICTIONS THAT PRECLUDE ANY MEANINGFUL DETERMINATION OF THE PLAN’S IMPACT.

A disclosure statement cannot cure a poorly drafted plan or settlement agreement upon which the plan is based. If the plan or settlement provisions are vague, contradictory or otherwise not meaningful, and their legal impact therefore can not be determined, then the

¹⁰ Because it appears that the Allowed JPMC Claims in Class 12 claims will dilute the pro rata share of other allowed General Unsecured Claims in such class even though JPMC may be waiving its right to distributions on account of such claims, the allowed amounts of these JPMC Claims are of particular importance to the other unsecured creditors.

disclosure statement can not serve its function of enabling a creditor to make an informed judgment about whether to accept or reject the plan. That is the case here.

The provisions identifying “the governing documents” are inconsistent. The Disclosure Statement at page 71 states the following: "In the event of any conflict between the terms of this Disclosure Statement, the Plan and the terms of the Liquidating Trust Agreement, the terms of the Plan shall govern." But on the very next page is this: "In the event of any inconsistency between the Plan and the Liquidating Trust Agreement, the Liquidating Trust Agreement shall govern."¹¹ Page 72. Extending the inconsistencies, the Disclosure Statement then declares that all of the rights, powers and duties of the Liquidating Trustee are "subject to the Proposed Global Settlement Agreement" and "[i]n all circumstances, the Liquidating Trustee shall comply with all of the Debtors’ obligations under the Proposed Global Settlement Agreement." *Ibid.* See also Joint Plan at pages 41-42.

The Joint Plan’s release provisions are convoluted to the point of being indecipherable. DTSC hereby objects that the release provisions in the Joint Plan and Disclosure Statement defy clear explication. What is nonetheless clear is that the sought-for releases are stunningly over broad, improper, and would preclude plan confirmation. See section VI.B. below. The overreaching and lack of clarity begins in the definition section. Consider the definition of “Claim” and “Released Claims” in section 1.148 of the Joint Plan. As discussed in section VI.A. below, the Debtors’ definition of “claim” is contrary to the definition under the Code and thus fatally infects and confuses the entire Joint Plan. With respect to the definition of Released Claims, the conjunctive phrase – “in each case pursuant to clauses (a) and (b) above” –

¹¹ The proposed provisions of the Liquidating Trust Agreement are referenced as attached, but are not.

appears approximately one-third of the way through the definition. Unfortunately, neither the conjunction nor the definition as a whole indicates how the clauses leading to the conjunction relate to the clauses following it. Presumably the later clauses either restrict or expand the earlier clauses. But which? We cannot say. No better are the substantive release provisions in Sections 42.2(a) and (b) and 42.6. Each of these sections contains an overly broad release, but neither the Disclosure Statement nor the Joint Plan explains what separate function each serves, nor indeed why there are three separate release provisions. Reading the individual provisions does not help. Consider, for example, the first sentence of section 42.2(b): this single run-on sentence contains over 150 words and over 20 commas. The Disclosure Statement, at page 99, unhelpfully repeats this language. One is tempted to leave off mocking the hyper-prolix constructions, but the stakes are far too high. As discussed in section VI.B. below, these release provisions could insulate scores of debtor and non-debtor entities and insiders from untold liabilities including to entities that do not appear to be receiving any consideration in exchange for such release. As discussed in section VI.C. below, the releases could have a particular impact on any BKK creditors. Clarity is essential.

The Plan includes self-nullifying opt-out provisions. The Joint Plan, at Section 42.6, p. 72, suggests that claimants holding impaired claims and who are otherwise entitled to vote, can opt-out of the releases (and forfeit distributions) that the Plan otherwise seeks to impose.

However, this opt-out provision is illusory. Section 42.6 continues:

...and provided, further, that, because the Plan and Global Settlement Agreement, and the financial contributions contained therein, are conditioned upon the aforementioned releases, and, as such, these releases are essential for the successful reorganization or the Debtors, pursuant to the Confirmation Order, those Entities that opt out of the release provided hereunder shall be bound and shall receive the distributions they otherwise would be entitled to receive pursuant to the Plan.

Id. (emphasis in original).

In other words, apparently, a claimant can opt out of the distribution and releases, but those claimants will still be “bound and shall receive the distributions.” This may mean, but it is not certain, that even though a claimant “opts out” of the releases, it may still be bound by them. In other words, two essential provisions contained in a single lengthy run-on sentence, are mutually contradictory. The Disclosure Statement does nothing to explain or clarify this material inconsistency, nor to explain what effect, if any, checking the opt-out box on the ballot (and thus, waiving the right to a distribution) would have on the rights of the voter.

The claims estimation provisions are confusing and unfair. The Disclosure Statement seems to provide that the Liquidating Trustee can force an estimation of a claim but then, even after that process, continue to litigate the claim objection. Page 70. Regardless of the claims estimation litigation outcomes, JPMC is apparently not bound by them. *Ibid.* These disclosures seem unfair and wasteful. They need further clarification.

