IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
	)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., *et al.*,	)	
	)	Jointly Administered
Debtors	)	
	)	Related Documents: D.I. Nos. 8312, 8345

MOTION OF THE TPS CONSORTIUM TO STRIKE DEBTORS' RESPONSE TO SUBMISSION BY CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS FOR INCLUSION IN THE RECORD OF EXCERPTS OF THE REPORT OF THE UNITED STATES SENATE SUBCOMMITTEE ON INVESTIGATIONS

The consortium of holders of interests subject to treatment under Class 19 of the Plan (the "TPS Consortium"[1]), by and through its undersigned counsel, hereby files this Motion to Strike the Debtors' response to the TPS Consortium's submission into the record of excerpts from the report of the United States Senate Subcommittee on Investigations Entitled "Wall Street and the Financial Crisis: Anatomy of a Financial Collapse" (the "Debtors' Response"). [D.I. No. 8345]. In support of this Motion to Strike, the TPS Consortium respectfully represents as follows:

PRELIMINARY STATEMENT

1. On July 29, 2011, Debtors simply ignored this Court's July 21, 2011 ruling and Order, and filed a purported Response to the TPS Consortium's submission of excerpts from the United States Senate Permanent Subcommittee on Investigations ("Subcommittee") Report titled

[1] The TPS Consortium is comprised of holders of interests (as set forth more fully in the Verified Fourth Amended Statement of Brown Rudnick LLP and Campbell & Levine LLC [Docket No. 7916], as such may be amended) proposed by the Debtors to be treated under Class 19 of the Plan [Docket No. 6696] – described in the Plan and Disclosure Statement as the "REIT Series." Capitalized terms not otherwise defined herein shall bear the meanings ascribed thereto in the Plan and/or Disclosure Statement, as applicable.

"Wall Street and the Financial Crisis: Anatomy of a Financial Collapse" (the "Senate Report") that was completely improper. On July 21, this Court clearly instructed the TPS Consortium to provide the Court by July 26 with a summary of the Senate Report, consisting of quoted excerpts from the Report, and instructed the Debtors to submit any counter-designations from the Senate Report by Friday July 29. Rather than abide by the Court's directive, Debtors submitted a purported Response containing no excerpts or quotations from the Senate Report. Instead, Debtors sought to interject new, inadmissible hearsay into an already closed trial record, present so-called "facts" that are not supported by any admissible evidence, and attempt to reargue the admissibility of the Senate Report.

2. Because Debtors failed to comply with the Court's instructions for submitting portions of the Senate Report, the Court should strike the Debtors' improper submission in its entirety and preclude Debtors from offering any portions of the Senate Report in any future submissions to the Court. Furthermore, the Court should strike and disregard Debtors' Response because it consists of inadmissible hearsay and arguments that are not supported by any admissible evidence. Lastly, even if the Court were to review Debtors' objection to the Court's prior ruling regarding admissibility of the Senate Report, such objection is without merit and the Court was correct in admitting into evidence excerpts from the Senate Report.

ARGUMENT

A. Debtors' Response Should Be Stricken Because Debtors Failed To Comply With This Court's Order To Submit Portions Of The Senate Report.

3. On July 21, 2011, during the confirmation proceedings on the Debtors' Sixth Amended Plan, the TPS Consortium sought the admission into evidence of the bi-partisan Senate Report issued on April 13, 2011 by United States Senate Permanent Subcommittee on

Investigations. The Court agreed that the Senate Report was relevant and admissible pursuant to the public records exception to the hearsay rule. 7/21/11 Hearing Tr. 296:19-297:9 [2]; See Fed. R. Evid. 803(8) (providing that the hearsay rule does not apply to "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report…or (C) in civil actions…factual findings resulting from an investigation made pursuant to authority granted by law unless the sources of information or other circumstances indicate lack of trustworthiness"); Barry v Trs. of Int'l Ass'n Full-Time Salaried Officers & Employees of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan, 467 F Supp 2d 91, 99-101 (D.D.C 2006) (admitting senate report because the objecting party failed to meet its burden of establishing the report is untrustworthy, as is required to overcome the presumption of admissibility); see also Goodman v. Penn. Turnpike Comm'n, 293 F.3d 665, 669 n.10 (3d Cir. 2002) (state legislative budget and finance committee report, based on factual investigation conducted by public agency, was properly admitted).[3] However, due to the length of the Report (639 pages), the Court instructed counsel for the TPS Consortium

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[2] Relevant portions of the July 21, 2011 Hearing Transcript are attached as Exhibit A hereto.

