IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., et al.,	:	
Debtors.	:	Jointly Administered
Black Horse Capital LP, et al.,	:	
Plaintiffs,	:	
v.	:	Adversary Proceeding
JPMorgan Chase Bank, N.A., et al.,	:	No. 10-51387 (MFW)
Defendants.	:	

PLAINTIFFS' REPLY IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiffs, by and through undersigned counsel, hereby submit this reply (the "Reply") to Defendants' joint opposition (the "Opposition") to Plaintiffs' cross-motion for summary judgment (and the accompanying Memorandum of Law, the "Cross-Motion").[1]

PRELIMINARY STATEMENT

An "exchange" is a bilateral contractual commitment requiring commensurate performance on both sides: "I give you something (voluntarily or involuntarily), you simultaneously give me something in return." It is a swap transaction, where ownership is conveyed simultaneously; title is given when title is received. That is what the "Exchange Agreements" at issue here provide. That is the deal that was memorialized by the parties. And such expectation is consistent with how commercial law generally operates.

Stated in the inverse, an "exchange" does not contemplate one side delivering title (voluntarily or involuntarily), and the other side having the option to, eventually, deliver return consideration. In other words, an "exchange" does not contemplate: "me giving you something today, you giving me something later (unless you file for bankruptcy in the interim)." That is not an "exchange"; that is a contract to purchase securities on credit, with a subsequent obligation to deliver payment (unless bankruptcy excuses your performance). The Bankruptcy Code refers to this kind of agreement as a "forward contract," reserving the word "exchange" (e.g., in Bankruptcy Code Section 1145) for use in other sections to mean what is commonly understood to be an actual, simultaneous swap transaction.

Here lies the Defendants' fundamental error. The Defendants admit WMI did not perform its side of the "exchange" bargain – it did not create, let alone issue or deliver, the very securities that were to have been handed over in the "exchange." The Defendants lose this

[1] Capitalized terms not otherwise defined herein shall bear the meanings ascribed thereto in the Cross-Motion.

Adversary Proceeding if the Court were to give the word "exchange" (as used in the Exchange Agreements) its basic, plain reading – consistent with the expectations of the parties. So, the Opposition twists and turns, pressing the Court to shift focus away from the operative documents (the Exchange Agreements). The Defendants ask this Court to accept as reality that the OTS had some fantasy-land magic powers, enabling it to transmute the fundamental nature of a security, from (i) a security actually issued by a trust to (ii) stock that was never actually created or issued by a separate corporation – without requiring any further act of legal import. They cite principles and case authority that have absolutely nothing to do with this Adversary Proceeding. All of this rhetoric is designed to do one thing: to prompt the Court to rule that the "Exchange Agreements" do not, in fact, contemplate an "exchange" but rather a contract to purchase securities on credit, like a "forward contract." The rhetoric, the effort to confuse and obfuscate, must fail.

At its core, this case is about WMI's failure to live up to its end of the bargain, consistent with the terms of the Exchange Agreements and surrounding law. Because WMI did not do what it promised it would do, the "exchange" did not happen, title did not transfer, the Trust Preferred Securities remain with the Plaintiffs (just as their brokerage statements today say they do) and the estates today are now unable to deliver an even greater unjustified windfall to JPMorgan. The rest of the Defendants' arguments are simply irrelevancy and noise. Summary Judgment should be granted for the Plaintiffs.

ARGUMENT

I. DEFENDANTS' ATTEMPTS TO MANUFACTURE CONFUSION SHOULD BE IGNORED.

It is undisputed that: (a) WMI failed to issue and deposit with the Depositary the WMI Preferred Stock; and (b) WMI was never recorded as the transferee of the Trust Preferred

Securities. See WMI Answer ¶ 206 (admitting that the WMI Preferred Stock was never issued); Deposition of Joseph B. Feil, Nov. 16, 2010, 51:6-9 (confirming that WMI was not reflected as the owner of the Trust Preferred Securities on the requisite records and ledgers). Counts I and II turn on whether there has been an exchange of holders' interests in the Trust Preferred Securities for interests in WMI Preferred Stock notwithstanding the admitted non-performance any of the steps set forth in the Exchange and Trust Agreements for the occurrence of a Conditional Exchange.

In the Opposition, the Defendants chose not to address that issue. Instead, they attempt to create unnecessary confusion for the Court as follows:

(i) Defendants' mischaracterize Plaintiffs' argument as a complaint about "receipts," when, instead, Plaintiffs have repeatedly stated it is WMI's failure to issue and deliver its preferred stock to the Depositary that precludes the occurrence of any exchange;

(ii) Defendants' references to purportedly "automatic" securities transactions not involving the Debtors are distinguishable from this case because their examples are all either of a single issuer or operation of law events (such as the filing of certificates of merger, or comparable documents, in the applicable jurisdictions);

(iii) Defendants' claim that the occurrence of the Conditional Exchange is governed exclusively by the Trust Agreements (and not the Exchange Agreements), when neither the OTS nor WMI is even a party to the Trust Agreements;

(iv) Defendants' repeated citations to language in Section 4.08(c) of the Trust Agreements providing that the failure to deliver certificates (i.e., "receipts") representing the Depositary Shares "for any reason" will not impede the Conditional Exchange – a concept that has no bearing whatsoever on whether the Conditional Exchange occurred; and

(v) Defendants' new argument that the WMI preferred shares have been authorized to be issued – a blatant red herring, as the critical point is whether such shares have actually been issued as required by the governing agreements.

