IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

THE TPS CONSORTIUM'S POST-TRIAL BRIEF IN FURTHER
OPPOSITION TO THE DEBTORS' MODIFIED SIXTH AMENDED JOINT PLAN

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Dated: August 10, 2011

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The consortium of holders of interests subject to treatment under Class 19 of the Plan (the "TPS Consortium"),[1] by and through its undersigned counsel, respectfully submits this post-hearing summation brief, following this Court's seven-day trial (July 13-15, 18-21, 2011) on the modified sixth amended plan [Docket Nos. 6696, 6964 and 7038], Debtors' Conf. Exs. 255, 256 and 257 (collectively, the "Plan") (App. A)[2] filed by Chapter 11 debtors Washington Mutual Inc. ("WMI") and WMI Investment Corp ("WMI Investment" and, together with WMI, the "Debtors"). In continued opposition to the Plan and in further support of its previously-filed objections to the Plan [Docket Nos. 6020, 7480 and 8100], fully incorporated herein by reference, the TPS Consortium respectfully submits as follows:

PRELIMINARY STATEMENT

1. Now before this Court is a tangle of complicated legal and factual issues. The varied arguments and conflicting evidence are confusing and tend to obfuscate, and all are inappropriately shadowed by jingoist urgings that the settlement is "Too Big To Fail." While multiple days of the confirmation trial delved into factual issues that may create independent bases for confirmation denial (e.g., allegations of insider trading), that same conclusion is otherwise mandated by a straight-forward application of legal principles to the more commercial-oriented facts.

2. The thicket needs pruning, and pruning requires careful legal analysis without rhetorical distraction. Accordingly, in this Brief, the TPS Consortium explores applicable legal

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1 As set forth in the *Verified Fourth Amended Statement of Brown Rudnick LLP and Campbell & Levine LLC Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure*, dated June 16, 2011 [Docket No. 7916] (App. B), the TPS Consortium is comprised of parties who have been classified for treatment under Class 19 of the Plan.

2 The accompanying Appendix (App. __) provides copies of, or excerpts from, cited record and other materials

principles, specifically identifies important portions of the evidentiary record, and explains why application of principle to commercial fact requires denial of confirmation. As explained herein, the Plan may not be confirmed for at least six reasons.

3. First, as a result of the pending appeal of the Court's ruling in Blackhorse Capital LP v. JPMorgan Chase Bank, N.A., Adv. No. 10-51387 (MFW), on appeal, Civ. Action No. 11-124-GWS, this Court lacks jurisdiction to confirm the Plan, given that the Plan incorporates numerous provisions obviously intended to moot issues now within the exclusive province of Chief District Court Judge Gregory M. Sleet. Unless the TPS Securities are placed into a disputed-claims escrow pending completion of the appellate process – the usual and customary mechanic for plans to comply with the Divestiture Rule – the Court simply lacks the jurisdictional power to issue the requested confirmation order.

4. Second, because this Plan is largely bankruptcy "wrapping" for a settlement of claims that must be litigated before an Article III District Court, this Court lacks Constitutional power to approve the Global Settlement with finality. Placing the Global Settlement Agreement before this Court for final approval is akin to placing a large class action settlement before a federal magistrate (another Article I judge), and asking the magistrate to enter the final "fairness" judgment pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and thereby impose the settlement on all disaffected members of the class. Federal magistrates are not empowered to issue such judgments; they may only render proposed findings of fact and conclusions of law. Similarly, pursuant to Stern v. Marshall, this Court may do no more than submit proposed findings of fact and conclusions of law to Chief Judge Sleet.

5. Third, the Plan over-compensates creditors. The law mandates post-petition interest for unsecured creditors in a solvent-debtor case, but payable at only the federal judgment

rate. Any discretion this Court may have in setting post-petition interest beyond the federal judgment rate arises only in connection with plans contemplating unsecured creditor "cram-down," and that is not the Plan presently before this Court. The federal judgment rate is determined as of entry of the confirmation order (i.e., the date of entry of the "judgment") and, since the Global Settlement results in distributable cash exceeding full claim satisfaction (including post-petition interest payable at the appropriate rate), creditors are unimpaired and holders of TPS Securities are entitled to excess cash, WMRRC value (whatever that may be), and proceeds from unsettled estate causes of action (whatever they prove to be), among other significant residual value.

6. Fourth, for another reason, the Plan over-compensates creditors, including especially the Settlement Noteholders. The Plan vests unsettled estate causes of action in a Liquidation Trust that will distribute litigation proceeds first to unpaid creditors and, thereafter, to holders of TPS Securities and preferred stock. But, the Plan "death-traps" any such right of recovery: any holder of TPS Securities or preferred stock that did not deliver a release as part of its Plan vote is denied any such distribution. Given that few holders of TPS Securities and preferred stock (other than the Settlement Noteholders) actually tendered this release, one-half of the litigation proceeds go (uncapped) to the Settlement Noteholders. The Debtors have utterly failed to prove the value of such estate causes of action and, in turn, have utterly failed to carry their burdens of proof and persuasion that this aspect of the Plan is consistent with Bankruptcy Code Sections 1129(a)(7) and 1129(b). Quite the contrary, the evidence strongly suggests that these causes of action are worth hundreds of millions, if not billions, of dollars (the Debtors were, after all, at the epicenter of the nation's macro-economic meltdown, and their role in that meltdown was facilitated by Wall Street and a number of other "aiders and abetters"). The Plan

therefore violates the "best interests" test and is not "fair and equitable" respecting holders of TPS Securities.

7. Fifth, the evidence supporting the Court's prior preliminary approval of the Global Settlement Agreement has changed. The Senate Report (giving strong challenge to any continued factual contention of pre-petition solvency) and the ANICO reversal (meaning that the estate business tort claims now may be litigated) both occurred after issuance of the Court's January 7, 2011 opinion denying confirmation (the "January 7th Opinion") [Docket No. 6528] (App. C). Estate avoidance and business tort claims against JPMorgan and the FDIC were among the most significant sources of potential estate recovery covered by the Global Settlement Agreement ($6+ billion); and, settlement of those claims historically had the wisp-thinnest of evidentiary support. That support has now evaporated completely, mandating a different conclusion. At the very least, it mandates an Order of the Court directing the Debtors to deliver to this Court a draft (on notice to all parties-in-interest) of proposed findings of fact and conclusions of law, identifying with particularity where, in the record, evidence exists for the Court to conclude that the Global Settlement Agreement is fair and appropriate in light of the fact-intensive nature of the avoidance actions and business tort claims.

8. Further to this point, the trial evidence – insufficient for anything more than suspicion in December 2010, but proven conclusively in July 2011 – clearly establishes that: (i) the "driver" of the settlement was allocation of tax refunds and the delivery of TPS Securities to JPMorgan, and did not involve any analysis whatsoever as to the value of the avoidance and business tort claims; (ii) the deal was struck at what the Settlement Noteholders thought was a pittance below full payment of the PIERs; and (iii) the Debtors (led by conflicted professionals) turned a blind-eye to – and never truly investigated – potential avoidance and business tort

claims to enable the deal to close, unfettered by what the true facts may be. The evidence now establishes the Debtors' "fairness" analysis was, in truth, a hand-over-equity on the balance-sheet: all above were to be paid; all beneath the hand were to receive nothing; underlying facts and legal sufficiency were (to the Debtors) analytically irrelevant.

9. Sixth, the Plan calls for "completion" of the Conditional Exchange of TPS Securities for WMI preferred stock that does not exist, in violation of Bankruptcy Code Section 365(c)(2), and continues the Debtors' past pattern of over-reaching releases.

10. To confirm the Plan, the Court must find for the Debtors on all six of these points. To do so would require the Court to dramatically bend long-established legal principles and/or establish entirely new ways of thinking about the law, and to ignore incontrovertible facts. This the Court should not do. But, if the Court is inclined to find for the Debtors on all six points, the TPS Consortium respectfully asks the Court to exercise its discretion under 28 U.S.C. § 158(d)(2), certifying issues for direct appeal to the Third Circuit Court of Appeals. In light of anticipated (never-ending) appeals, the TPS Consortium respectfully submits that Third Circuit certification is the surest means to near-term case conclusion.

ARGUMENT

I. This Court Lacks Authority To Confirm The Plan In Its Present Form, And No Evidence Or Argument Has Been Presented To Support Any Different Conclusion.