The Relationship of the JPMC allowed claims to the Class 12 General Unsecured Claims is Unclear. JPMC’s over 40 proofs of claim are to be “allowed” and entitled to receive the same treatment as other Allowed general unsecured claims under the Plan. Disclosure Statement, page 12. However, JPMC “will waive any distribution JPMC otherwise would be entitled to receive on account of its claims.” *Id.* It is unclear what the effect of the allowed JPMC Claims will have on the distributions to the general unsecured claims in the same class (i.e. Class 12). Will the allowed JPMC Claims effectively dilute the pro rata shares of other general unsecured creditors even though JPMC is not to receive any distributions on account of such allowed claims? If so, this fact should be more clearly disclosed as should the Allowed

amount of such claims so that the other creditors in Class 12, including the BKK-related Claimants, can fully understand that – notwithstanding that the parties to the *hoped-for* Global Settlement Agreement all agree that JPMC shall not receive any distribution on account of its own general unsecured claim – those claims are nevertheless being used to dilute the pro rata shares of the other unsecured creditors in Class 12. Neither the amount of the Allowed JPMC Claims is disclosed in the Disclosure Statement, nor how these presently unliquidated claims will be liquidated if the parties to the Global Settlement Agreement have not already agreed to the allowed amounts. In addition, because the Disclosure Statement fails to contain any meaningful information concerning the number and projected amount of the Allowed Class 12 General Unsecured Claims, the dilution effect of the JPMC Claims cannot be calculated.

V. THE DISCLOSURE STATEMENT, MIRRORING THE JOINT PLAN, DOES NOT CLEARLY INDICATE IF, OR TO WHAT EXTENT, THE BKK LIABILITIES WILL BE ASSUMED BY JPMC AND/OR PAID.

A. Summary of the Provisions in the Joint Plan and Global Settlement Agreement Regarding BKK

The specific provisions regarding the BKK liability can be found in section 2.21 of the Global Settlement Agreement, section 2.1(f)(4) of the Joint Plan, and section C.4.d of the Disclosure Statement.¹² Definitions and other ancillary provisions appear elsewhere.

¹² The Disclosure Statement at paragraph C.4.d. on page 11, states: “As set forth in the Proposed Global Settlement Agreement, JPMC will assume all liabilities and obligations of the WMI Entities, other than WMI Rainier, for remediation or clean-up costs and expenses (and excluding tort related liabilities) in excess of applicable insurance, arising from or relating to that certain litigation styled *California Dept. of Toxic Substances Control, et al. v. American Honda Motor Co., Inc. et al.*, No. CV05-7746 CAS (JWJ), currently pending in the United States District Court for the Central District of California (the “BKK Litigation”), and certain agreements related thereto. The Debtors have agreed to object to any proofs of claim filed against their chapter 11 estates relating to the BKK Litigation and related agreements, and to the extent such proofs of claim are not withdrawn, with prejudice, JPMC will defend the Debtors against and reimburse the Debtors for any distribution which the Debtors become obligated to

Superficially, the provisions provide for the following. A) JPMC would assume Debtors' BKK-related liability. B) JPMC would not assume the BKK-related liability of WMI's non-debtor subsidiary, WMI Rainier. C) JPMC would take over, control and reap the benefits of all BKK - related insurance policies benefiting Debtors and their non-debtor subsidiaries, including WMI Rainier. D) There is a presumption that the BKK-related Claimants will dismiss their claims, "with prejudice," but if they do not, the Debtors would be compelled to object to the BKK claims (on some unspecified basis) and JPMC has agreed to defend those objections and "reimburse" the Debtors. The numerous ambiguities in the provisions, however, create a much more complex and uncertain structure.

B. Examples of Fundamental Questions About the BKK Liability that the Disclosure Statement and the Joint Plan do not Answer.

But for its convolutions and uncertainties, DTSC very well might support the Plan. DTSC agrees certainly that it is appropriate for JPMC to assume Debtors' BKK liabilities. The incomplete and contradictory passages of the Joint Plan, however, prevent DTSC or other BKK-related Claimants from determining the net effect of the Joint Plan on the BKK liability. As discussed below, depending on how deficiencies in the Joint Plan provisions are corrected, gaps filled and contradictions resolved, JPMC's assumption of the BKK liabilities may be (i) complete and appropriate or (ii) merely illusory. Until there is more clarity about the Joint Plan provisions, the Disclosure Statement, as it relates to the nature, extent and treatment of the BKK claims, cannot enable the BKK-related Claimants "to make an informed judgment about the plan."

make on account of remediation or clean-up costs and expenses, to the extent not covered by applicable insurance. Likewise, JPMC has agreed to indemnify the WMI Entities, other than WMI Rainier, for liabilities relating to the BKK Litigation, to the extent not covered by applicable insurance."