The Opposition also conflates three distinct events relating to consummation of the Conditional Exchange, moving directly from the first to the last and skipping over the

intermediate steps that they concede they did not perform. These events are: (i) the occurrence of an Exchange Event; (ii) the issuance and delivery of the WMI Preferred Stock to the Depositary and recordation of the transfer of the Trust Preferred Securities; and (iii) the surrender of the Trust Preferred certificates for Depositary Shares. The only dispute at issue pertains to event (ii). The Defendants' assertions that the occurrence of the Exchange Event is dispositive (the first event) and that the Plaintiffs' claims are merely complaints about their failure to receive certificates (the third event) are pure obfuscation regarding the non-occurrence of the second, critical event.

A. The Conditional Exchange Requires An "Exchange."

The lifeblood of the agreements governing the occurrence of a Conditional Exchange is the principle that there must be an "exchange." But, WMI has taken no action to effect the actual exchange of interests in the Trust Preferred Securities for interests in WMI Preferred Stock. No pronouncement by the OTS has the power to transform one security (i.e., the Trust Preferred Securities issued by the SPEs) into another type of security issued by a different entity (i.e., WMI Preferred Stock) completely outside the requirements of applicable trust or corporate law. For the exchange to be given legal effect, a series of steps mandated by the operative documents and applicable law had to be performed. Most fundamentally, WMI had to actually issue the new shares of WMI Preferred Stock and deposit them with the Depositary.[2] Unless and until it receives the WMI Preferred Stock, the Depositary will hold nothing to exchange for the Trust

[2] This is a completely different concept from the delivery of certificates representing the Depositary Shares to holders, which is addressed in Section 4.08(c) of the Trust Agreements and which is the focus of the Opposition, but which is not relevant here.

Preferred Securities.[3] The Defendants' attempt to confuse the Court by skipping the steps in between the OTS' utterance of the magic words and the holders' surrender of the Trust Preferred Securities certificates ignores the plain, common sense meaning of the term exchange – i.e., '[the] act of giving or taking one thing for another."[4]

B. The Automatic "Morphing" Of Securities Is Not Routine.

Securities transactions occurring pursuant to mergers, reverse stock splits, and other transactions involving the conversion of one security are distinguishable from the transaction before the Court. These examples provide no support for Defendants' position that the interests in the Trust Preferred Securities "morphed" into interests in WMI Preferred Stock upon the OTS's pronouncement of an Exchange Event. Opposition, pp. 7-8. The conversion of securities that occurs pursuant to a merger or a reverse stock split occurs pursuant to some official form of action – e.g., the filing of certificates of merger, or comparable documents, in the jurisdictions of both corporations (in the case of a merger), or the amendment of the applicable certificate of authority (in the case of a reverse stock split). As the Chancery Court held in Shields v. Shields, 498 A.2d 161, 167 (Del. Ch. 1985), the "statutory conversion of stock in a constituent corporation into stock in the surviving corporation that is effected by a stock for stock merger ought not be construed to constitute a sale, transfer or exchange of that stock for purposes of an agreement among shareholders restricting their power to transfer their stock." Further, examples

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[3] Only after receiving the WMI Preferred Stock, could the Depositary issue the Depositary Receipts to WMI which the Trust Preferred Securities holders were to receive in the exchange. Even if the former Trust Preferred Security certificates can serve as a substitute for such Depositary Receipts, they would represent an interest in a Depositary Fund with no assets. See Deposit Agreements, at § 2.02; Cross-Motion, Coffey Aff., Ex. K.

[4] In re Hastie, 2 F.3d 1042, 1045 (10th Cir. 1993), quoting Black's Law Dictionary, 5th ed. at 505 (1979).

of transactions involving the conversion of one security of an issuer into another security of the same issuer are fundamentally distinct from the circumstances in this case, where the Defendants seek a declaration that the securities issued by one entity (i.e., the SPEs) automatically transmute into a different security never issued by a different entity (i.e., WMI).

Defendants do not and cannot cite to a case where the exchange of securities in one issuer for the securities of a different issuer was deemed to have occurred absent the requisite filings. And, the reason is simple: no such case exists. Both Bernstein v. Canet, Civ. A. No. 13924, 1996 WL 342096 (Del. Ch. Jun. 11, 1996) and Co-Investor, AG v. Fonjax, Inc., No. C 08-1812 SBA, 2009 WL 2390227 (N.D. Cal. Aug. 3, 2009) involved the conversion of preferred stock to common stock of the same issuer, and are thus readily distinguishable from the facts here. Moreover, Section 151(e) of the DGCL, to which the Defendants cite as support for the proposition that there is no distinction between an "exchange" of securities and a "conversion" of securities "where intangible interests are involved," speaks only to a conversion or exchange of shares of a corporation for another class or series of securities of the same corporation, and is similarly inapplicable here. Opposition, p. 7.

The critical distinction to be drawn here is not between the use of the words "conversion" or "exchange," but rather between an exchange of securities of the same issuer and the exchange of securities of two different issuers. The latter type of exchange cannot be addressed in the governing document of one issuer – on the contrary, such an exchange requires a mutuality of obligations to be effected (such as, in the case of a merger, the filings of certificates of merger, or comparable documents, in the jurisdictions of both parties to the merger). Pursuant to Section 2 of the Exchange Agreements, WMI must transfer the Trust Preferred Securities into its name

(through notification of the Trustee) and "immediately and unconditionally" issue the WMI Preferred Stock to the Depositary in order to effect the exchange.