A. The Plan Violates The Divestiture Rule, And Nothing Has Been Presented To Support Any Different Conclusion.

1. Applicable Legal Principles.

10. The "Divestiture Rule" is really quite simple. During the pendency of a bankruptcy case, two parties litigate a matter before the Court. The Court renders a ruling and an appeal is taken. Jurisdiction over the matter on appeal is removed from this Court and vested

exclusively with the Article III District Court. The matter thereafter is "ring-fenced." This Court may do nothing to invade the District Court's exclusive jurisdiction over the matter. This Court may not enter any order on collateral issues that would disable the District Court from reversing and returning the parties to the status quo ante. The Debtors may not propose a plan, and this Court may not confirm a plan, that advertently or inadvertently moots the appeal by invading what is now the exclusive province of the District Court.

11. In Griggs v. Provident Consumer Disc. Co., 459 U.S. 56 (1982), the Supreme Court explained the Divesture Rule as follows: "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Id. at 58. The Third Circuit Court of Appeals emphasized that this Rule is to be rigidly observed by lower courts: "'Divest' means what it says – the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere." Venen v. Sweet, 758 F.2d 117, 120-21 (3d Cir. 1985). Courts throughout the United States have, time and again, consistently heeded this instruction in the bankruptcy context, and correctly honored the Divestiture Rule in situations similar to the one before the Court.

12. For example, in Whispering Pines Estates v. Flash Island, Inc. (In re Whispering Pines Estates), 369 B.R. 752 (B.A.P. 1st Cir. 2007), the Bankruptcy Court confirmed a plan proposed by the secured lender, over the debtor's objection. The debtor appealed the confirmation order. While that appeal was pending, the Bankruptcy Court entered an order granting the secured lender stay relief to foreclose on collateral. The debtor then appealed the stay relief order. In connection with the second appeal, the Bankruptcy Appellate Panel vacated the stay relief order, holding that it violated the Divestiture Rule:

> [W]e find the subject matter under the appeal of the Confirmation Order so closely related to the Stay Relief Motion that the entry of the Stay Relief Order impermissibly interfered with the Debtor's rights in its appeal. As such, we find that the bankruptcy court's decision contravenes the generally recognized rule of appellate jurisdiction and our previous decisions recognizing this rule.

Id. at 759.

13. In Bialac v. Harsh Inv. Corp. (In re Bialac), 694 F.2d 625 (9th Cir. 1982), the Bankruptcy Court granted the secured lender stay relief to foreclose on its collateral. The debtor appealed the stay relief order and, soon thereafter, filed a plan of reorganization with the Bankruptcy Court. At the appellate level, the debtor argued the stay relief order should be vacated so that its plan could go forward before the Bankruptcy Court. The Ninth Circuit Court of Appeals rejected the argument, finding no error in the stay relief order and, in turn, that the Divestiture Rule prohibited the Bankruptcy Court from entering any order advancing the debtor's plan: "The pending appeal divested the lower court of jurisdiction to proceed further in the matter. Even though a bankruptcy court has wide latitude to reconsider and vacate its own prior decisions, not even a bankruptcy court may vacate or modify an order while on appeal." Id. at 627 (citations omitted).

14. Almost directly on point is In re DeMarco, 258 B.R. 30 (Bankr. M.D. Fla. 2000). There, the IRS filed a large secured claim. The debtor filed a motion to determine the debtor was not liable on the claim, and a trial was conducted. The Bankruptcy Court ruled against the IRS, and the IRS appealed. While the appeal was pending before the District Court, the debtor filed a plan that afforded the IRS nothing on account of its asserted secured claim. The IRS objected to the plan, contending that it violated the Divestiture Rule. The Bankruptcy Court agreed, finding that the plan invaded the District Court's exclusive jurisdiction over the matter on appeal. The Bankruptcy Court deferred consideration of the plan pending conclusion of the appeal process.

15. The plan-related impact of the Divesture Rule was concisely stated in In re Strawberry Square Assocs., 152 B.R. 699, 702 (Bankr. E.D.N.Y. 1993), as follows: "the bankruptcy court [may not] exercise jurisdiction over those issues which, although not themselves on appeal, nevertheless so impact those on appeal as to effectively circumvent the appeal process."

2. The Plan Unabashedly Flouts The Divestiture Rule.

16. This Plan is, quite obviously, constructed to disable Chief Judge Sleet from effectively reviewing on appeal this Court's decision in Black Horse Capital LP v. JPMorgan Chase Bank, N.A., Adv. No. 10-51387 (MFW), on appeal, Civ. Action No. 11-124-GWS. The following Plan provisions impermissibly encroach on Chief Judge Sleet's exclusive jurisdiction in violation of the Divestiture Rule:

- **Plan Section 2.1(c).** Provides that, as part of the Global Settlement,[3] the Debtors shall "sell, transfer, and assign" the TPS Securities to JPMorgan (App. A).

- **Global Settlement Agreement Section 2.3.** Provides that, on the Plan's Effective Date, the TPS Securities will be sold to JPMorgan pursuant to Bankruptcy Code Section 363. Thereafter, JPMorgan will be the exclusive owner of the TPS Securities. JPMorgan is also granted the ability to direct parties to reflect the transfer on all applicable registers, and otherwise document the title transfer. This section also contains a release, directed towards ending the appeal before Chief Judge Sleet: "And all claims against the Debtors, the WMI Entities, the Acquisition JPMC Entities and the FDIC Parties with respect to the Trust Preferred Securities shall be released and withdrawn, with prejudice, including any claims under section 365(o) of the Bankruptcy Code or any priority claim under section 507(a)(9) of the Bankruptcy Code." (App. I)

[3] Under Plan Section 2.1 prelude, the Global Settlement Agreement is incorporated into and made part of the Plan. In fact, where there is a conflict, the Settlement Agreement controls the Plan (App. A).

- **<u>Global Settlement Agreement Section 3.2</u>.** Provides as follows: "Any other Person that claims through [the Debtors' estates] . . . shall be deemed to have irrevocably and unconditionally. . . waived, released, acquitted and discharged" JPMorgan from any claims, "including . . . claims related in any way to the Trust Preferred Securities." (App. I)

- **<u>Plan Section 23.2</u>.** Extinguishes all Class 19 rights but, at the same time, provides that, as of the Plan Effective Date, "JPMC or its designee is the sole legal, equitable and beneficial owner of the Trust Preferred Securities for all purposes." (App. A)

- **<u>Plan Section 38.1</u>.** Provides for the following conditions precedent to confirmation: (1) approval of the Global Settlement Agreement (38.1(a)(5)); (2) authorization of the taking of all actions to effectuate the transfer of the TPS Securities under the Global Settlement Agreement (38.1(a)(8)); (3) approval of the transactions reflected in the Global Settlement Agreement (38.1(a)(9)); and (4) an order providing that, on the Effective Date, the TPS Securities shall be sold to JPMorgan free and clear of all rights, claims and interests (38.1(a)(10)). Most importantly: <u>The confirmation order must protect JPMorgan as a "good faith" purchaser of the TPS Securities, pursuant to Bankruptcy Code Section 363(m), thereby immunizing JPMorgan from disgorgement if Chief Judge Sleet reverses on appeal (38.1(a)(10)) (App. A).</u>

- **<u>Plan Section 43.2</u>.** Provides for a release and discharge of Class 19 claims and interests asserted against the estates, thus releasing and discharging the contention on appeal that the TPS Securities are not assets belonging to the Debtors' estates (App. A).

- **<u>Plan Sections 43.6, 43.7, 43.9 and 43.12</u>.** All further inhibit the TPS Consortium's arguments on appeal, and are directed towards preventing due recovery, if the appeal is successful (App. A).

3. The Court's Jurisdictional Boundaries Must Be Recognized, Even If It Frustrates The Debtors' Preferred Case Strategy.

17. The Debtors and JPMorgan argue that the TPS Consortium's reference to the Divesture Rule here is just a ruse to evade the impact of equitable mootness, and that this Court is free to simply ignore the Rule. They are wrong.[4]

18. First, the Divesture Rule is not a "ruse." It is a long-standing rule of law that rigidly circumscribes this Court's jurisdiction over matters on appeal before a superior court. It is clearly developed in binding precedent and must be followed, regardless of the impact to the Debtors' preferred case strategy.