It is unclear whether JPMC’s Assumption of Liability is Coextensive with the BKK-related Claims. As discussed above, DTSC and the other BKK-related Claimants seek to recover “response costs” as that term is used in CERCLA and the HSAA. 42 U.S.C. 9601(25). However the Global Settlement Agreement states that JPMC is assuming “remediation or clean-up costs and expenses.” See also Joint Plan section 1.39. Neither the Disclosure Statement nor the Joint Plan indicates whether “remediation or clean-up costs and expenses” includes all response costs or is a more narrow category of costs. This ambiguity could be eliminated if the Global Settlement Agreement and other documents stated simply that JPMC is assuming the liability presented in the BKK claims or at least to the extent those claims seek “response costs.” Presently, however, the ambiguity prevents the BKK-related Claimants from making an informed decision about the Joint Plan.

It is unclear whether the assumption by JPMC of the WMI Entities’ BKK-related liabilities includes any alter ego or other derivative liability ascribable to WMI. The *hoped-for* Global Settlement Agreement in sections 2.21(a)(a) and 2.21(c) indicates that JPMC is assuming the BKK-related liability of WMI but not that of its non-debtor subsidiary WMI Rainier LLC (WMI Rainier).¹³ See also Joint Plan, section 1.39. This begs the question whether JPMC is assuming WMI’s derivative liability as the alter ego of ADI and/or WMI Rainer or any derivative liability WMI may have as the successor to H.F. Ahmanson, based on that company’s ownership of Oxford. This question – whether JPMC is assuming any such derivative liability – would substantially affect the value of the assumption of liability. Without a clear answer, DTSC

¹³ Pursuant to a postpetition merger WMI effected between two of its non-debtor subsidiaries, WMI Rainier is the successor to Ahmanson Development, Inc. (ADI), which as Oxford was one of the owners and operators of the BKK Landfill. WMB was the creator and first owner and operator of the landfill.

and the other BKK-related claimants cannot make an informed decision regarding whether to accept the Joint Plan.

It is unclear whether JPMC is reserving the right to argue that it did not assume all of WMB's BKK liability. Because WMB is not a "WMI Entity" as that term is defined in the Global Settlement Agreement it appears that JPMC is not *in the Global Settlement Agreement itself* agreeing to assume any BKK liability from WMB. Although DTSC would urge JPMC, for clarities sake, to restate in the Global Settlement Agreement that it is assuming WMB's BKK liability, DTSC believes, nonetheless, that JPMC assumed WMB's liability for the BKK Landfill in JPMC's pre-petition Purchase and Assumption Agreement with the FDIC. That belief finds support in section 2.21(a) of the Global Settlement Agreement, which states that the FDIC Receiver "agrees that" the Purchase and Assumption Agreement "assigned or otherwise transferred to JPMC" WMB's interest in the BKK-related insurance policies. If the Purchase and Assumption Agreement transferred the BKK-related insurance policies to JPMC, it no doubt transferred the BKK liabilities as well.

Unfortunately, JPMC is on record denying that it assumed any BKK Liability under the Purchase and Assumption Agreement. See Exhibit 1 to DTSC's Proof of Claim, No. 2213, Marcy 3, 2009 letter from Mr. Albert Cohen, counsel to JPMC. Elsewhere, the Disclosure Statement suggests that JPMC continues to deny it assumed any BKK liability from WMB. The Disclosure Statement states, on page 22, that JPMC only assumed "all of WMB's **deposit** liabilities," (emphasis added) which arguably would not include WMB's BKK liability. Again, without knowing whether JPMC is reserving the right to argue that it did not assume all of WMB's BKK-related liabilities and/or whether through the release provisions it is attempting

through the Global Settlement Agreement and the Joint Plan to secure a discharge and release of its WMB-based BKK-related liabilities, DTSC and the other BKK-creditors cannot make an informed decision about the nature, extent or value of the assumed BKK Liabilities (presumably but not specifically identified yet as a Plan Contribution Asset on the yet-to-be-disclosed Exhibit “G” to the Global Settlement Agreement).

The relationship between JPMC’s agreement to pay the BKK Liabilities and DTSC’s rights to seek payment in the bankruptcy is unclear under the terms of the Global Settlement Agreement. The Global Settlement Agreement, in Section 2.21(a)(b) states that JPMC will assume and pay the WMI Entities’ BKK Liabilities to the extent there is not insurance coverage. This implies that DTSC, as well as other BKK-claimants, could if necessary sue JPMC post-confirmation for WMI’s pre-petition BKK liability. Section 2.21(b), however, requires JPMC to defend Debtors against the BKK Proofs of Claim in the bankruptcy and to reimburse Debtors for any distribution they are required to make. (See also Disclosure Statement section C.4.d.) The relationship between these provisions is unclear. JPMC’s assumption of the BKK Liability does not divest Debtors of liability. In particular, Debtors cannot contract away their environmental obligations to DTSC. The Joint Plan and Disclosure Statement should state clearly whether the terms of the Joint Plan would, for example, allow DTSC and the other BKK-related Claimants to press their case both in the bankruptcy against Debtors and outside the bankruptcy against JPMC in order to increase their chances of getting a full recovery. Similarly, if the BKK-related Claimants withdrew their claims “without prejudice,” would Debtors still be obliged to object to the claims? (See Disclosure Statement paragraph C.4.d.). With these ambiguities unresolved, the BKK Disclosure Statement lacks adequate information and DTSC cannot make an informed decision about the Joint Plan.