C. The Exchange Agreements Control.

Defendants' claim that the occurrence of the Conditional Exchange is governed exclusively by the Trust Agreements (and not the Exchange Agreements), ignores the fact that neither the OTS nor WMI is even a party to those agreements. The Trust Agreements are contracts between the trustees and the holders of the Trust Preferred Securities. Neither WMI nor the OTS is a party to any of the Trust Agreements, and neither party can compel any actions to be taken under such agreements. Similarly, the OTS has no contractual relationship with the Depositary and otherwise has no authority to automatically "create" a Conditional Exchange outside of the requirements set forth in the documents that explicitly govern the terms of any condition exchange – the Exchange Agreements. The Conditional Exchange requires the issuance of WMI Preferred Stock in exchange for the Trust Preferred Securities, and the only documents to which WMI is a party that govern a Conditional Exchange are the Exchange Agreements and the Depositary Agreements.[5]

The Defendants simply ignore the Exchange Agreements[6] with only a footnote reference that the Trust Agreements, not the Exchange Agreements, govern. Opposition, p. 4, n.4. The Defendants citation to Matulich v. Aegis Comm'ns Group, Inc., 942 A.2d 596, 600 (Del. 2008)

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5 Under Section 4.08(a)(iii) of the Trust Agreements, WMI is obligated to issue Depositary Shares to each holder "pursuant to the Exchange Agreement." See, e.g., McIntosh Dec., Ex. 4A. The Trust Agreements specifically incorporate the requirements in the Exchange Agreement that the WMI Preferred Stock first be issued and deposited with the Depositary. Id.

6 Plainly, they do so because the Exchange Agreements require that WMI Preferred Stock be issued and deposited with the Depositary before the Depositary Shares can be issued and the Trust Preferred Securities can be deemed to evidence the Depositary Receipts.

for the proposition that a company's charter governs the rights and limitations of its preferred stock, is again beside the point as that is a single issuer situation, not one involving two separate issuers as is the case here.

Consistent with both Matulich and DGCL Section 151(e), the rights of the holders of the Trust Preferred Securities as they relate to the trusts are governed by the Trust Agreements; the rights of the holders of the Depositary Shares as they relate to the Depositary are governed by the Deposit Agreements;[7] the rights of the holders of the WMI Preferred Stock as they relate to WMI are governed by the applicable certificates of designation of WMI; and the mechanics by which the Conditional Exchanges are to be "effected" are governed by the Exchange Agreements. Here, no equivalent to a certificate of merger being filed to "automatically" effect an exchange has taken place (such equivalent would have included, inter alia, the issuance of the Depositary Shares, which never occurred). Moreover, the Trust Agreements, again, incorporate by reference WMI's immediate and unconditional obligations to issue the WMI Preferred Stock and to deposit those securities with the Depositaries in connection with a Conditional Exchange – making clear that it is the Exchange Agreements that govern when it comes to a Conditional Exchange.

D. It Is The Non-Issuance Of The Stock Not The Non-Delivery Of "Receipts" That Is Relevant.

Section 4.08(c) of the Trusts Agreements requires the parties to take steps to effect the mechanical transfers of the Trust Preferred Securities within 30 days of the exchange, including

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[7] Section 2.02 of the Deposit Agreement expressly states that "Subject to the terms and conditions of the Exchange Agreement," WMI must deliver to the Depositary properly endorsed certificates representing issued WMI Preferred Stock along with a "written order" directing the Depositary to "execute and deliver" to holders receipts of the Depositary Shares. See, Coffey Aff., Ex. K, Cross-Motion, dated November 17, 2010 [Docket No. 139]. These steps never occurred.

delivering certificates evidencing the Depositary Shares to holders. This requirement is wholly distinct from WMI's "immediate and unconditional obligation" to issue and deliver (i.e., deposit) its preferred stock with the Depositary, which it admits it has not done. There is simply nothing in the Exchange Agreements or the Trust Agreements that excuses this obligation. Defendants' repeated citations to the language of Section 4.08(c) that purportedly excuses performance "for any reason," applies only to the delivery of the certificates (i.e., the "receipts") and not to the provisions of Section 4.08(a) of that Agreement which specifically requires issuance and deposit of the WMI Preferred Stock with the Depositary (a substantive act required for the creation of the Depositary Shares).

E. The Receipt Of Depositary Shares Is A Red Herring.

Defendants assert that "[i]f Trust Agreement § 4.08(c) has any meaning whatsoever, the physical receipt of Depositary Shares cannot be a prerequisite to the Conditional Exchange" is a red herring. Opposition, p. 8 (emphasis omitted). Again, they simply conflate the critical distinction between the underlying WMI Preferred Stock and the Depositary Shares.

As the Second Circuit recently recognized in Law Debenture Trust Co. of New York v. Maverick Tube Corp., 595 F.3d 458 (2d Cir. 2010), underlying stock and the depositary shares representing such stock are distinct instruments:

> Given the pains taken by the parties to have the Indenture set out detailed definitions of numerous terms and to have its definition of Capital Stock make explicit reference to ADSs [American Depositary Shares] -- a reference we are not entitled to regard as superfluous-- we conclude that the district court properly declined to read ADSs into the undefined term "common stock ...."