19. Second, the Debtors and JPMorgan misstate the law, by conflating two distinct legal postulates. Equitable mootness, on the one hand, arises when a Bankruptcy Court wrongfully confirms a plan, but relief cannot be effectively granted thereafter. It has a retroactive vantage point: the appeal is meritorious but, regrettably, there is nothing the appellate court can do to rectify the situation given interceding developments. The Divestiture Rule, on the other hand, arises prior to that point in time, as parties are in the process of constructing a plan. It has a forward-looking vantage point, providing in effect as follows: (i) in the United States, "due process" rights are important and must be honored; (ii) Bankruptcy Courts are courts

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[4] Earlier in this case, JPMorgan argued aggressively in favor of application of the Divestiture Rule in its own dispute with the Debtors. See Notice of Divestiture of Jurisdiction Pending Appeals, at 2-3, JPMorgan Chase Bank, N.A. v. Washington Mut., Inc., Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del., September 18, 2009) [Docket No. 146] (App. D) ("JPMC has not and need not seek a stay. The timely filing of a notice of appeal *automatically* divests the lower court of jurisdiction") (emphasis in the original). JPMorgan should be estopped from contending that this same rule is somehow inapplicable here. See Yoo Wong Park v. United States AG, 472 F.3d 66, 73 (3d Cir. 2006) (quoting In re Chambers Dev. Co., Inc., 148 F.3d 214, 229 (3d Cir. 1998)) ("Judicial estoppel is 'a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding.'").

of limited jurisdiction, and their jurisdictional bounds must be honored; (iii) as parties go about constructing a plan, the plan they construct must abide by these legal principles; and (iv) if the parties fail to abide by these legal principles, the Bankruptcy Court will lack the jurisdiction necessary to confirm the plan they propose.

20. Third, equitable mootness is not some beloved, enshrined doctrine to be sheltered. It is in fact disfavored, even despised by appellate tribunals. See Nordhoff Invs., Inc. v. Zenith Elecs. Corp. (In re Zenith), 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring) ("I continue to disagree with the expansive version of the equitable mootness doctrine that . . . can easily be used as a weapon to prevent any appellate review of court orders confirming reorganization plans."); In re Pac. Lumber Co., 584 F.3d 229, 244 n.19 (5th Cir. 2009) (discussing the negative impact equitable mootness can have on markets and the unwillingness of lenders to work with debtors when appellate review can be thwarted by equitable mootness). The equitable mootness doctrine, where applicable, forces appellate courts to begrudgingly acknowledge an injustice has occurred. The Debtors and JPMorgan are simply wrong to ask this Court to coddle an evasive form of justice.[5]

21. The position espoused by the Debtors and JPMorgan is not aided one whit by cries of "Settlement!" and dire predictions that the deal is "Too Big To Fail!" Regardless of the accuracy/likely-inaccuracy of such predictions, this Court has no choice but to scrupulously honor its jurisdictional boundaries. As the Supreme Court specifically admonished in Stern v.

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5 The doctrine of equitable mootness may be inapplicable in any event, being that this is a bankruptcy liquidation. See, e.g., In re Christian Anthanassious, Nos. 09-4594 & 10-2285, slip op. at 6 n.3 (3d Cir. Feb. 7, 2011) (App. E) (questioning whether the doctrine of equitable mootness has any application to an appeal in the context of a chapter 7 liquidation); Schroeder v. New Century Liquidating Trust (In re New Century), 407 B.R. 576, 588 n.27 (D. Del. 2009) (questioning whether the doctrine of equitable mootness applies respecting a Chapter 11 plan of liquidation).

Marshall: "It goes without saying that the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it." 131 S. Ct. 2594, 2619 (2011). Indeed, the Third Circuit Court of Appeals specifically instructed that jurisdictional bars must never bend for case advancement: "This litigation has been unduly prolonged, unnecessarily burdening this court in this appeal, as it will burden the district court in the proceedings which will undoubtedly follow. Nevertheless, jurisdictional requirements may not be disregarded for convenience sake." Venen, 758 F.2d at 123.

4. The TPS Securities Must Be Fully Escrowed In A Disputed Claims Reserve Pending The Ultimate Outcome Of The Appellate Process.

22. To be sure, Chapter 11 does not compel pre-confirmation resolution of all disputed entitlements to estate value. It is, in fact, a usual plan mechanic to continue claims-reconciliation post-consummation. Plans commonly provide that holders of disputed claims will be afforded their fair day in court, with all attendant due process rights preserved. Distributions (based on the amount claimed by the creditor) are held in escrow, pending final adjudication of the claim. If the claimant is proven correct, it will receive its due plan entitlement from the escrow. If the claimant is proven incorrect, amounts escrowed will be released to other claimants in the same class or in lower classes. This common plan mechanic comports perfectly with the Divesture Rule, since it "ring-fences" the value and, thus, enables (rather than obstructs) the appellate process. See, e.g., Premier Entm't Biloxi LLC v. Pacific Mgmt. Co., LLC (In re Premier Entm't Biloxi LLC), No. 08-60349, 2009 WL 1616681 (5th Cir. June 9, 2009) (finding the debtors' plan properly deposited disputed funds into an escrow account, with a determination of which party was entitled to those proceeds to be made through post-confirmation litigation); see also January 7th Opinion, at 50-51 (App. C) (noting the need for a sufficient plan escrow to

protect the interests of holders of litigation tracking warrants should they be classified as unsecured claims rather than common equity).

23. Proper recognition and application of the Divesture Rule compels inclusion of the same mechanic in this Plan: The TPS Securities must be placed in a "ring-fenced" escrow pending final resolution of the appellate process. If this Court's decision regarding current ownership of the TPS Securities is reversed, the TPS Securities demanded by the members of the TPS Consortium must be released to them. If the Court's decision regarding ownership is affirmed after full exhaustion of appellate rights, the TPS Securities then may be released to JPMorgan. Absent such escrowing, the Plan invades the District Court's exclusive jurisdiction in violation of the Divestiture Rule, and cannot be confirmed. No argument advanced, and no evidence admitted at trial, supports any other conclusion.

B. The Plan Amounts To Little More Than Bankruptcy "Wrapping" For A Settlement Of Complex Non-Core Litigation That Is Beyond This Court's Constitutional Power To Resolve With Finality, And Nothing Has Been Presented To Support Any Different Conclusion.

1. The Court Lacks Constitutional Power To Adjudicate The Estate Claims Against JPMorgan And The FDIC.

24. In Stern v. Marshall, a majority of the Supreme Court charted the boundary between Congress's Article I power "to establish uniform laws on the subject of bankruptcies" and the "judicial power" vested exclusively in Article III Courts. Three points of law, clearly established in the Stern opinion, are particularly relevant here.

25. First, Acts of Congress do not control the question. So, even if 28 U.S.C. § 157, the Bankruptcy Code, or the Bankruptcy Rules facially provide this Court authority to render a particular order or judgment, that does not mean such order or judgment is Constitutionally valid

and enforceable. On this point, Stern simply reiterates the teachings of Granfinanciera v. Nordberg, 492 U.S. 33, 50 (1989). See Stern, 131 S. Ct. at 2614.

26. Second, if the Court is presented with an issue for resolution that has the look, feel, taste, and smell of a true cause of action – i.e., is the "Stuff of the Courts of Westminster" – then that issue is not for this Court to decide. It must be passed to the District Court for final resolution. See id. at 2609. That is true if the lawsuit arises under non-bankruptcy law (like the estate's tort claim in Stern) or under the Bankruptcy Code (like the estate's fraudulent conveyance claim in Granfinanciera). See id. at 2609-10. That is also true if the parties consent to trial by this Court, since private litigants cannot confer on a tribunal Constitutional power that does not otherwise exist. See Capon v. Van Noorden, 6 U.S. 126 (1804); Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 293-94 (3d Cir. 1998). Any final judgment by this Court in violation of the foregoing would be subject to subsequent collateral attack. See Stern, 131 S. Ct. at 2594; Louisville & Nashville R.R. v. Motley, 211 U.S. 149 (1908).[6]

[6] Although not issue dispositive, it bears noting that neither JPMorgan nor the FDIC have consented to this Court's jurisdiction to adjudicate estate claims asserted or assertable against them. See Notice of Divestiture of Jurisdiction Pending Appeals at 2-3, JPMorgan Chase Bank, N.A. v. Washington Mut., Inc., Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del. March 24, 2009) [Docket No. 146] (App. D) ("JPMC has not and need not seek a stay. The timely filing of a notice of appeal *automatically* divests the lower court of jurisdiction") (emphasis in the original); Motion to Dismiss in Part Pursuant to Federal Rules 12(b)(1) and 12(b)(6) at 3, Washington Mut., Inc. v. FDIC, Adv. Proc. No. 09-00533 (RMC) (D.D.C. Oct. 13, 2009) [Docket No. 25] (App. F) (seeking dismissal of four of the five counts alleged against the FDIC on the theory that "federal law expressly deprives courts of subject matter jurisdiction to even consider some of those claims"). They have consented only to this Court's jurisdiction to adjudicate the settlement. If the settlement is not approved, those parties presumably will return to other courts for further proceedings; see also Supplemental Memorandum of Law in Support of Motion to Dismiss of JPMorgan Chase Bank, N.A., Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A., No. 10-03266 (JMP) (Bankr. S.D.N.Y. Aug. 5, 2011) [Docket No. 90] (App. G) (advancing arguments under Stern that are indistinguishable from those advanced by the TPS Consortium in this case).