It is unclear whether any insurance rights are being transferred to the Liquidating Trust. The Disclosure Statement provides that "to the extent Liquidating Trust Assets are allocable to Disputed Claims," they will be considered transferred "to the Liquidating Trust Claims Reserve." Disclosure Statement at 75. This provision could mean that policies or proceeds from BKK-Related Policies are being transferred to the Liquidating Trust, which would of course conflict with other provisions which say they are being transferred to and controlled exclusively by JPMC. This too needs to be clarified.

C. The Disclosure Statement Fails to Explain Why it is Proper or Fair for the Debtors to Cause Non-debtor WMI Rainier to be Stripped of its Insurance Assets for the Benefit of JPMC, while Leaving WMI Rainier with its and/or ADI's BKK Liability.

The Global Settlement Agreement authorizes JPMC to "act as [the] exclusive agent with respect to all rights and benefits to which the WMI Entities or the FDIC receiver are entitled under the BKK-Related Policies and to resolve the BKK Liabilities on behalf of the WMI Entities." Section 2.21(a)(c). Further, JPMC "rather than the WMI Entities of the FIDC Receiver, shall be entitled to recover from the BKK-Related Carriers any costs and expenses . . . incurred by any of the WMI Entities or WMB prior to the Effective Date." Section 2.21(a)(e). Finally, "the WMI Entities shall assign for themselves and their successors in interest to JPMC all claims for contribution, equitable indemnity and cost recovery in the future related to the BKK Liabilities." Section 2.21(a). In other words, JPMC would receive and control the payouts from any BKK-Related Policy or other benefit, including benefits that belong to WMI Rainier and the FDIC.

Yet, JPMC is not assuming WMI Rainier's BKK Liabilities.¹⁴ Section 2.21(a)(a) and 2.21(c). This raises the question under what, if any, circumstances could it be fair to creditors for JP Morgan Chase to capture WMI Rainier's BKK insurance benefits and contribution rights, while leaving WMI Rainier with the liabilities that gave rise to those benefits. Allowing that to proceed, would permit JPMC to use the insurance policies which provide coverage for WMI Rainier to settle all claims against all WMI Entities other than WMI Rainier and to leave WMI Rainier as an empty shell with no assets and all of the remaining BKK liabilities. Moreover, the releases and injunctions appear sweeping enough that the BKK-related Claimants could be barred after the Effective Date from pursuing non-debtor WMI Rainier for the BKK Liabilities. JPMC is acquiring all of the insurance rights, so it must bear all of the liabilities covered by such insurance.

DTSC is amenable to working with Debtors and JPMC to amend these provisions. JPMC is acquiring all of the insurance rights, so naturally it must bear all of the liabilities covered by such insurance.

The uncertainty about the scope of the liability that JPMC is accepting or assuming exacerbates the impropriety of the insurance provisions. The inequity of stripping WMI Rainier's insurance proceeds without accepting WMI Rainier's liability would apply with equal force if JPMC asserts now or any time in the future that it has not assumed from Debtors any alter ego or other derivative liability ascribable to WMI or that it has not assumed (or will after the Effective Date be released from) WMB's BKK Liability.

¹⁴ As noted above earlier, for the purpose of this discussion only, DTSC is accepting as valid the fiction that the relevant ultimate predecessors of WMB and WMI Rainier – Home Savings and Loan and Oxford Investment Company Inc., respectively, – had separate liability. DTSC reserves all its rights.

D. The Disclosure Statement Should Identify the BKK-Related Carriers and Policies.

Further, Schedule 2.21 of the Global Settlement Agreement, which should list the BKK-related policies and carriers, is blank. Without the opportunity to evaluate the insurance policies, DTSC cannot make an informed decision on the Joint Plan.

E. The Disclosure Statement Does Not Provide Adequate Information about the WMI Rainier.

Other than stating that JPMC is disavowing its purchase of the WMI Rainier liabilities, the Disclosure Statement reveals nothing about this entity, generally classified as a "Non-Debtor Subsidiary." The Disclosure Statement states the following: "WMI has been in the process of winding-down many of its non-debtor, non-banking subsidiaries." Disclosure Statement at 50. The Disclosure Statement goes on to discuss its non-debtor, non-banking subsidiaries "with material assets and operations." Neither WMI Rainier nor ADI are among those listed. Disclosure Statement at 50-51. This may imply that Debtors assert that WMI Rainier and ADI have no material assets or liabilities.