[3] The Senate Report, available at http://hsgac.senate.gov/public/_files/Financial_Crisis/FinancialCrisisReport.pdf, is also a self-authenticating document. See Fed. R. Evid. 902(5) ("Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . (5) Official Publications. Books, pamphlets, or other publications purporting to be issued by a public authority."); see also Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 551 (D. Md. 2007) ("Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method of authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily.").

to prepare and submit a 10-page summary of the Senate Report consisting of a compilation of excerpts therefrom. 7/21/11 Hearing Tr. 296:19-297:9.

4. The Court further provided the Debtors with an opportunity to counter-designate portions of the Senate Report. 7/21/11 Hearing Tr. 298:7-19, 332:17 – 333:25. As the colloquy makes clear, the Court's intention was to have the parties designate and counter-designate excerpts from the Senate Report:

> MR. STARK: Your Honor, I guess we could do that. I really don't have a problem. To me, it comes down to the fact that we're going to take some quotes out of a report and put it before Your Honor. They should take out some quotes that they think they like and put it before Your Honor.
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> JUDGE WALRATH: Right.
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> MR. STARK: I don't really know what the big issue is. You can tell me a date –
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> JUDGE WALRATH: When is it going to be done?
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> MR. STARK: I can do it Tuesday [July 26].
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> JUDGE WALRATH: And the debtor wants to take their quote.
>
> MR. ROSEN: We'll do it by Friday [July 29], Your Honor.

7/21/11 Hearing Tr. 333:6 – 333:25.

5. With the exception of such designations and counter-designations of the Senate Report and a supplemental submission from the TPS Consortium showing the then-current federal judgment rate and the effects of its application, the Court closed the evidentiary record. See 7/21/11 Hearing Tr. 331:2 – 332:16, 336:10-13.

6. As promised, on July 26, 2011 the TPS Consortium submitted a 10-page set of excerpts from the Senate Report. See D.I. No. 8312.[4]

[4] On July 26, 2011, the TPS Consortium also filed the supplemental schedule setting forth the federal judgment rate from June 24 through July 22 [D.I. No. 8315].

7. Contrary to this Court's order, however, Debtors submitted a purported Response to the TPS Consortium's Submission [D.I. No. 8345] that is devoid of any excerpts or designations from the Senate Report. Instead, Debtors attempt to interject inadmissible documents and make arguments that are not supported by any evidence within the now-closed trial record. Such submission flouts this Court's ruling, and as such, is entirely improper and should be stricken.

8. Additionally, this Court should ignore Debtors' attempt to "reserve all rights to further supplement this response." Debtors' Response, ¶ 10. Because Debtors chose to submit a document that is entirely inconsistent with this Court's instructions for submission of excerpts of the Senate Report by July 29, they should not be allowed to comply with the Court's prior directive at their leisure pending disallowance of their non-compliant submission. Debtors proposed a deadline to the Court, the Court agreed to permit the time requested, Debtors should not be allowed to flaunt that deadline.

B. Debtors' Response Should Be Stricken And Disregarded Because Debtors' Have Improperly Submitted Inadmissible Documents And Unsubstantiated Facts Without Any Context Or Foundation.