27. Third, the Court's jurisdiction does not expand if the litigation target files a proof of claim. In that situation, the Court may adjudicate the estate lawsuit as part of the trial over the disputed proof of claim, but only if: (a) the off-set provisions of Bankruptcy Code Section 502(d) apply (not applicable here); or (b) the trial concerning the estate claim is completely entwined with the trial concerning the disputed proof of claim. Stern, 131 S. Ct. at 2611, 2616. Stern instructs that estate counter-claims are entwined with the underlying claim dispute when the elements of the trial (on both sides) perfectly overlap; in other words, where the estate lawsuit does not raise any elements in addition to those at issue respecting the disputed proof of claim. Id. at 2617-18. Thus, if the debtor has a tort claim against a creditor and creditor has a contract claim against the debtor, the litigation is not entwined. In that situation, the Court may try the dispute over the proof of claim, but the estate lawsuit must be passed to the District Court for separate adjudication.[7]

28. Following these principles of law, it seems incontrovertible that this Court lacks jurisdiction to resolve the estate claims against JPMorgan and the FDIC. Estate litigation already commenced asserts true causes of action; it is the "Stuff of the Courts of Westminster." Much of this litigation arises under non-bankruptcy law, including causes of action asserted under Washington state corporation law, general state tort law, federal intellectual property law, state fraudulent conveyance law, and the Federal Tort Claims Act. See Second Supplemental Objection of the Consortium of Trust Preferred Security Holders to Confirmation [Docket No.

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[7] For this reason, and in deference to judicial economy, SDNY Bankruptcy Judge Gerber recently deferred litigation over a proof of claim, so that it might be joined with the estate litigation that must be litigated elsewhere. See In re BearingPoint, No. 09-10691, 2011 WL 2709295, at *1 (Bankr. S.D.N.Y. July 11, 2011) ("[T]here are no benefits in hearing the action here. To the contrary, requiring the Trustee to endure the procedural hurdles in starting (but evidently, not finishing) the litigation in the bankruptcy court . . . can hardly be said to be in the interests of justice.") (App. J).

8100], Ex. C (App. H). Moreover, these claims do not perfectly over-lap (and, thus, are not entwined with) the disputed proofs of claim asserted by JPMorgan and the FDIC. Those proofs of claim arise under other law, and involve elements distinct from those at issue in the estate claims. See Global Settlement Agreement (Second Amended and Restated Agreement, dated as of February 7, 2011) at 3, Debtor's Conf. Ex. 255H (App. I).

29. As a result, this Court may not render final findings of fact or conclusions of law bearing on those lawsuits.[8] Any such findings or conclusions would be, according to Stern, subject to subsequent collateral attack. See Stern, 131 S. Ct. at 2594.

2. The Court Also Lacks Constitutional Power To Grant Final Approval Of The Global Settlement, Which Resolves Non-Core Estate Claims Against JPMorgan And The FDIC.

30. The next level of legal analysis asks: if this Court cannot try estate causes of action against JPMorgan and the FDIC, may the Court still adjudicate a hotly-contested settlement of those very same non-core claims? It is true that Bankruptcy Code Section 1123(b)(3)(A) and Bankruptcy Rule 9019 may be read to mean that Congress has granted Bankruptcy Courts general authority to adjudicate contested settlements of estate

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[8] This Court's decision in Miller v. Greenwich Capital Fin. Prods. (In re Am. Bus. Fin. Servs., Inc.), Nos. 05-10203, 06-50826, 2011 WL 3240596 (Bankr. D. Del July 28, 2011) is not to the contrary. In American Business, the Court concluded the Stern decision did not foreclose the Court's final adjudication of the claims at issue. See id at *2. But, the estate claims in American Business all related to post-petition acts, arose as part of the administration of the bankruptcy case, and/or related to actions taken in connection with the Court's approval of use of cash collateral. See id. at *1. Such issues, having a direct nexus to the Court's Constitutionally-permitted oversight of bankruptcy proceedings, are distinguishable from the claims and causes of action here, arising under numerous non-bankruptcy legal regimes, that would be finally resolved through the Court's approval of the Global Settlement Agreement.

claims.[9] But, again, statutes and rules of procedure may not authorize the Court to do what, according to Stern, is reserved exclusively for Article III District Courts. Any such grant of authority would be an unconstitutional encroachment on the judicial power. See Stern, 131 S. Ct. at 2614.[10]

31. In circumstances like these, Stern poses the analytical inquiry in the following way. Is the issue before the bench: (a) a court-like adjudicatory function, falling within what is traditionally thought of as the "stuff" of Article III District Courts; or (b) an administrative function, falling within what is traditionally thought of as the "stuff" of bankruptcy-administration? See id. at 2609-10, 2615. According to the Supreme Court, the issue is the "stuff" of bankruptcy-administration if: (x) it is within that "particularized area of law" generally

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9 It is, however, worth noting that neither Bankruptcy Code Section 1123(b)(3)(A) nor Bankruptcy Rule 9019 specifies what particular type of estate claim may be settled and, so, a determination by this Court that it lacks jurisdiction to render the type of settlement approval requested here does not require a ruling that these provisions are facially unconstitutional. Rather, such a determination would simply recognize the bounds of the Constitutionally-appropriate application of Bankruptcy Code Section 1123(b)(3)(A) and Rule 9019, a result itself consistent with the teachings of Stern. See Stern, 131 S. Ct. at 2605 (where possible, federal statutes are to be construed so as to avoid doubts as to their Constitutionality).

10 In a recent decision, the Bankruptcy Court for the Southern District of Texas held that, since Rule 9019 gives bankruptcy courts the discretion to approve compromises and since that Rule had been interpreted by federal courts, Bankruptcy Courts retained the power to enter final orders approving settlements notwithstanding the Stern decision. See In re Okwanna, No. 10-31663, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011), at *4. Assuming jurisdiction based on a procedural rule would appear to fly in the face of Stern's admonition that it is the Constitution, rather than any statute, that determines whether a Bankruptcy Court has the power to act (particularly given the Stern court's holding notwithstanding the existence of 28 U.S.C. § 157(b)(2)(C) and the numerous judicial interpretations thereof). Further, the Court should decline to follow Okwanna given the decision was in the context of a dispute totaling $20,000 (versus the billions of dollars at issue in this case), no party in that case had opposed the Bankruptcy Court's exercise of jurisdiction (or had briefed the issue), the holding was arguably dicta given the Court's alternative basis for exercising jurisdiction, and the decision is not controlling on this Court.

considered bankruptcy; (y) it involves issues that Bankruptcy Courts are widely seen as "experts" at resolving; and (z) the Bankruptcy Court is "particularly suited to examine and determine" the issue. Id. at 2615.

32. To be sure, the trial over the Global Settlement Agreement bears all of the hallmarks of a court-like adjudicatory function, falling within what is traditionally thought of as the "stuff" of Article III District Courts. The evidentiary record of the December 2010 trial and the July 2011 trial is massive; the volume of the rhetoric is deafening; the arguments and allegations (on both sides of the aisle) are complex and aggressive, focusing on whether third-parties bear judgment liability; the amounts at stake are staggering; and most importantly, the January 7th Opinion dedicated more than 65-pages to an evaluation of the underlying merits of non-core estate causes of action. See January 7th Opinion (App. C). This is not some "rubber-stamp" resolution at the universal behest of all parties-in-interest. This matter prompted a large trial over whether the settlement is fair to – and, therefore, may be forcibly imposed upon – thousands of disaffected parties-in-interest. The Court's final order is fully intended by the parties supporting confirmation to have res judicata and collateral estoppel effect. It is fully intended to become binding on parties (such as the TPS Consortium) that vigorously oppose the settlement terms. It is fully intended to have the force of judgment by a Court of Law, as if rendered by historic "Courts of Westminster."