The Disclosure Statement does not fully indicate whether WMI Rainier or its predecessor ADI are among those non-debtor subsidiaries that had cash deposits with WMB at the time of the FDIC seizure. That question is materially important to DTSC when determining whether to accept the Joint Plan.¹⁵

¹⁵ There is a reference in a schedule of some of the cash deposits at WMB that ADI had in excess of \$1 million on deposit at the time of the takeover and sale to JPMC. If true, it certainly would be material for the BKK-related Claimants who may have about-to-be-released causes of action against ADI and its successor WMI Rainier, to understand the disposition by JPMC of that cash and/or the allocation of that cash or credit, together with other facts relating to the assets and liabilities of ADI and WMI Rainier in the relevant periods of time before and after the merger, as well as evidence of WMI's, ADI's and WMI Rainier's adherence to corporate formalities in the years leading up to the bankruptcy and merger of the two subsidiaries. No such information is in the Disclosure Statement.

Similarly, the Disclosure Statement does not indicate whether WMI Rainier was in any of Debtors' joint tax groups. If so, it may be entitled to any refunds that JPMC receives from tax authorities. .

In sum, DTSC and other creditors require information about the present net worth of WMI Rainier – what are its assets and liabilities. If indeed WMI Rainier were solely responsible for any portion of the BKK liability, which DTSC denies, WMI Rainier's net worth would be an important question for DTSC and other BKK-related Claimants. Prior to its collapse WMB on behalf of itself and WMI was actively engaged in the BKK response actions. The collapse therefore interfered with the response actions.

F. The Disclosure Statement Does Not Adequately Explain Why the BKK Claims are Included in Class 12, General Unsecured Claims or Provide Any Justification for the Disparate Treatment of Such Claims.

Though not clearly stated in the Disclosure Statement, claims with respect to BKK Liabilities appear to be lumped into the category of "Class 12 - General Unsecured Claims." DTSC submits that it and other BKK-related Claimants should be classified in their own class under Section 1122(a) of the Bankruptcy Code on the basis that BKK-related Claimants' claims are substantially different than the other general unsecured claims. Among other things, all or a portion of the BKK claims appear to be collectible from the BKK-Related Policies providing indemnity coverage for WMI and its affiliates, including WMB, ADI and WMI Rainier.

The proceeds from the identified insurance policies in WMI's case are an important asset which will pay for BKK claims. WMI's disclosure statement indicates that all control over those policies is being assigned to JP Morgan Chase Bank ("JPMC"), so WMI will lack the necessary incentive to pursue the insurance policies for the benefit of the claimants. Based on the definitions in the plan and the underlying settlement terms, it appears that JPMC, and WMI

actually are trying to convert the BKK Liabilities from general unsecured claims covered by insurance to general unsecured claims with no insurance coverage.

It is appropriate to classify unsecured creditors whose claims are covered by proceeds of insurance separately from other unsecured creditors. *In re United States Mineral Products Co.*, 2005 Bankr. Lexis 3259 (D. Del. 2005). Unsecured claims with access to insurance coverage are significantly different from general unsecured claims. *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413, 421 (Bankr. E.D. Pa. 1995). In *Sacred Heart Hospital*, the court approved a plan under which unsecured creditors whose claims were covered by insurance would initially receive what they could recover from applicable insurers and any portions of such claims not paid by applicable insurers were classified with the rest of the general unsecured creditors. *Id.* at 415 and 421, n.8. ("Dissimilar treatment for dissimilar claims does not run afoul of the unfair discrimination provision."). See also *In re Mahoney Hawkes, LLP*, 289 B.R. 285 (Bankr. D. Mass. 2002). ("The Class 3 claimants have the right to receive some property of the estate that general unsecured creditors cannot receive. They are, in effect, multiple secured creditors having claims against a single fund.")

The Disclosure Statement proposed by the Debtors in this case fails to address the significant difference between the BKK claims and the remainder of the Debtors' general unsecured creditors and fails to explain how they can be lumped in with general unsecured creditors.

It also appears that the BKK-related Claimants will receive disparate treatment under the Joint Plan. Of the 21 classes specified in the Joint Plan, there are several for which there is no rational distinction from the BKK-related Claimants, yet JPMC is assuming the Debtors'

liabilities in full. Whereas for the BKK Claims, JPMC will assume only an unclear portion of the liability and the BKK-related Claimants will be subject to mandatory objections to their claims otherwise. To the extent those claims are allowed after the objections are resolved, JPMC will “reimburse” the Debtors for any pro rata distributions they are required to make on account of the BKK Class 12 Claims to the extent not covered by insurance. Thus, while many of the Debtors general unsecured creditors will be paid in full, the portion of the BKK-related Claimants’ claims that JPMC does not assume, if allowed, may receive only a pro rata share of amounts available from the Creditor Cash and the Liquidating Trust Assets, if any. This classification scheme seems likely to minimize if not eliminate the BKK-related Claimants’ claims and/or unfairly dilute their pro rata shares of the limited and undefined assets allocated to their class. Because the Disclosure Statement contains inadequate information about the amount or projected range of amounts of the allowed claims and the amount and value of the Plan Contribution Assets, the BKK-related Claimants are unable to determine what the expected payout is under the proposed Joint Plan and the potential difference between what the BKK-related Claimants can expect to receive as compare to other unsecured creditors in other classes being treated more favorably.