9. Even if the Debtors' Response were not directly contrary to this Court's Order regarding submission of portions of the Senate Report, it should be stricken and the information contained therein should be disregarded because it is nothing more than a conduit through which Debtors seek to offer into an already closed record irrelevant, unduly prejudicial and inadmissible hearsay and purported factual statements that are unsupported by any evidence.[5]

[5] Notably, on August 1, Debtors lodged similar objections to the TPS Consortium's proposed Exhibit 301-B, which sets forth the effect on the waterfall of applying the federal judgment rate versus the contract rate. See Debtors' Objections to the Equity Committee's Designations and the Trust Preferred Holders' Exhibit in Connection with Confirmation [D.I. 8349] ¶ 4 (no witness to provide foundation), ¶ 7 (hearsay), ¶ 8

10. Specifically, Debtors attached to their Response two motions to dismiss claims brought against five defendants in the Western District of Washington. Even if the Court had not closed the record to such submissions – which it did (7/21/11 Hearing Tr. 331:2 – 332:16, 336:10-13) – the motions to dismiss are rank hearsay, made inadmissible by Fed. R. Evid. 802. Debtors have not pointed to, nor can they point to, any applicable exception to the hearsay rule that would warrant the admission of pleadings from a separate action. Therefore, the motions to dismiss attached to Debtors' purported Response, and all references thereto, should be stricken and disregarded. See Arrowood Indem. Co. v. Hartford Fire Ins. Co., No. 09-166-LPS, WL 1193024, at *5-7 (D. Del. Mar. 30, 2011) (in connection with summary judgment motion, refusing to consider prior deposition testimony and prior pleadings from separate action because

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(record is closed). However, the difference between Exhibit 301-B and the Debtors' submission – as set forth in more detail in the TPS Consortium's Response to the Objections of the Debtors and the Unsecured Creditors' Committee, submitted separately – is that Exhibit 301-B is a summary based on, and merely demonstrative of, evidence already contained in the trial record, including the weekly average federal judgment rates and the Declaration of Debtors' witness Jonathan Goulding. That summary was prepared because the Court stated that such a chart would be helpful. See 7/15/11 Hearing Tr. 140:16 – 142:16, attached hereto as Exhibit B. As such, Exhibit 301-B, is a summary that is properly admissible under Federal Rules of Evidence 611(a) and 1006. See United States v. Velasquez, 304 F.3d 237, 240 (3d Cir. 2002) (use of summary chart based on testimony that had been introduced into evidence not error), citing United States v. Kapnison, 743 F.2d 1450, 1458 (10th Cir. 1984) and United States v. Winn, 948 F.2d 145, 157-59 (5th Cir. 1991) (summary/testimony charts are admissible and Rule 1006 should not be interpreted literally or restrictively as to the "voluminous document" requirement); see also United States v. Milkiewicz, 470 F.3d 390, 395-400 (1st Cir. 2006) (discussing interplay and overlapping nature of Rules 611 and 1006, explaining that summaries and charts may be admissible under both if based on admissible and/or admitted evidence, and affirming the district court's decision to allow the jury to review summaries during deliberations); United States v. Oyakhire, 2011 U.S. App. LEXIS 12664, 5-6 (3d Cir. June 21, 2011) (summary charts admitted under Rule 611(a), and which are based on previously admitted evidence, "may be used to highlight points favorable to a party's case"). In any event, the Debtors have conceded that the TPS Consortium can use Exhibit 301-B, at least as a demonstrative at closing argument. Debtors' proffered pleadings from a separate action, which are the subject of this Motion to Strike, would serve no useful purpose as a demonstrative aid.

defendant failed to establish admissibility and striking portions of affidavit not based on affiant's personal knowledge); Bouriez v. Carnegie Mellon Univ., C.A. 02-2104, 2005 WL 2106582, * 9 (W.D. Pa. Aug. 26, 2005) (striking exhibits to summary judgment motion because defendant failed to "establish that the alleged hearsay statements could be admissible at trial").

11. Moreover, those motions to dismiss are inadmissible because they have been offered with no context or evidentiary foundation to establish any relevance to the proceedings. Even if they were relevant, those motions to dismiss cannot be considered without also considering the allegations contained in the Complaint that initiated that action as well as the plaintiff's opposition to the motions to dismiss, which has yet to be filed in that action. See Civil Docket Report, U.S.D.C. W.D. Wash. C.A. No. 2:11-cv-00459, attached hereto as Exhibit C.[6] It would be improper to consider the motions to dismiss without the added context of the complaint and the opposition to the motions because to do so would be unduly prejudicial, confusing and misleading. See Fed. R. Evid. 403.