33. This contested matter is, in fact, much like a "fairness" hearing over whether a class action settlement should be made binding on all members of the class, not only the lead plaintiff. See Fed. R. Civ. Pro. 23(e)(1)(C). Pursuant to Rule 23(e)(1), notice of the hearing must be distributed to all class members, and they all must be given a full opportunity to voice their objections before the settlement is forcibly made binding on them. Under the law, a

magistrate judge (another Article I judge) cannot render the "fairness" ruling. The magistrate judge only may deliver to the District Court proposed findings of fact and conclusions of law. See 28 U.S.C. § 636(b)(1)(A); Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611, 619-20 (D.D.C. 1987); see also 14 Moore's Federal Practice ¶ 72.02[12] (3d ed. 2011). A final "fairness" determination is the "stuff" of court adjudication; it is the "stuff" reserved exclusively for Article III District Courts. Such a division of labor between an Article I Court and the Article III Court is no less principled (and mandated) here.

34. The Debtors and JPMorgan contend the trial over the Global Settlement Agreement instead bears the hallmarks of traditional bankruptcy-administration. That is not credible. The hotly-contested resolution of complex causes of action involving, among other non-core law, Washington State corporation law, general state business tort law, federal intellectual property law, the Federal Tort Claims Act, and FIRREA simply does not fall within the "particularized area of law" generally thought of as bankruptcy. Respectfully, this Court is not an "expert" on these matters. Stated differently, this Court is not as "particularly suited to examine and determine" a settlement of these claims as it is more traditional bankruptcy matters, such as (a) contested cash collateral usage, (b) DIP and exit financing, (c) lease assumption and rejection, and (d) enterprise valuation. This latter grouping is the real "stuff" of bankruptcy.

35. The trial over the Global Settlement Agreement is outside the ambit of bankruptcy administration; it is outside the ambit of the Court's Constitutional power. The trial record – as a whole – confirms this conclusively. This Court may do no more than issue proposed findings of fact and conclusions of law for review and final consideration by Chief Judge Sleet.

3. Such Ruling Recognizes The True Nature Of This Chapter 11 Case (A Liquidation) And The True Nature Of This Plan (Bankruptcy "Wrapping" For A Settlement Of Claims That Must Be Adjudicated By The District Court).

36. The Debtors and JPMorgan contend that recognizing the import of Stern v. Marshall in this manner would ring the death knell of Chapter 11 as we know it today. That is a vast overstatement. Regardless of the Court's ruling in this particular case, American companies will continue to face financial troubles for myriad reasons; American companies will therefore continue to seek Chapter 11 relief in Delaware. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), will continue to be the law of the land and, as a result, Chapter 11 debtors will still require DIP and exit financing. Businesses will need to be reorganized or liquidated; contracts will need to be assumed or rejected; claims will need to be allowed or disallowed; businesses will need to be sold pursuant to Bankruptcy Code Section 363; plans of reorganization will need to be confirmed; and enterprises will need to be valued.

37. This case is far removed from the "typical" Chapter 11 case. The Debtors do not have a business. They do not have any future prospects. They are a liquidating shell with no operational assets.[11] The estates' asset-base is predominantly rights of recovery from the government and third-parties, under various theories of non-bankruptcy law. The case probably

[11] See Transcript of July 13, 2011 Hearing (Testimony of Steven Zelin), at 330:3-330:8 (App. K) ("The value that's intrinsic in this business is the existing runoff. It has no management team, it has no sales force, no ability today, nor did it have one while it was a captive pre-bankruptcy to go generate its own asset value. I'm sorry, to go generate new reinsurance contracts"); Transcript of July 14, 2011 Hearing, at 172:3-173:3 (App. K) (acknowledging that WMRRC: (i) has no employees; (ii) has only two people managing the day-to-day operations of the company; (iii) has no financing imposed on WMMRC; (iv) has no business plan; and (v) has no plans to write new insurance policies); Transcript of December 2, 2010 Hearing (Testimony of William Kosturos), at 138:17-23 (App. L) (acknowledging "the current analysis of the value of WMMRC assumes that there will be no new business").

should have been converted to Chapter 7 a long time ago. The Plan is largely bankruptcy "wrapping" for a settlement of estate causes of action that must be litigated before the District Court. The Court lacks Constitutional power to render a final ruling on the Plan because the Plan, at its core, is not the "stuff" of bankruptcy. It is the "stuff" of federal District Court litigation. Final decision on the Global Settlement should be reserved for Chief Judge Sleet, and nothing in the record speaks differently.[12]

II. The Plan Over-Compensates Creditors, And No Evidence Or Argument Has Been Presented To Support Any Different Conclusion.

A. As A Matter Of Law, Unsecured Creditors Are Not Entitled To Post-Petition Interest Beyond The Federal Judgment Rate, Determined As Of Entry Of The Confirmation Order, Regardless Of Creditor Activity Or Good Faith.

38. As previously briefed for the Court, the "best interests" test of Bankruptcy Code Section 1129(a)(7) invokes Bankruptcy Code Section 726(a)(5). Those two Bankruptcy Code provisions operate to entitle unsecured creditors to post-petition interest at "the legal rate" before stockholders may receive dividends from the estate. This begs two questions. First, is "the legal rate" the contract rate, the federal judgment rate, or some other discretionary rate in between? Second, if "the legal rate" is the federal judgment rate, is the reference date for determining the applicable rate of interest the petition date, the confirmation date, or the plan effective date? These two questions are addressed in turn below.

12 Such a ruling also promotes judicial efficiency given that, in light of the Divestiture Rule, the TPS Securities must be escrowed through the appeal process. If the Court delivers proposed findings of fact and conclusions of law for Chief Judge Sleet's final consideration, he then will be procedurally positioned to simultaneously consider the TPS Consortium appeal and the Global Settlement.

1. In A Solvent-Debtor Case, Unsecured Creditors Are Entitled Only To Post-Petition Interest At The Federal Judgment Rate.

39. The case law is clear: "the legal rate" for determining post-petition interest on unsecured claims is the federal judgment rate, as set forth in 28 U.S.C. § 1961(a). This conclusion has a firm analytical foundation: (i) the phrase "the legal rate" has large precedential meaning outside the bankruptcy context referring to the federal judgment rate; (ii) such interpretation furthers uniformity within federal law and uniform treatment of all unsecured creditors; (iii) the Bankruptcy Code's legislative history strongly suggests Congress intended "the legal rate" to mean the federal judgment rate; (iv) the language of the Bankruptcy Code itself strongly suggests federal judgment rate, since Bankruptcy Code Section 726(a)(5) refers to "the legal rate" while Bankruptcy Code Section 506(b) refers explicitly to the rate provided "under the agreement . . . under which such claim arose"; and (v) Bankruptcy Code Section 726(a)(5) imposes one particular rate – "the" legal rate – not "a" rate. See, e.g., Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231 (9th Cir. 2002); In re Country Manor of Kenton, Inc., 254 B.R. 179 (Bankr. N.D. Ohio 2000); In re Dow Corning Corp., 237 B.R. 380 (Bankr. E.D. Mich. 1999) ("Dow I"); In re Melenyzer, 143 B.R. 829 (Bankr. W.D. Tex. 1992).

40. The federal judgment rate is the rate that should apply here, as a matter of law.

2. Judicial Discretion To Determine The Rate Of Post-Petition Interest Arises Only In Connection With Unsecured Creditor "Cram-Down;" It Does Not Arise In The Circumstances Now Before The Court, Especially Where There Is Sufficient Estate Cash To Satisfy All Creditor Claims.

41. In the January 7th Opinion, the Court stated: "The Court has considered this issue before and concluded that the federal judgment rate [is] the minimum that must be paid to unsecured creditors in a solvent debtor case under a plan to meet the best interests of creditors

test, but that the court [has] discretion to alter it." January 7th Opinion, at 93 (App. C). For the reasons that follow, no such discretion should be exercised in this particular case.

42. As an initial matter, the words "the legal rate" do not reflect a general grant of equitable discretion. Congress afforded Bankruptcy Courts discretion in certain specific provisions of the Bankruptcy Code. <u>See</u>, <u>e.g.</u>, 11 U.S.C. § 510(c) ("under principles of equitable subordination . . ."); 11 U.S.C. § 552(b)(2) (". . . except to the extent that the court . . . based on the equities of the case, orders otherwise."). But, <u>not</u> here, <u>not</u> respecting Bankruptcy Code Section 726(a)(5). Here, Congress did not indicate, by the words it chose, any equitable discretion respecting the rate of post-petition interest required under Bankruptcy Code Section 726(a)(5). Instead, Congress directed Bankruptcy Courts to rigidly order the payment of interest at "the" rate – a rate that is the "legal" rate – as might an historic Court of Law (not a Court of Equity).