VI. THE JOINT PLAN IS NOT CONFIRMABLE IN ITS CURRENT STATE.

It is now well accepted that a court should not approve a disclosure statement if the plan cannot be confirmed. *In re Main Street AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) (disclosure statement should not be approved, even if it provides adequate information, if plan could not be confirmed); *In re Silberkraus*, 253 B.R. 890, 899 (Bankr. C.D. Cal. 2000) (it is appropriate for the court to deny approval of disclosure statement describing a plan that is not confirmable); *In re 266 Washington Assocs.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992)

(disclosure statement will not be approved where it describes a plan which is fatally flawed); *In re Century Investment Fund VIII Ltd. Partnership*, 114 B.R. 1003, 1005 (Bankr. E.D. Wis. 1990) (if a plan is not confirmable as a matter of law it is appropriate for the court not to approve the disclosure statement); *In re Market Square Inn, Inc.*, 163 B.R. 64,68 (Bankr. W.D. 12 Penn. 1994) (where it is clear that a plan of reorganization is not capable of confirmation it is appropriate to refuse the approval of the disclosure statement). Courts deny approval of disclosure statements if the plans they describe are not confirmable, because soliciting votes and seeking court approval of such plans is a fruitless venture that wastes the resources of both the courts and the parties. *In re Silberkraus*, 253 B.R. at 899; *In re 266 Washington Assocs.*, 141 B.R. at 288.

A. The Plan Impermissibly Redefines “Claim” a fundamental Bankruptcy Concept and May Thereby Eviscerates Many of the Limitations on the Impact of a Bankruptcy Plan.

The Joint Plan alters and expands the definition of Claim. Compare the definition in paragraph 1.60 of the Joint Plan with that in 11 U.S.C. § 101(5). Debtor’s new case-specific definition includes, for example, any right to “performance” as well as any right to “payment.” Unlike the Bankruptcy Code, in this Plan, Claims would include rights that were “unknown” or “unasserted.” Under the Joint Plan, but not in other bankruptcies, “claim” would include rights to an “equitable remedy for . . . performance” even if the underlying breach *does not give* “rise to a right to payment.” 11 U.S.C. § 101(5). And so on. Certainly Debtors cannot avoid the non-dischargeability of their environmental injunction liabilities owed to governmental units, simply by re-writing self-styled and new Code provisions into their proposed Joint Plan. In no way do these provisions comply with the 11 U.S.C. 1129(a)(3) requirement that the plan be proposed in good faith

It is no exaggeration to say that Debtors, with the participation of possibly the other parties to the Joint Plan and Global Settlement Agreement are attempting to restructure the foundation on which the confirmed plan rests. The impact on plan interpretation is impossible to predict. Numerous published decisions, for example, address the impact of plan confirmation on unknown rights to payment.¹⁶ Who can say how a Court would apply those decisions if “claims” as defined in this plan and this plan alone included rights to payment unknown at the time of confirmation.

Similarly the definition of claim could cause the plan to violate 11 U.S.C. § 1141(d)(1), which provides that Debtors are not entitled to a discharge for environmental claims that arise on or after the confirmation date.

B. The Releases and Injunctions in the Plan are impermissible on their face and thus, the Plan is not feasible and approval of the Disclosure Statement should be denied.

The release and injunction provisions in the Plan are sweeping both as to Debtors’ releases¹⁷ and the releases of claims by third parties against non-debtors. See generally Sections

¹⁶ In the environmental context, see for example, *See, e.g., In re Crystal Oil Co.*, 158 F.3d 291, 296 (5th Cir. 1998) (environmental claims arise when a potential claimant can tie a debtor to a known release of hazardous substances); *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993) (environmental claims arise when they are within the fair contemplation of the parties); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 786 (7th Cir. 1992) (Superfund claim arises when the claimant can tie the debtor to a known release of a hazardous substance which the claimant knows will lead to response costs, and the claimant has conducted tests with regard to the contamination).