12. Debtors' Response is also riddled with statements that are not substantiated by any portion of the now-closed record, or even by any evidence submitted with the Response itself. For example, Debtors reference arguments that the FDIC may make in other jurisdictions related to the potential claims of WMI, and Debtors represent, without evidentiary support, that the FDIC is conducting investigations into certain matters referenced in the Senate Report. *Debtors' Response* ¶ 6, ¶ 6 n.3. Debtors further represent, without evidentiary support, that a

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[6] If, notwithstanding this Motion to Strike, the Court decides to consider the motions to dismiss, as well as the complaint and the opposition to the motions to dismiss that has yet to be filed, upon request of the Court, the TPS Consortium will submit to the Court the complaint and opposition when it is filed. The TPS Consortium has not submitted the complaint with this Motion to Strike because the Court has closed the record, and because the Court need not be burdened with even more unnecessary papers if it grants the Motion to Strike.

multi-agency task force led by the U.S. Attorney's Office undertook "a far more intensive and extensive analysis of WMB's lending practices" than did the Senate Subcommittee. *Debtors' Response* ¶ 7. Because those allegations are not substantiated by any admissible evidence, in the trial record or otherwise, they amount to nothing more than inadmissible and improper hearsay statements of Debtors' counsel and should be stricken.[7]

C. As This Court Already Ruled, The Senate Report Is Admissible As A Relevant Public Record.

13. Despite the fact that the Court has already ruled on the admissibility of the Senate Report, a summary of which the TPS Consortium submitted as directed, Debtors continue to object to the Senate Report on hearsay grounds. However, Debtors fail to address the fact that the Senate Report fits squarely within the public records exception to the hearsay rule, and therefore, is admissible in its entirety. Fed. R. Evid. 803(8). In sharp contrast to the motions to dismiss that Debtors attached to their Response, public records such as the Senate Report are deemed to have significant probative value, and are admissible in civil proceedings. See Fed. R. Evid. 803(8); Barry, 467 F Supp 2d at 99-101 (admitting senate report pursuant to public records exception). In other words, the Court's ruling regarding the relevance and admissibility of the Senate Report was correct, and should not be disturbed.

14. The Senate Report was the product of an exhaustive, bi-partisan investigation, the

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[7] In contrast to the Debtors' attempt to admit into evidence pleadings from another case, in their Post-Trial Brief in Further Opposition to the Debtors' Sixth Amended Joint Plan, the TPS Consortium cites to the Supplemental Memorandum of Law submitted on August 5, 2011 by JPMorgan Chase Bank, N.A. ("JPMC"), a plan supporter, in In re Lehman Brothers Holdings, Inc., Adversary Proceeding No. 10-03266 (JMP), pending in the Southern District of New York. In that Supplemental Memorandum, at p. 1, JPMC takes the position that Stern v. Marshall, 131 S.Ct. 2594 (2011), precludes the Bankruptcy Court from hearing LBHI's damage claims brought under New York law. JPMC's arguments in Lehman are strikingly similar to the arguments made by the TPS Consortium in this matter. Such citation in a post-trial brief to the legal position of a plan supporter need not be admitted into evidence for the Court to take judicial notice of it.

breadth of which more than substantiates the trustworthiness that already is presumed to exist in such reports. See Fed. R. Evid. 803(8)(c), Advisory Committee Notes (public reports are presumed to be admissible); Barry, 467 F Supp 2d at 99-101 (admissibility is presumed and the objecting party bears the burden of establishing that public record should be excluded as untrustworthy). As the Senate Report explains:

> [T]he Subcommittee has engaged in a wide-ranging inquiry, issuing subpoenas, conducting over 150 interviews and depositions, and consulting with dozens of government, academic, and private sector experts. The Subcommittee has accumulated and reviewed tens of millions of pages of documents, including court pleadings, filings with the SEC, trustee reports, prospectuses for public and private offerings, corporate board and committee minutes, mortgage transactions and analyses, memoranda, marketing materials, correspondence and emails. The Subcommittee has also reviewed documents prepared by or sent to or from banking and securities regulators, including bank examination reports, reviews of securities firms, enforcement actions, analyses, memoranda, correspondence, and emails.
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> In April 2010 the Subcommittee held four hearings examining four root causes of the financial crisis. Using case studies detailed in thousands of pages of documents released at the hearings, the Subcommittee presented and examined evidence showing how high risk lending by US financial institutions, regulatory failures, inflated credit ratings, and high risk, poor quality financial products designed and sold by some investment banks, contributed to the financial crisis.