43. Consistent with that reading, the bulk of legal authority holds that Bankruptcy Courts are <u>not</u> empowered to set the rate of post-petition interest based on case circumstance. <u>See</u>, <u>e.g.</u>, <u>Cardelucci</u>, 285 F.3d at 1236 (9th Cir. 2002) ("'[I]nterest at the legal rate' is a statutory term with a definitive meaning that cannot shift depending on the interests invoked by the specific factual circumstances before the court."); <u>In re Garriock</u>, 373 B.R. 814, 817 (E.D. Va. 2007) ("Nor, given the statutory interpretation analysis set forth above, is the Court free to interpret '"the legal rate'" in different ways depending on the specific factual circumstances before the Court.") (citation omitted); <u>Dow I</u>, 237 B.R. at 409 ("Therefore, this Court is duty-bound, equitable concerns notwithstanding, to apply 'interest at the legal rate' in accordance with its most plausible meaning – the rate of interest fixed by 28 U.S.C. § 1961(a)."); <u>see</u> <u>also</u> 6

Collier on Bankruptcy ¶ 726.02[6] (16th ed. 2011) ("The reference in the statute to the 'legal rate' suggests that Congress envisioned a single rate.").

44. A careful review of the case law indicates that judicial discretion to set the rate of post-petition interest arises, in a solvent-debtor case, only in connection with plans requiring unsecured creditor "cram down" under Bankruptcy Code Section 1129(b). See, e.g., In re Coram Healthcare Corp., 315 B.R. 321, 346 (Bankr. D. Del. 2001) ("[W]e conclude that the specific facts of each case will determine what rate of interest is 'fair and equitable'" under Bankruptcy Code Section 1129(b)); In re Dow Corning Corp., 244 B.R. 678 (Bankr. E.D. Mich. 1999) ("Dow II"). But, that is not the nature of the Plan now before this Court. This contested matter focuses only on whether the Plan passes the "best interests" test of Bankruptcy Code Section 1129(a)(7), not what is "fair and equitable" treatment to enable creditor cram down under Bankruptcy Code Section 1129(b). The analysis under each of those two Bankruptcy Code provisions is different. See Dow II, 244 B.R. at 687 ("Thus there is no contradiction between the holding in our previous decision [federal judgment rate for "best interests" test analysis] and the contention that § 1129(b) may mandate recognition of contractual interest rates.").

45. Indeed, as discussed further below, the trial evidence clearly establishes there is more than sufficient estate cash to fully satisfy all creditor claims, plus post-petition interest at the federal judgment rate. All creditor claims are, therefore, unimpaired and not entitled to vote; unsecured creditor "cram down" is not an issue under the circumstances of this case. See In re PPI Enterprises (U.S.), Inc., 324 F.3d 197, 207 (3d Cir. 2003). The Court's analysis, thus, need

not delve any further than determining required interest at "the legal rate" for the purposes of Bankruptcy Code Section 1129(a)(7).[13] That is the federal judgment rate, pure and simple.

46. Other cases cited in the January 7th Opinion in connection with judicial discretion to set the interest rate are readily distinguishable from the present case circumstance, and are therefore analytically inapposite. See Southland Corp. v. Toronto-Dominion (In re Southland Corp.), 160 F.3d 1054 (5th Cir. 1998) (determining level of interest pursuant to Bankruptcy Code Section 506(b) for an over-secured creditor); In re Chicago, Milwaukee, St. Paul and Pac. R.R. Co., 791 F.2d 524 (7th Cir. 1986) (determining level of interest for 100-year railroad debt under the prior Bankruptcy Act, which did not have provisions comparable to those in the Bankruptcy Code at issue here).

47. Only one decision cited by the Debtors, issued by a Texas bankruptcy court more than 18 years ago, concluded that "the legal rate" of post-petition interest is whatever the bankruptcy judge thinks appropriate under the case circumstances. See In re Schoeneberg, 156 B.R. 963 (Bankr. W.D. Tex. 1993). Importantly, Schoeneberg dealt with post-petition interest payable to a single creditor and, therefore, did not implicate considerations of equality of treatment across a class of unsecured creditors. It also is a decision today held in wide disrepute. See, e.g., In re New Valley Corp., 168 B.R. 73, 80 (Bankr. D.N.J. 1994) (rejecting Schoeneberg because that court did not have "the opportunity to consider the statutory construction argument

[13] With this determination, the Court may avoid ruling on other thorny evidentiary issues presented at trial, such as the value of the WMRRC net operating loss carry-forward and the value of the estate causes of action to be vested the Liquidation Trust. That is because all such value, whatever it may be, simply "flows down" the capital structure to holders of TPS Securities and equity. This presents something of a Solomonic solution, if this Court determines to overrule the TPS Consortium's continued objection regarding the Global Settlement Agreement.

presented to this court"). The Court should likewise decline to follow such an untenable reading of Bankruptcy Code Section 726(a)(5).

48. The federal judgment rate applies in this case. That is the result regardless of whether the evidence does or does not support a finding that the Settlement Noteholders traded on inside information. That is the rate mandated by law.

3. The Date Of "Judgment" For Determining The Federal Judgment Rate Of Interest Is The Confirmation Date.

49. As indicated above, the vast bulk of legal authority instructs that post-petition interest shall be calculated in accordance with Section 1961(a) of Title 28 of the United State Code. That statute provides, in pertinent part, as follows (emphases added):

> Interest shall be allowed on any money judgment in a civil case recovered in a district court…. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

Thus, the interest reference date for determining the federal judgment rate is the date of entry of the "judgment."

50. Again, this begs the following question: What event occurring in the bankruptcy is most like the "judgment" date for purposes of Section 1961(a)? One thing seems certain: It is not the date the Debtors filed their voluntary bankruptcy petitions. Under Bankruptcy Code Section 301(b), the Debtors' voluntary bankruptcy filing generated an automatic "order for relief" not subject to appeal. See, e.g., Sw. Equip. Rental v. Fundsnet, Inc. (In re Sw. Equip. Rental), 152 B.R. 207, 210 (Bankr. E.D. Tenn. 1992). But, an order is properly categorized as a "judgment" only if it is "a final judicial decision subject to appeal." United States v. Hark, 320 U.S. 531, 534 (1944); see also 10 Moore's Federal Practice ¶ 54.02[2] (3d ed. 2011) ("If the order is appealable, the order is a 'judgment.'"). Analogizing a Chapter 11 case to federal civil

court litigation, the petition date is much more akin to the date the complaint is filed (initiating suit) than the date the judgment is entered.[14]

51. The plan effective date also does not analogize well to the date of judgment. No judicial action occurs on the plan effective date; rather, that is the date of transaction "closing" following entry of the confirmation order directing distribution of estate value. The effective date seems more akin to the date that a judgment is paid, and thus ends the lawsuit.

52. Rather, it is entry of the confirmation order that is most analogous to the date of federal court judgment. See Silverman v. Tracar, S.A. (In re Am. Preferred Prescription, Inc.), 255 F.3d 87, 92 (2d Cir. 2001) ("The confirmation of a plan in a Chapter 11 proceeding is an event comparable to the entry of a final judgment in an ordinary civil litigation."). The confirmation order is, after all, the order establishing the means for case resolution. See 11 U.S.C. § 1141; see also 7 Collier on Bankruptcy ¶ 1129.01 (16th ed. 2011) ("Confirmation of a plan of reorganization is the statutory goal of every chapter 11 case."). The confirmation order has res judicata and collateral estoppel effect, Johnson v. Stemple (In re Stemple), 361 B.R. 778, 796 (E.D. Va. 2007), just like a judgment in federal civil litigation, Amcast Indus. Corp. v.

[14] Also militating against use of the petition date is the fact that, as of the petition date, there is no entitlement to payment of post-petition interest. See 11 U.S.C. § 502(b)(2). Rather, the entitlement (if any) to post-petition interest arises only when distributions become payable from a solvent estate: in Chapter 7, on the date a dividend is declared and paid pursuant to Bankruptcy Rule 3009; and, in a Chapter 11 case, on the date the plan providing for such payments is confirmed. To engage in the fiction that the petition date is the date of "judgment" for purposes of Section 1961(a) would be to ignore, among other things: (a) the inability (in the vast majority of cases) to determine solvency on the petition date; and (b) the reality that enterprise value may fluctuate and administrative expense claims may accrue over the course of a case, meaning a debtor solvent on the petition date might become insolvent by the time estate distributions are payable (and, in the case of fluctuating enterprise valuation, vice versa). As such, use of the petition date as the "judgment date" for purposes of Section 1961(a) would be to adopt the untenable proposition of a "judgment" that, depending on subsequent case events, might or might not have any ultimate vitality.