Id. at 472.

Here, the issuance and deposit of the WMI Preferred Stock into the Depositary was not a mere formality; it was the essence of the "exchange," as the Depositary shares cannot represent something until that something exists.

F. "Authorization" Is Not Issuance.

Despite WMI's previous admission that no WMI Preferred Stock had been issued, Defendants now allege that "every corporate act necessary for issuance of the WMI preferred shares was duly approved by the Board of Directors." Presumably, that assertion somehow excuses the actual issuance of the securities. Opposition, pp. 9-10. This is another red herring. Authorization is not synonymous with issuance. This well-understood fact was succinctly stated by the Court in In re Argent, 275 B.R. 122, 125 (D. D.C. 2001): "to issue securities means to emit, put into circulation, or dispose of securities already authorized and prepared for disposition." (emphasis added). The issue is whether the WMI Preferred Stock has actually been issued, not whether WMI's Board authorized the eventual issuance. Defendants do not and cannot point to any action taken by WMI or its authorized officers to actually effect the issuance of any shares of WMI Preferred Stock to the Depositaries, as is required under the Exchange Agreements.[8]

[8] See also UCC 8-102(15) (a security must either be a certificated security or must be registered on the books of the issuer); Section 6.4 of Restated Bylaws of Washington Mutual, Inc., as amended on July 19, 2005 ("Transfer of shares of the corporation shall be made only on the stock transfer books of the corporation by the holder of record thereof or by his legal representative who shall furnish proper evidence of authority to transfer, or by his attorney thereunto authorized by power of attorney duly executed and filed with the secretary of the corporation, on surrender for cancellation of the certificate for the shares…""); see also Grimes v. Alteon Inc., 804 A.2d 256, 261 (Del. 2002) ("to ensure certainty [DGCL provisions governing the issuance of stock] contemplate board approval and a written instrument evidencing the relevant transactions affecting issuance of stock").

II. DEFENDANTS ARGUMENTS REGARDING ARTICLE 8 ARE UNAVAILING.

A. Defendants Cannot Elude The Delivery Requirements of Article 8.

Opting out of Article 8 requires a clear intention to do so.[9] But, the Defendants attempt to mislead the Court by suggesting the parties to the Trust and Exchange Agreements had such an intent. Rather than expressing a clear intent to opt out of Article 8, those agreements track the delivery requirements of Article 8.[10] Not surprisingly, the Defendants fail to address this in the Opposition. How could there be a clear intention to opt-out of Article 8 when the delivery requirements in the governing agreements track the actual language of Article 8? [11]

Seeking to escape application of Article 8, Defendants cite to the Court contract provisions providing that, after the occurrence of an Exchange Event; and after the Conditional Exchange, and after WMI had sent out notices instructing holders of Trust Preferred Securities certificates to submit those certificates for certificates representing Depositary Shares, prior to such submission the Trust Preferred Securities certificates were to represent Depositary Share certificates. The Defendants then assert that this mechanism served as the requisite "opt-out" language.

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9 See Cross-Motion, dated November 17, 2010 [Docket No. 139], at p. 65.

10 See, e.g., McIntosh Dec., Ex. 4B, WMPFII Exchange Agreement, §2(c) ("effective on the date and time of the Conditional Exchange, WaMu Delaware II shall record, or cause to be recorded, in the Register WMI as owner of all of the Trust Securities, as transferee from the Persons who are holders of Trust Securities immediately prior to such date and time."); McIntosh Dec., Ex. 3C, WMPFII Amended and Restated Trust Agreement, § 4.08(a)(ii) ("effective on such date and time, the Trustees shall (or shall cause the Registrar and Transfer Agent to) record in the Register WMI as owner of all of the Trust Securities, as transferee from the Holders of Trust Securities immediately prior to such date and time.").

11 See, e.g., McIntosh Dec., Ex. 3C, WMPFII Amended and Restated Trust Agreement, § 4.08(c) (imposing obligations to mail notice of the Conditional Exchange and, pursuant to the Exchange Agreement, obligating WMI to deliver a "like amount" of Depositary Shares).

Again, the Depositary Shares and the Trust Preferred Securities are not the same security. Consequently, any deemed delivery of Depositary Share certificates to investors has no bearing on the delivery to WMI of the Trust Preferred Securities, for purposes of Article 8. More importantly, there is no reason to borrow language regarding the Depositary Shares to interpret how delivery of the Trust Preferred Securities was to occur, because the agreements clearly and simply address such delivery. The Defendants' problem is that the delivery requirements chosen by the parties and reflected in both the Trust and Exchange Agreements track the language of Article 8 and simply do not indicate the requisite clear intent to opt out of such applicable law. The Trust and Exchange Agreements clearly require delivery in accordance with Article 8, and WMI admits such delivery did not occur.[12] The facts are clear that no delivery was made in compliance with Article 8 and therefore the Plaintiffs still hold the Trust Preferred Securities.