Senate Report, pp. 1-2.

15. Because they cannot challenge the breadth and depth of the Subcommittee's investigation, Debtors allege that none of the Senate Report's findings are meaningful because the report (the Debtors contend) focuses on WMI's bank subsidiary, not WMI itself. That argument is nonsense. First, Debtors ignore what the Subcommittee actually stated about its investigation: "Based on the subcommittee's investigation to date we make the following findings of fact related to Washington Mutual Bank **and its parent holding company, Washington Mutual, Inc**." 7/21/11 Hearing Tr. 280:3-9 (emphasis added).

16. Second, Debtors ignore the fact that the directors and officers of WMB and WMI

overlapped, holding positions of control and trust in both entities. See 7/21/11 Hearing Tr. 278:21-279:4. It cannot be disputed that the officers and directors of WMI owed fiduciary duties to WMI and would be liable to the Debtor WMI for breaching those duties. See Weinberger v. Uop, 457 A.2d 701, 710-711 (Del. 1983) ("individuals who act in a dual capacity as directors of two corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations … and this duty is to be exercised in light of what is best for both companies"). Indeed, Debtors claim to be investigating claims of WMI, based precisely on this principal. Trial Ex. TPS 5, Debtors' Application to Retain Klee, Tuchin, ¶ 6.

17. It is axiomatic that when the directors or officers of a parent-holding company squander the corporation's primary asset (a cash-generating subsidiary) by running that subsidiary into the ground, those directors or officers bear corporate and tort law liability to the parent-holding company itself. See, e.g., Case Fin., Inc. v. Alden, 2009 WL 2581873 (Del Ch. Aug. 21, 2009) (parent-holding company asserted claim for breach of fiduciary duty against executive for actions deteriorating the value of the company's principal, wholly-owned subsidiary); Grace Bros., Ltd. v. UniHolding Corp., 2000 WL 982401, *12 (Del. Ch. July 12, 2000) (Strine, V.C.) ("To the extent that members of the parent board are on the subsidiary board or have knowledge of proposed action at the subsidiary level that is detrimental to the parent, they have a fiduciary duty, as part of their management responsibilities, to act in the best interests of the parent and its stockholders."); see also In re Verestar, Inc., 343 B.R. 444, 473-74 (Bankr. S.D.N.Y. 2006) ("Any situation where a wholly-owned and controlled subsidiary enters

the zone of insolvency obviously requires all responsible parties to act with the utmost care and responsibility."). [8]

18. Moreover, third-parties that knowingly aid and abet wrongful director or officer activities also bear complicity liability to the parent-holding company. See, e.g., In re OODC, LLC, 321 B.R. 128, 144 (Bankr. D. Del. 2005) (Walrath, B.J.) ("To establish liability for aiding and abetting a breach of fiduciary duty, the plaintiff must prove three elements: a) that the fiduciary's conduct was wrongful; b) that the defendant had knowledge that the fiduciary's wrongful conduct was occurring; and c) that the defendant's gave substantial assistance or encouragement to the fiduciary's wrongful conduct.") (citations omitted).