¹⁷ The Joint Plan includes the release of several non-debtors by the Debtors and their respective Related Persons (defined below), including without limitation the JPMC Entities, the FDIC Receiver and FDIC Corporate, the Settlement Note Holders, and each of their Related Persons, which includes each of the foregoing Released Parties’

...present and former Affiliates, and each of their respective current and former members, partners, equity holders, officers, directors, employees, managers, shareholders, partners, financial advisers, attorneys, accountants, investment bankers, consultants, agents, and professionals, or other representatives, nominees or investment managers, each acting in such

42.2 through 42.13 of the Plan and the definitions in the Plan of “Released Parties,” “Released Claims,” “Related Persons,” and “Related Actions.” In essence, pursuant to the proposed Joint Plan, the Released Parties, including non-debtors the JPMC Entities, the FDIC Receiver, the FDIC Corporate and the Settlement Note Holders, seemingly are being fully released by the Debtors and the Reorganized Debtors and their Related Persons, as well as by numerous third parties, including the BKK-related Claimants and all other Claimants and Equity Interest Holders and their respective Related Persons. The claims and liabilities being released and enjoined include “Related Actions” that could have been brought in any court of competent jurisdiction, relating to the Debtors, the Receivership, or the business, operations, assets or liabilities of the Debtors or their current or former Related Persons at any time prior to the date of the Plan. *See* 42.6 of the Joint Plan at p. 71.

These broad releases are impermissible.¹⁸ Citing to this Court’s decision in *In re Zenith Elec. Corp.*, 241 B.R. 92,110 (110 (Bankr.D.Del.1999), Judge Carey recently restated the factors

capacity, and any Entity claiming by or through any of them (including their respective officers, directors, managers, shareholders, partners, employees, members and professionals.)

See 1.147 of the Joint Plan at 17. The release by the Debtors includes the release of ...any and all Claims or Causes of Action that the Debtors, the Reorganized Debtors, the Liquidating Trust, the Liquidating Trustee, the Liquidating Trust Beneficiaries, and the Disbursing Agent, and their respective Related Persons, or any of them, or any one claiming through them, on their behalf or for their benefit, have or may have or claim to have, now or in the future, against any Released Party or any of their respective Related Persons that are Released Claims or otherwise are based upon , relate to or arise out of or in connection with, in whole or in part, any act, omission, transaction, occurrence, statement, or omission in connection with or alleged or that could have been alleged in the Related Actions, including, without limitation, any such claim, demand, right, liability, or cause or action for indemnification, contribution, or any other basis in law or equity for damages, costs or fees.

See 42.5 of the Plan at 71.

¹⁸ *See, e.g., In re Continental Airlines*, 203 F.3d 203, 212-213 (3d Cir. 2000) (surveying case law on when releases of non-debtor liabilities are appropriate).

to be considered in determining whether Debtor releases of non-debtors and injunctions will be permitted notwithstanding section 524(e) of the bankruptcy Code.). *In re Spansion, Inc.*, 2010 WL 1292837, __ B.R.__ (April 1, 2010). Such factors include (1) the identity of interest between the debtor and third parties; (2) substantial contribution by 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; and (5) provision in the plan for payment in full of all or substantially all of the claims or classes affected by the injunction. *Id.* at n. 47 (Citing this Court’s decision in *In re Zenith Elec. Corp.*, 241 B.R. 92,110 (110 (Bankr.D.Del.1999)). In short, there is insufficient information in the Disclosure Statement to apply the factors here.

The third-party releases in the Joint Plan are also sweeping and broad and on their face and impermissible rendering the Joint Plan fatally infirm. First, despite the insertion into the third-party release provision in Section 42.6 of the Joint Plan and in the proposed ballots, of an “opt-out” of the release, the third-party release is not consensual and thus, cannot be approved. *See In re Coram Healthcare Corp.*, 315 B.R. 321, 335-337 (D. Del. 2004) (Third-party release of Noteholders can not be approved to the extent they have not been accepted by the parties affected.) The opt-out is not being made available to those not entitled to vote, either to unimpaired claimants or those presumed to reject the Joint Plan because they will receive nothing on account of their claims or equity interests. Moreover, as discussed above the opt-out appears illusory.

Although some courts have rejected non-debtor releases, even those that have allowed them recognize that non-debtor releases are appropriate only in rare cases.

A non-debtor release is a device that lends itself to abuse.. By it, a non-debtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity.

In re Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005). The Court's subject matter jurisdiction to issue a Bar Order as sweeping as the one called for in the Plan, is also questionable. See *In re Dreier LLP*, ___ B.R. ___, 2010 WL 1707737 (Bankr. S.D.N.Y.) (April 2_, 2010)..).

C. Potential Impacts of the Release Provisions on the BKK-related Claimants.

Whether and to what extent the Debtors or Reorganized Debtors may be intending to release JPMC for liability in connection with its obligations as agent with respect pursuing insurance under the BKK Policies and distributing the proceeds to the BKK-related Claimants on account of the BKK Liabilities and the allowed BKK-related Claimants' Claims is of obvious importance to DTSC. It appears from the language and scope of the Release that Debtors would indeed be releasing JPMC from such liability which, given that DTSC and other BKK-related Claimants could benefit greatly by a successful recovery from the Debtors' BKK Insurance Policies, would be unfairly prejudicial to DTSC and the other BKK-related Claimants, particularly because DTSC the BKK-related Claimants are not being offered any additional compensation as consideration for such a release.