B. Defendants Cannot Escape Article 8 By Arguing WMI Was Not A "Purchaser."

The Defendants' assertions that WMI is not a "purchaser" under Article 8 are misguided. The Defendants press this argument by re-citing a case whereby a court-ordered transaction was deemed not to constitute a "purchase" under the UCC.[13] It speaks volumes that the Defendants could not find a transaction whereby a party to a contract to exchange securities was deemed by a court not to constitute a "purchaser" under the UCC. The Defendants also cite to a case, United States v. Seattle First National Bank, in which the Court stated that "[t]hus it is the National Banking Act that is the mechanism by which the transfer of securities is made

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12 See Cross-Motion, dated November 17, 2010 [Docket No. 139], at p. 62 (citing WMI's Answer, ¶ 205) ("Here, WMI admits in the answer to the Complaint that the requirements of 8-301(b) were not met because the applicable trustees have not recorded WMI as the holder of the Trust Preferred Securities in any of the associated trust registers.").

13 See In re Interstate Stores, Inc., 830 F.2d 16 (2d Cir. 1987).

effective" and the "transfer occurred wholly by operation of law."[14] The Conditional Exchange, an exchange of securities between two private parties governed by a contractual arrangement, is not by operation of law.[15]

III. PLAINTIFFS' POSITION IS CONSISTENT WITH SETTLED PRINCIPLES OF COMMERCIAL AND BANKRUPTCY JURISPRUDENCE.

Commercial law and the "formalities" that effectuate transfers are given strict effect in bankruptcy cases. A common example is when bankruptcy courts refuse to enforce security interests as perfected when parties fail to take the proper steps under non-bankruptcy law to perfect the interest, including signature requirements.[16] Likewise, the Exchange Agreements are contracts governed by relevant non-bankruptcy law, and continue to be such in bankruptcy.[17]

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[14] See 321 U.S. 583, 588 (1994).

[15] The Plaintiffs offered on point analysis and citations in the Cross-Motion demonstrating that WMI would constitute a "purchaser" under the UCC, which the Defendants cannot counter. For the sake of brevity, Plaintiffs refer the Court to the Cross-Motion, at pp. 68-70.

[16] See, e.g., Lavonia Mfg. Co. v. Emery Corp., 52 B.R. 944, 947 (E.D. Pa. 1985) ("Any seeming unfairness to [the seller] in this result is dispelled by recognition of the fact that the seller could have protected its interest by complying with the UCC's purchase money provisions"); Trimarchi v. Together Dev. Corp., 255 B.R. 606, 611 (D. Mass. 2000) (concluding that plaintiff was not entitled to any lien on proceeds of the sale of defendant's assets because plaintiff filed the UCC-1 Financing Statement with the Patent and Trademark Office but failed to also file with the relevant Secretary of State, as required under the UCC). See also Callaway Cmty. Hosp. Ass'n v. First N. Bank And Trust (In re Chama, Inc.), 265 B.R. 662, 668 (Bankr. D. Del. 2000) (concluding that financing statement filed by bank did not perfect a security interest in equipment because the bank failed to include the name of the owner); Reeves Entertainment Group v. LBS Communications, Inc., No. 91 Civ. 0534, 1991 U.S. Dist. LEXIS 9773, 1991 WL 135476, at *3 (S.D.N.Y. 1991) (UCC-1 which fails to identify owner and debtor is invalid and fails to perfect security interest).

[17] See Butner v. United States, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."); In re Bucholz, 224 B.R. 13, 20 (Bankr. D.N.J. 1998) (citing Butner and finding that state law will apply to a determination of

"[I]n the absence of a specific provision to the contrary, bankruptcy courts take non-bankruptcy rights and laws as they find them . . . Therefore, in a bankruptcy proceeding, if one party seeks an outcome that differs from the one a court would hold outside of bankruptcy, the court will require that party to identify a specific bankruptcy rule requiring that conclusion."[18]

Here, WMI failed to take the proper steps, as set out in the Exchange Agreements, to effectuate the Conditional Exchange. Therefore, title to the Trust Preferred Securities remains with the Plaintiffs and this Court must enforce that result in accordance with applicable non-bankruptcy law governing the rights of the parties. Giving effect to the terms of the Exchange Agreements, no matter the effect on WMI's bankruptcy estate, is exactly the result that is required under applicable law and is consistent with commercial and bankruptcy legal principles.

IV. WMI'S FAILURES OF PERFORMANCE RESULTED IN THE NON-OCCURRENCE OF THE CONDITIONAL EXCHANGE.

The Defendants' final effort to delimit the significance of the non-issuance of WMI Preferred Stock rests on conflating the basic legal concepts of express and constructive contractual terms. Defendants' assert that the Trust Agreements set forth a timeline of events leading up to the Conditional Exchange, and therefore, constructive conditions cannot be implied in the Trust Agreements or the Exchange Agreements. Opposition, p. 6. Such arguments, along with Defendants' assertion that Delaware courts do not recognize constructive conditions in circumstances such as those in the instant case, are not supported by the law.

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whether a mortgage was secured as of the date the petition was filed). "[A]pplication of the Bankruptcy Code does not change the attributes of a given legal relationship." Enterprise Energy Corp. v. United States (In re Columbia Gas Sys.), 50 F.3d 233, 238 (3d Cir. 1995).

[18] In re AMC Investors, LLC, 406 B.R. 478, 486-87 (Bankr. D. Del. 2009).

Express conditions are those agreed to by the parties to a contract, while implied or constructive conditions are those imposed by a court.[19] Express and implied conditions are not mutually exclusive, and the existence of express conditions in the Exchange and Trust Agreements does nothing to limit the existence of constructive conditions.[20] In the case of bilateral contracts, the ordinary rule is simultaneous performance of obligations, with each party's performance constituting a constructive condition to the other's performance.[21] The Exchange and Trust Agreements are bilateral contracts, rendering WMI's performance of its obligations thereunder (including, inter alia, its immediate and unconditional obligations to issue the WMI Preferred Stock and deposit it with the Depositary) required conditions to the occurrence of the Conditional Exchange.