Detrex Corp., 45 F.3d 155, 158 (7th Cir. 1995). After confirmation, the Bankruptcy Court's subject matter jurisdiction narrows considerably. See LaRoche Indus., Inc. v. Orica Nitrogen LLC (In re LaRoche Indus., Inc.), 312 B.R. 249, 257 (Bankr. D. Del. 2004) (Walrath, J.). And, of course, the confirmation order is appealable. See, e.g., In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004) (vacating confirmation order).

53. Beyond just simple logic, this conclusion also comports with numerous cases holding that, if a Chapter 11 case is converted midstream to a proceeding under Chapter 7, the date of "judgment" for determining the date post-petition interest begins accruing under Bankruptcy Code Section 726(a)(5) is – not the petition date – but the date of the order converting the case. See, e.g., Varsity Carpet Servs. v. Richardson (In re Colorex Indus., Inc.), 19 F.3d 1371, 1384 (11th Cir. 1994) ("[U]pon conversion to Chapter 7, the interest accruing thereafter enjoys only the fifth priority pursuant to § 726(a)(5)."); Rupp v. United States (In re Rocky Mountain Refractories), 208 B.R. 709, 713 (B.A.P. 10th Cir. 1997) ("Section 726(a)(5) applies to post-Chapter 7 interest."); In re Olympia Holding Corp., 250 B.R. 136, 144 (Bankr. M.D. Fla. 2000) ("The interest accruing . . . from the date of conversion of the case until the date of payment is entitled to payment pursuant to § 726(a)(5).").

54. This conclusion is not altered one iota by the language of Bankruptcy Code Section 726(a)(5), affording "payment of interest at the legal rate from the date of the filing of the petition." Congress's use of the word "from" indicates that the prepositional phrase ("*from* the date of the filing of the petition") relates only to the time period interest is due; i.e., the phrase simply means that the creditor is entitled to interest for the post-petition time period. See S. Rep. No. 95-989, 95th Cong., 2d Sess. 5, reprinted in Vol. D Collier on Bankruptcy App. Pt. 4(e)(i) (15th ed. 2011) (Bankruptcy Code Section 726(a)(5) "provides that postpetition interest

on prepetition claims is . . . to be paid to the creditor."). It says nothing about how that interest rate is to be calculated, mechanically.

55. And, the "from" prepositional phrase most certainly does not direct a determination that post-petition interest shall be calculated using the federal judgment rate in existence "as of" the petition date. See Kaiser Aluminum & Chem. Corp. v. Bonjomo, 494 U.S. 827, 838 (1990) (finding the language of 28 U.S.C. § 1961(a) – that interest "shall be calculated *from the date of the entry of the judgment*" – implies "the calculation of interest is inextricably tied to the date of the entry of judgment") (emphasis in the original). The interest reference date is determined by the words preceding the word "from;" those words direct the Court to impose "the legal rate" of post-petition interest in accordance with 28 U.S.C. § 1961(a). And, Section 1961(a) would have interest determined as of the date of "judgment," to wit: the date the plan is confirmed.[15]

4. The Economic Impact Is Quite Significant.

56. The liquidation analysis attached as Exhibit A to the Declaration of Jonathan Goulding, dated July 8, 2011, Debtors' Conf. Ex. 374 (the "Goulding Declaration") (App. M),

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15 The TPS Consortium acknowledges the existence of a limited number of cases in which Bankruptcy Courts, without analysis, used the petition date as the interest reference date rather than the confirmation date. The TPS Consortium is, however, unaware of any case (including those particular cases) where the Court was actually asked to – and actually did – thoroughly analyze what particular date should be used as the interest reference date. Perhaps that is because litigants previously were not economically motivated to press the legal point, given that the federal judgment rate is only now at an historically low level. Moreover, in this Court's prior decision in Coram, the Court did not apply the federal judgment rate existing on the petition date (6.35%); rather, the Court used the rate that was in effect on the date of the Official Equity Committee filed its Third Amended Disclosure Statement (0.97%). As such, it appears that the question of which federal judgment rate should be applied is really one of first impression; but one of critical importance here in that application of the correct post-petition interest rate (i.e., at the federal judgment rate on the confirmation date) will result in hundreds of millions of dollars in value being made available to otherwise disenfranchised parties-in-interest.

attests to the following two uncontroverted facts: (1) the amount of distributable cash on the Plan's Effective Date is $7,129 million; and (2) the aggregate amount of claims to be paid in this case, excluding post-petition interest, is $7,032 million.

57. Attached hereto as Exhibit A are documents that have also been submitted as Confirmation Exhibits "TPS 301-A" and "TPS 301-B" [Docket Number 8315]. As indicated on TPS 301-A, the now-prevalent federal judgment rate of interest has been below 0.20%, and was 0.16% at the conclusion of the confirmation trial. As indicated on TPS 301-B, application of this interest rate (0.16%) to all forms of debt, for the entire post-petition period, yields an incremental $33.5 million due to creditors. Thus, of the $7,129 million in distributable cash available, $7,065.5 million is due to creditors (principal plus pre-petition and post-petition interest), leaving an excess of $63.5 million after full creditor satisfaction. Besides the $63.5 million, the estates would also still hold the following residual value: (i) unsettled estate causes of action worth perhaps hundreds of millions or billions of dollars; (ii) WMMRC, worth (according to Messrs. Goulding and Zelin) $160 million; (iii) subsidiary investments, worth (according to Mr.

Goulding) $72 million; and (iv) future income tax receivables, worth (according to Mr. Goulding) $75 million.[16]

58. The Plan distributes all such excess value to creditors, resulting in their over-compensation. Respecting holders of TPS Securities, such over-compensation violates Bankruptcy Code Sections 1129(a)(7) and 1129(b), thus rendering the Plan unconfirmable.

5. The Debtors Are Not Able To Evade This Conclusion By Pointing To Unsustainable "Tack On" Claims That Have Absolutely No Legal Or Evidentiary Support.

59. Debtors resort to non-evidentiary smoke and mirrors in an attempt to distract the Court from the Plan's legal infirmities. They contend that none of the foregoing value would accrue to holders of the TPS Securities because: (a) the PIERs are entitled to "gross-up" their unsecured claim to cover their contractual subordination obligations to holders of senior funded debt (i.e., senior debt takes PIERs distributions to the extent that the estates do not deliver post-petition interest at the contract rate); and (b) Class 18 litigation claims stand as a material obstacle in the way of the TPS holders realizing any of the excess value. Neither contention is supported by the law or the evidence.

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16 There is a fair amount of "poetic justice" in this result. As discussed herein, the evidence adduced in July 2011 now conclusively establishes that: (i) the Settlement Noteholders bought negotiating influence and exploited it to construct a deal that over-enriched themselves at the expense of others lower in the capital structure; (ii) the "driver" of the settlement was allocation of tax refunds and the delivery of TPS Securities to JPMorgan, and did not involve any analysis whatsoever as to the value of the avoidance and business tort claims; (iii) the deal was struck at what they thought was a level just a pittance below full payment of the PIERs, so that the Settlement Noteholders retained case control; and (iv) the Debtors (led by conflicted professionals) turned a blind-eye to – and never truly investigated – the potential avoidance and business tort liability to enable the deal to close, unfettered by what the true facts may be. This was a Machiavellian "gaming" of the system. It seems perfectly fitting and equitable that, due to their miscalculation and the appropriate operation of law, all of this value flows down to those parties-in-interest the Plan architects aimed to disenfranchise.

a. The WMI Estate Is Not Responsible For PIERs Turn-Over Obligations To Senior Funded Debt.

60. Bankruptcy Code Section 502(b)(2) explicitly provides that an unsecured claim does not include post-petition interest. That does not change in a solvent-debtor case; there is no "solvency exception" built into the Bankruptcy Code Section 502(b)(2). The right to post-petition interest in the solvent-debtor case derives instead from Bankruptcy Code Section 1129(a)(7) and the Bankruptcy Code Section 726(a)(5) "waterfall" mechanic that entitles unsecured creditors to post-petition interest at "the legal rate" before any amount may flow down to preferred equity. This sort of flow-down "tax" is merely a supplemental creditor entitlement in a solvent-debtor case. The pre-petition unsecured claim does not "grow" to encapsulate post-petition interest in contravention of Bankruptcy Code Section 502(b)(2).