19. This Court should reject Debtors' invitation to ignore the fact that as part of its overall investigation into the root causes of the 2008 economic crisis, a bi-partisan public body tasked with conducting such investigations[9] conducted a pointed, substantial investigation into

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[8] The cases cited by the FDIC in its August 3, 2011 purported Response to the TPS Consortium's summary of the Senate Report [D.I. No. 8371, at ¶ 3], are not to the contrary. While the FDIC asserts that it owns all claims against WMI's officers and directors, "[u]nder FIRREA, the FDIC succeeds to the rights of the Bank only. Therefore, where the Trustee is suing to vindicate the rights of the Holding Company against its own officers, FIRREA is not invoked." Lubin v. Skow, 382 Fed. Appx. 866, 872 n.9 (11th Cir. 2010); Brandt v. Basset (In re Southeast Banking Corp.), 827 F. Supp. 742, 746-48 (S.D. Fla. 1993) (holding that direct claims by the holding company, such as failing to disclose pertinent information to the parent's board, do not belong to the FDIC) (also cited in the FDIC's Response at ¶ 3), aff'd in part and reversed in part, 69 F.3d 1359 (11th Cir. 1995). The Lubin court went on to note that the officers of the holding company may have breached duties to the holding company by failing to inform the holding company's board of bank mismanagement or failing to effectuate change in the mismanagement, which would have given rise to direct claims by the holding company and not the bank, but the complaint failed to make such allegations. Lubin, 382 Fed. Appx. at 873. Thus, the cases cited by the FDIC actually stand for the proposition that the holding company, here WMI, does retain direct claims against its officers and directors.

[9] The Senate Committee on Homeland Security and Governmental Affairs delegated the following jurisdiction to the Permanent Subcommittee on Investigations:

the wrongdoing of numerous parties and their contribution to the collapse of both Washington Mutual Bank and its parent company, the Debtor, WMI. 7/21/11 Hearing Tr. 280:3-9. The evidence contained in the Senate Report that WMI directors and officers ran the bank in a manner that effectively squandered WMI's principal cash-generating asset (its interest in the bank), failed to effect a change in the management and/or policies in order to protect the parent holding company and its shareholders, and engaged in corporate waste by receiving payments of tens of millions of dollars in compensation from the parent holding company while simultaneously driving the holding company into the ground, gives rise to substantial estate corporate and tort law claims against those WMI directors and officers. And, proof that Wall Street investment banks (e.g., Goldman Sachs and Deutsche Bank), rating agencies, appraisal firms, and others knowingly aided and abetted such wrongful director and officer activity gives rise to substantial complicity claims that are also owned by the WMI estate. The viability of

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- Studying or investigating the efficiency and economy of operations of all branches of the Government;
- Studying or investigating the compliance or noncompliance of corporations, companies, or individual or other entities with the rules, regulations, and laws governing governmental agencies and their relationships with the public;
- Determining whether any changes are required in the laws of the United States in order to protect public interests against eh occurrence of improper practices or activities by labor or management groups;
- Studying or investigating syndicated or organized crime which may operate in or otherwise utilized the facilities of interstate and international commerce;
- Studying or investigating all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare, and safety including but not limited to investment fraud schemes, commodity and security fraud, computer fraud, and the use of offshore banking and corporate facilities to carry out criminal objectives…

See Statement of Jurisdiction and Delegation available at: http://hsgac.senate.gov/public/index.cfm?FuseAction=AboutCommittee.Jurisdiction; see also S. Res. 53 (112th Congress).

those claims is directly relevant to Plan confirmation because it affects the value of the Liquidation Trust and the interest that the TPS Holders should have in that Liquidation Trust.

20. In short, as this Court correctly ruled on July 21, the Senate Report is admissible pursuant to Fed. R. Evid. 803(8), 902(5) and 1005, and the Subcommittee's findings are relevant to this Court's determinations regarding the value of claims to be vested in, and pursued by, the Liquidating Trust. 7/21/11 Hearing Tr. 296:24 – 297:9.

CONCLUSION

For the above-stated reasons, the TPS Consortium respectfully requests that the Court grant the Motion and: (1) strike and disregard Debtors' Response; (2) strike and disregard the attachments to Debtors' Response; (3) disallow any excerpts from the Senate Report subsequently submitted by Debtors, because they failed to do in a timely manner in accordance with the Court's Order; (4) allow the admission of the Senate Report, as and to the extent previously Ordered; and (5) provide any other relief that the Court deems just and proper.

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Dated: Wilmington, Delaware
August 10, 2011

Respectfully submitted,

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