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[19] See In re Nextmedia Group, Inc., No. 09-14463, 2010 Bankr. LEXIS 3788, at *8 (Bankr. D. Del. Nov. 5, 2010) (citing Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 660 N.E.2d 415, 418, 636 N.Y.S.2d 734 (N.Y. 1995)); see also SLMSoft.Com, Inc. v. Cross Country Bank, No. Civ.A 00C09163JRJ, 2003 WL 1769770, at *12 (Del. Super. Ct. Apr. 2, 2003) (events may be made conditions in two ways, "either by the agreement of the parties or by a term supplied by the court.").

[20] See SLMSoft.Com, Inc., 2003 WL 1769770 at *12 (citing Restatement (Second) of Contracts, § 226 ("No particular form of language is necessary to make an event a condition . . . An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language. Whether the parties have, by their agreement, made an event a condition is determined by the process of interpretation.").

[21] See Zintsmaster v. Werner, 41 F.2d 634, 636 (3d Cir. Pa. 1930); see also Restatement, Contracts, § 234(1) ("Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary."); International Fid. Ins. Co. v. County of Rockland, 98 F. Supp. 2d 400, 439 (S.D.N.Y. 2000) ("in bilateral contracts for an agreed exchange of performances, even though the promises are in form absolute, the law regards them as constructively conditioned in order to avoid an unjust result") (citations omitted).

V. BANKRUPTCY CODE SECTION 365(C)(2) PROHIBITS COMPLETION OF THE CONDITIONAL EXCHANGE NOW.[22]

Defendants' arguments as to why Bankruptcy Code Section 365(c)(2) does not now prohibit the issuance of the WMI Preferred Stock to effectuate the Conditional Exchange are indefensible. First, contrary to Defendants' argument (Opposition, p. 10), the Conditional Exchange has not occurred because, inter alia, WMI never performed the critical steps of issuing WMI Preferred Stock and depositing it with the Depositary (as required by Section 2 of the Exchange Agreements) – the very basis of the "exchange" to be effected under the Exchange Agreements. As such, the Exchange Agreements remain the critical document in determining the parties' rights.

Second, Defendants argue the Exchange Agreements do not constitute contracts "to issue a security of the debtor" within the ambit of Bankruptcy Code Section 365(c)(2). The applicability of Bankruptcy Code Section 365(c)(2) and the terms of the Exchange Agreements could not be clearer.[23] By their terms, the Exchange Agreements impose on WMI the immediate

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[22] Bankruptcy Code Section 365(c)(2)'s absolute prohibition may not be circumvented by the application of 11 U.S.C. § 1142(b). Opposition, p. 13. Because the Exchange Agreements dictate the terms on which the Conditional Exchange can occur, if at all, it is also those contracts that govern their performance and the pendency of WMI's bankruptcy cannot serve to enhance WMI's prepetition contract rights. See Chicago Bd. of Trade v. Johnson, 264 U.S. 1 (1924) (state law limitations on a debtor's contract rights will be recognized in bankruptcy, meaning that bankruptcy does not expand the terms and/or limitations of a debtor's prepetition contract rights).

[23] Even if, as Defendants argue, (Opposition, pp. 12-13), Bankruptcy Code Section 365(c)(2) required "new money" (a requirement not present in the language of the statute itself), that requirement would not defeat application of Bankruptcy Code Section 365(c)(2) to prohibit assumption of the Exchange Agreements. This requirement, if it is one, is satisfied here because the exchange of securities, if allowed, absolutely results in the Plaintiffs being compelled to advance new value to the Debtor. If the exchange were effected, the result would be that the investors would transfer their priority rights in the underlying collateral pool, a right having a value of $4 billion in exchange for securities of the debtors. This exchange is analogous to the extension by Plaintiffs, third parties, of

and unconditional obligation to issue the WMI Preferred Stock. As set forth in the Cross-Motion (pp. 51-56), this obligation to issue securities clearly makes Bankruptcy Code Section 365(c)(2) applicable to the Exchange Agreements.[24]

Next, Defendants argue the Exchange Agreements are not "executory" and, thus, not subject to Bankruptcy Code Section 365(c)(2). Such an argument is circular and teeters on the unsupportable premise that all material performance occurred prior to the petition date. In support of their argument that no material obligations remain to effectuate the Conditional Exchange, Defendants state that "[a]t the time of the Conditional Exchange on September 26, 2008, all material obligations of the parties were performed, because TruPS holders received the economic substance they had bargained for under these circumstances; WMI preferred equity interests."[25] This statement is patently false – Plaintiffs received nothing and no Depositary Shares were available to be "exchanged" because WMI did not issue and has not issued the WMI Preferred Stock. As set forth in the Cross-Motion, each and every obligation imposed under the Exchange Agreements remains unperformed to this day. Cross Motion, dated November 17,

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new credit to the Debtors. See In re Ardent, 275 B.R. 122, 125-26 (Bankr. D. D.C. 2001) ("that Congress enacted [Bankruptcy Code Section] 365(c)(2) to prevent a trustee or debtor-in-possession from requiring new advances of money, **property**, or loans does not preclude the court from applying it to other executory contracts that require the transfer of **other types of consideration in exchange** for a debtor's securities.") (emphasis added).