Also prejudicial and unfair to DTSC and other BKK-related Claimants is the potential release of WMI's non-debtor subsidiaries ADI and WMI Rainier LLC. It appears that the Joint Plan would effectively bar DTSC and the other BKK-related Claimants from seeking response costs from liable non-debtors. Thus, not only would the Plan deprive DTSC and the other BKK-related Claimants of their claims against a non-debtor, it expressly carves out the WMI Rainier

LLC liabilities that would otherwise be included among the assumed WMI Entities' BKK Liabilities and also fails to channel available insurance of the Debtors to satisfy the BKK Claims.

The third party release of the FDIC is also particularly prejudicial to DTSC and the BKK-related Claimants in that JPMC seemingly denies that it assumed WMB's BKK former owner/operator liability pursuant to the Purchase and Assumption Agreement..

VII. THE DEBTORS' PROPOSED DISCLOSURE STATEMENT, SOLICITATION AND CONFIRMATION PROCEDURES SHOULD NOT BE APPROVED

Debtors' request for court approval of the Notice of Disclosure Statement Hearing is improper and premature and should be denied. For the reasons stated above, the purported Disclosure Statement filed by the Debtors is materially deficient and incomplete and fails to comport with Section 1125 of the Code. There has been no supplementation of the Disclosure Statement since its original filing date. As a result, a disclosure statement within the meaning of and in accordance with Rule 3016(b) has not been filed. Because no disclosure statement has been filed in accordance with Rule 3016(b) or served as contemplated by Rule 2002, the 28-day notice period before which the required hearing on approval of the disclosure statement may commence under Rule 3017, has not yet commenced, and can not commence until the material and facial deficiencies are cured.

In addition, the disclosure statement objection deadline of May 13, 2010 provided in the Notice may be improper. The May 13, 2010 deadline for objections appears not to have been fixed by the Court, but rather by the Debtors. In order to afford parties-in-interest the meaningful notice and opportunity to be heard that the Code and Rules contemplate, a deadline

for objections to a disclosure statement should not be established and approved until Debtors have provided a revised and credible disclosure statement.

DTSC objects to the voting deadline as premature. Given the deficiencies herein described the proposed voting deadline of July 7, 2010 is premature and will allow insufficient time for parties in interest to review and evaluate any revised plan and disclosure statement necessitated by the deficiencies in the one now pending. DTSC imposes a similar objection to the proposed confirmation hearing date of July 20, 2010 and the proposed deadline for objections to confirmation of June 25, 2010 for the same reasons. Although DTSC realizes the benefit of having a confirmation hearing and objection deadline on the calendar to encourage timely resolution of disputes, the schedule selected by the Debtors here is simply too aggressive given that as of this date the proposed Joint Plan is based entirely on a purported Global Settlement Agreement that does not exist.

In addition, BKK-related Claimants, because their claims are in large part unliquidated, will, at best have their claim temporarily allowed at \$1 for voting purposes pursuant to the Motion. See the Motion at Para 41.(b). This is fundamentally unfair as the BKK Claimant's claims have a value well in excess of \$1 dollar and the method proposed by Debtors is not narrowly tailored to strike a fair balance between the unliquidated amount and the right to cast a meaningful vote. In addition, if the debtor files an objection to the BKK Claims or a motion to estimate them, then such claims become "disputed" and the holder is not allowed to vote. See the Motion at paragraph 41(g). Finally, the procedures proposed by the debtors would allow them to file an objection or motion to estimate a BKK Claimant's claim on the eve of the

balloting deadline and leave insufficient time before the voting deadline for the BKK Claimant to secure an order from the court estimating its claim or temporarily allowing it for voting purposes.

The “Record Date” as proposed by the Debtor of May 19, 2010 as the date for determining which creditors and equity holders are entitled to vote, is too soon. Given the inadequacies of the Disclosure Statement as outlined herein, the May 19, 2010 Record date provides insufficient time within which creditors such as the BKK-related Claimants can obtain a timely estimation or temporary allowance or reserves order.

The form of ballots proposed by the Debtors, particularly for the BKK-related Claimants in Class 12, should not be approved. First, Debtors present no compelling evidence as to why the Official Form No. 14 ballot cannot suffice. Second, the releases and injunction plan provisions on the ballots are confusing, incomprehensible and internally inconsistent. For example, as described in the Joint Plan, the release provision on the ballot for Class 12 after it describes an opt-out option to enable a claimant to elect to opt out of the sweeping releases, then nullifies that provision by stating that the election may not be valid and that even the opt out claimant will be bound by the sweeping releases and injunctions without its consent.

Conclusion

DTSC therefore respectfully submits that the Disclosure Statement should be rejected along with the Plan and the Debtor ordered to cure the deficiencies and renote the hearing on

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the Disclosure Statement to comport with section 1125. DTSC reserves the right to join in objections filed by other creditors or parties in interest and to supplement this objection.

Dated: May 13, 2010

Respectfully Submitted,



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