[24] In support of their position, Defendants cite to the Teligent decision, but ignore the later decision in Ardent, where that court, dealing with the same type of agreement, found the proscriptions of Bankruptcy Code Section 365(c)(2) applicable. See In re Ardent, 275 B.R. at 124 (ordering contract to issue securities to be, and to be deemed, rejected after concluding Bankruptcy Code Section 365(c)(2) applied to prohibit assumption).

[25] Opposition, p. 11.

2010 [Docket No. 139], at pp. 3, 51-56. As such the Exchange Agreements are undeniably "executory."

Moreover, the failed steps are not mere "ministerial" record keeping actions. Rather, these steps constitute the essence of the very exchange contemplated: Trust Preferred Securities for Depositary Shares.[26] Because WMI failed to issue the WMI Preferred Stock as required under the Exchange Agreements and such failure is essential to the performance of the Exchange Agreements, the Conditional Exchange was not effectuated before the Petition Date. Therefore, the Exchange Agreements simply remain, if anything, executory contracts within the purview of Bankruptcy Code Section 365(c)(2).[27]

The actions of the Defendants outside the Adversary proceeding show their recognition of the agreements as executory contracts. In the Plan Supplement [Docket No. 5724], WMI seeks to assume and assign to JPMC:

> "[a]ny and all contracts, as and to the extent necessary or required to transfer to JPMC or its designee any and all right, title and interest the WMI Entities may

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[26] The cases cited by Defendants (Opposition, pp. 11-12) for the proposition that the remaining obligations under the governing agreements are non-material and therefore not executory are distinguishable. None of them involve a contract for securities. Two concern contracts for the sale of real property where minor conditions were not satisfied; in each case the property to be exchanged existed, unlike the securities here. See In re Midwest Portland Cement Co., 174 Fed. Appx. 34, 38 (3d Cir. 2006) (contract for sale of real property not executory where unperformed obligations were ministerial); In re Streets & Beard Farm P'ship, 882 F.2d 233, 234-35 (7th Cir. 1989) (debtors' default on installment contract for the sale of real estate not executory where debtors were only equitable owner of the property). The insurance cases have nothing to do with the "issuance of a security of the debtor" proscribed by 365(c)(2). See In re Federal-Mogul Global Inc., 385 B.R. 560, 575 (Bankr. D.Del. 2008) (asbestos insurance policy); Ewell v. Those Certain Underwriters of Lloyd's, London, C.A. No. S09C-07-031 RFS, 2010 WL 3447570, at * 7 (Del. Super. Ct. Aug. 27, 2010) (fire protection policy).

[27] See In re Exide Techs., 378 B.R. 762, 765 (Bankr. D. Del. 2007) (". . . contract is executory when 'the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.'").

> have or may ever have had in the Trust Preferred Securities free and clear of all claims, liens, interests and encumbrances, as contemplated in Section 2.3 of the Global Settlement Agreement, as and to the extent such contracts are or may be executory contracts, including, without limitation, (a) offering circulars, (b) trust agreements, (c) **exchange agreements,** (d) side letters, and/or (e) any additional ancillary and subsidiary documents."[28]

While the Defendants ignore the Exchange Agreements in the Opposition, they recognize in connection with the Plan that the terms of the Exchange Agreements are unperformed and critically important, and that the agreements are executory. That the Defendants argue otherwise on summary judgment is disingenuous.

VI. DEFENDANTS' "PARADE OF HORRIBLES" DOES NOT CLEANSE WMI'S UNCLEAN HANDS.

Defendants' re-casting of the equitable doctrine of "unclean hands" follows the same pattern as the rest of their brief: mischaracterize the arguments and attack the straw man. Counts IV and V of the Complaint ask the Court to refrain from exercising its equitable powers to consummate the exchange of the Trust Preferred Securities for non-existent shares of WMI. That request is based on WMI's appearance before the Court with unclean hands resulting from the fraudulent non-disclosure of its backroom arrangement with the OTS to downstream the Trust Preferred Securities to WMB upon a Conditional Exchange.[29] In response, WMI attempts

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

[29] Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933) ("The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity"); see also Casa Nova, Inc. v. Casa Nova of Lansing, Inc., 146 B.R. 370, 380 (Bankr. W.D. Mich. 1992) ("While 'equity does not demand that its suitors shall have led blameless lives,' [citation omitted], as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. [Citations omitted]") (emphases added), quoting Precision

to distract the Court by characterizing the plaintiffs as not "true creditors" whose claims would "destroy the global settlement" and upset the priority scheme of Bankruptcy Code Section 507. These are all red herring arguments.

First, that Plaintiffs are not creditors of ***WMI*** is exactly the point of the Adversary Proceeding. As the Conditional Exchange never occurred, Plaintiffs remain the holders of preferred interests in the SPEs – a fact demonstrated by the trade confirmations showing the SPEs are the issuers of the securities Plaintiffs acquired.

Second, there is no merit to the assertion that enforcing the Exchange Agreements pursuant to their terms will limit any recovery to any creditor of the WMI. Pursuant to the Settlement Agreement, the value associated with the Trust Preferred Securities, if the Court were to allow the Conditional Exchange to now occur, would be transferred immediately to JPMC for virtually no consideration. In other words, the value of the Trust Preferred Securities has never been proposed to be "estate" value to be distributed to creditors.

But, it is the third argument that really underpins the Defendants' position, and it is nothing more than a threat made directly to the Court: "If you don't find for the Defendants, Your Honor, we will "blow up" the settlement!" To what end? Would WMI abdicate its fiduciary duties and relinquish its superior claim to the $4 billion in cash deposits it maintained with WMB? Or Would WMI walk away from its claim to the Tax Refunds? The threats are hollow.

Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814-815 (1946).

VII. PLAINTIFFS' PURCHASE PRICES AND DATES ARE LEGALLY IRRELEVANT.

The purchaser of a security automatically receives the right to collect the full face value of that security even if it was purchased at a substantial discount. The fact that these Plaintiffs may have purchased the Trust Preferred Securities post-petition and at a discount to par is irrelevant to the unambiguous terms of the governing documents, the undisputed facts and, ultimately, to the issue of title to the Trust Preferred Securities. The fact that Plaintiffs made discount purchases of the Trust Preferred Securities and with notice of Defendants' wrongdoing also does not subject the Plaintiffs to any inference of inequity.[30]

Thus, Defendants' fixation on the dates and prices of Plaintiffs' acquisition of the Trust Preferred Securities should be ignored for what it is – more smoke to distract the Court from the question of whether title to the Trust Preferred Securities did, or now can, pass from the Plaintiffs to WMI.[31] That Defendants must resort to threats[32] and distraction tactics is telling of the weakness of the their legal positions.[33]

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[30] See Fairfield Executive Assocs. v. Hyperion Credit Capital Partners, L.P. (In re Fairfield Executive Assocs.), 161 B.R. 595, 602 (D.N.J. 1993) ("how the claims of the [insurance company] and the trade creditors achieved their status does not alter their current legal character. . . . [Classifying] Hypernion's claim separately because it bought Fairfield's loan at a discount with knowledge that Fairfield was in default would run counter to the principle that the price paid for a claim does not affect the amount of the claim, or the creditor's voting power.").

[31] The Defendants still do not understand this lawsuit is a dispute over title. As such, they incorrectly accuse the Plaintiffs of misleadingly citing Consolidated Edison, Inc. v. Northeast Utilities, 318 F. Supp. 2d 181 (S.D.N.Y. 2004), "for the proposition that the right to assert fraud travels with the security." Opposition, p. 20. The Plaintiffs do not cite Consolidated and UCC 8-302(a) for this proposition because the Plaintiffs are not asserting fraud claims. Instead, the Plaintiffs cited Consolidated Edison, Inc. v. Northeast Utils., 318 F. Supp. 2d at 192, for the proposition that a holder's right in the security includes "rights against the issuer under the contract embodied in the security as supplemented by federal and state law." See Cross-Motion, p. 72. Based on both Consolidated Edison and UCC § 8-302, the Plaintiffs, as holders of the Trust Preferred Securities, have the right to assert issues of title.

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[32] The Defendants go so far in their response as to state that it is a "crime to purchase certain securities with the primary purpose of bringing a lawsuit on them" citing N.Y. Jud. L. § 489. First, New York law does not govern the Trust Agreements so this defense is unavailable. Second, the champerty statute does not prohibit "the acquisition of debt with the motive of collecting on it, notwithstanding that litigation might be a necessary step in the process." Elliot Associates, L.P. v. Banco de la Nacion, 194 F.3d 363, 374 (2d Cir. 1999). Here, the Plaintiffs bought the Trust Preferred Securities as investors seeking a profit. As a result of the Defendants' conduct, Plaintiffs seek a declaration of title. Litigation is necessary for the Plaintiffs to receive a declaratory judgment of title but the record does not support a finding of bringing a lawsuit as the primary motivation, no less the sole basis, for purchasing the Trust Preferred Securities and is not a suitable subject for summary judgment. See M.V.B. Collision Inc. v. Allstate Ins. Co., 2009 NY Slip Op 29251, at *2-3 (N.Y. Dist. Ct. 2009) ("[W]hether an assignment was taken for the sole or primary purpose of bringing suit on the claim – rarely is amenable to summary adjudication…the question of intent and purpose of the purchaser or assignee of a claim is usually a factual one to be decided by the trier of facts") (citations and quotations omitted).

[33] With respect to other arguments raised in the Opposition with respect to Counts IV through XI, such points have been addressed extensively in the Memorandum of Law, and the Plaintiffs refer to such materials.

WHEREFORE, the Plaintiffs respectfully request entry of an order (i) granting the Plaintiffs' motion for summary judgment regarding Counts I and II of its Complaint, (ii) denying Defendants' Motions, and (iii) granting the Plaintiffs such other and further relief as is just and proper.

Dated: November 16, 2010
Wilmington, Delaware

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., et al.,	:	
Debtors.	:	Jointly Administered
Black Horse Capital LP, et al.,	:	
Plaintiffs,	:	
v.	:	
	:	Adversary Proceeding
JPMorgan Chase Bank, N.A., et al.,	:	No. 10-51387 (MFW)
Defendants.	:	

CERTIFICATE OF SERVICE

I, Marla Rosoff Eskin, of Campbell & Levine, LLC, hereby certify that on November 24, 2010, I caused a copy of the *Plaintiffs' Reply in Support of Cross-Motion For Summary Judgment* to be served upon the individual listed below via First Class Mail:

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