61. Thus, once senior creditors receive their Bankruptcy Code Section 502(b)(2) entitlement (principal plus accrued pre-petition interest) and their Bankruptcy Code Section 726(a)(5) entitlement (post-petition interest at the federal judgment rate), they are not entitled to any additional value from the estates; all estate obligations to the senior creditor class <u>are paid in full</u>. Likewise, when subordinated creditors receive their Bankruptcy Code Section 502(b)(2) entitlement (principal plus accrued pre-petition interest) and their Bankruptcy Code Section 726(a)(5) entitlement (post-petition interest at the federal judgment rate), all estate obligations to the subordinated creditor class <u>are also paid in full</u>. Any estate value remaining thereafter goes to preferred equity.

62. That does not change if there is a subordination agreement between the senior creditors and the junior creditors, obligating the junior creditors to "turn-over" their distributions so that the senior creditors receive more than "the legal rate" of post-petition interest (<u>e.g.</u>, the contract rate). That is an arrangement only involving those two creditor groups; it is not anyone

else's business or obligation. But, if a plan properly gives Bankruptcy Code Section 510(a) effect to a subordination agreement and, as a result, (a) the senior creditors receive post-petition interest at the contract rate and (b) the junior creditors retain less than par, that is not the estates' problem. Again, both classes of claims are fully paid as far as the Bankruptcy Code is concerned, and the junior creditors do not have any entitlement whatsoever to ask the estates for more. See Bank of Am., N.A. v. N. LaSalle St. P'ship (In re 203 N. LaSalle St. P'ship), 246 B.R. 325, 330 (Bankr. N.D. Ill. 2000) ("A senior creditor under a subordination agreement could argue that its claim was entitled to postpetition interest, despite the general prohibition, with the payment of interest coming not from the estate, but from the dividend that would otherwise be paid to the subordinated claim."); First Fidelity Bank, N.A. v. Midlantic Nat'l Bank (In re Ionsophere Clubs, Inc.), 134 B.R. 528, 532 (Bankr. S.D.N.Y. 1991) ("Payment of [post-petition] interest may have the effect of sharply reducing or eliminating recovery for the [junior creditors] because while the [senior creditors'] claim for interest increases, the [junior creditors'] aggregate claim against the Debtor remains the same. Thus, the [senior creditors] can only receive their interest payment out of the potential dividends of one or more of the subordinated series."); see also HSBC Bank USA, N.A. v. Bank of New York Mellon Trust Co. (In re Bank of New England Corp.), No. 10-1456, 2011 WL 2476470 (1st Cir. June 23, 2011) (explaining that, under subordination agreements, "the payment of post-petition interest to senior creditors [can eliminate] any recovery on junior indebtedness, [by] entitling senior creditors to amounts that would otherwise be payable to junior creditors"); In re Smith, 77 B.R. 624, 627 (Bankr. N.D. Ohio 1987) (finding that subordination agreements between creditors (i) may not impair the rights of non-contracting parties and that (ii) "the amount of claims against the Debtor, and the distribution to uninvolved creditors, remains unaffected").

63. This understanding is reinforced by the lead-in clause of Bankruptcy Code Section 726(a): "Except as provided in section 510 of this title . . . ." This clause states, in effect: Creditors are entitled to participate in the Bankruptcy Code Section 726(a) "waterfall" of estate distributions, unless a subordination agreement obligates a reallocation of such distributions to different (contractually senior) creditors. See Patrick Darby, Southeast and New England Mean New York: The Rule of Explicitness and Post-Bankruptcy Interest on Senior Unsecured Indebtedness, 38 Cumb. L. Rev. 467, 477 (2008) ("[W]hen the estate is solvent, the Bankruptcy Code may provide a basis for allowing post-petition interest on senior debt. To the extent senior debt is unsecured, however, the Bankruptcy Code does not allow for post-petition interest as a claim against the estate. To collect interest, which may be substantial in the course of a lengthy bankruptcy case involving large debts, the senior creditor must look to the junior creditor under the subordination agreement.").

64. The WMI estate does not bear PIERs "gross-up" liability because of that class's contractual subordination obligations. There is absolutely nothing in the Bankruptcy Code to support such a ruling, which would otherwise be in clear derogation of the express terms of Bankruptcy Code Section 502(b)(2). The Court should reject any such contention out-of-hand.

b. Neither The Law Nor The Trial Evidence Support A Finding Of Any Class 18 Liability.

65. The law does not allow the Debtors to hold up phantom (contingent, unliquidated) litigation claims in an effort to divert estate value from flowing where it naturally should. Such litigation strategy is not in keeping with the Debtors' fiduciary responsibilities, nor with Bankruptcy Code Sections 1129(a)(2) and (a)(3). See 11 U.S.C. §§ 1107, 704(a)(5) (obligating the debtor-in-possession to "object to the allowance of any claim that is improper"); Int'l Yacht and Tennis, Inc. v. Wasserman (In re Int'l Yacht and Tennis, Inc.), 922 F.2d 659, 661 (11th Cir.

1991) (finding debtor-in-possession "has the duty to object to the allowance of any claim that is improper").

66. Moreover, if there truly is a question as to whether such claims are sustainable, the law does not allow the Court simply to whisk the issue aside and confirm the Plan, as the Debtors here request. Rather, the Bankruptcy Code explicitly obligates this Court to estimate the amount of such contingent, unliquidated claims before confirming the Plan. See 11 U.S.C. § 502(c)(1) ("There shall be estimated for purposes of allowance under this section any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.") (emphasis added); 4 Collier on Bankruptcy ¶ 502.04[2] (16th ed. 2011) ("The language of section 502(c) is mandatory and places upon the court an affirmative duty to estimate unliquidated claims in the proper circumstances."); In re Nova Real Estate Inv. Trust, 23 B.R. 62, 65 (Bankr. E.D. Va. 1982) (estimation of contingent, unliquidated claim mandated where claim calls plan into question).

67. As Plan proponents, the Debtors bear the burdens of proof and persuasion respecting such claim estimation. In other words, it was the Debtors' obligation to present to this Court evidence proving that there are sustainable Class 18 claims that absorb the value otherwise expected by holders of the TPS Securities. See In re Colfer, 159 B.R. 602, 608 (Bankr. D. Me. 1993) (holding that "the burden rests on the debtors to persuade the court, by preponderance of the evidence, that the classification and treatment they propose does not discriminate unfairly"); Bittner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982) (finding a Bankruptcy Court may determine the value of a claim only after the debtor has provided "sufficient evidence on which to base a reasonable estimate of the claim"). The Debtors did not carry these burdens. Quite the

contrary, the evidence establishes that there is no sustainable liability standing between the PIERs (Class 17) and the TPS Securities (Class 19).

(i) There Is No "MARTA" Liability.

68. The primary Class 18 claim is a bondholder fraud claim, called the "MARTA" claim. In the Debtors' Amended Thirty-Second Omnibus (Substantive) Objection to Claims (Claim Nos. 3812, 2689, 3174, 3179, 3187), dated May 18, 2010 [Docket No. 3801] (App. N), the Debtors provided a 69-page explanation, submitted to this Court under the strictures of Bankruptcy Rule 9011, as to why the estates bear absolutely no MARTA liability.

69. Second, in the Debtors' Motion to Estimate Maximum Amount of Certain Claims for Purposes of Establishing Reserves Under the Debtors' Confirmed Chapter 11 Plan, dated November 17, 2010 [Docket No. 5971], at Exhibit B, pages B-10 and B-11 (App. O), the Debtors make the following representation to the Court:

> Claim Nos. 2689 and 3812 are based on securities claims asserted in the class action captioned *Boilermakers National Annuity Trust Fund v. WaMu Mortgage Pass-Through Certificates, et al.*, Case No. 09-0037 (W.D. Wash.), filed by a retirement plan based on the purchase of WaMu Mortgage Pass-Through Trust Certificates. A consolidated class action complaint was filed on 11/23/09, alleging, among other things, that certain offering documents contained false and misleading statements . . . .
>
> The Debtors objected to these claims as part of the *Thirty-Second Omnibus Objection to Claims*, on the grounds that there was no legal basis to hold WMI liable for any of the Securities Act claims or state statutory securities claims asserted in the underlying non-bankruptcy litigation. No response was filed by the claimants. The Debtors have conferred with the claimants and are in the process of executing a stipulation pursuant to which these claims shall be withdrawn without prejudice to refile. Upon entry of the stipulation, there will be no liability to WMI arising from these claims, but in an abundance of caution, the Debtors seek to estimate their maximum exposure at $0 on account of these claims.

Having made these representations to the Court in pleadings that remain outstanding, the Debtors are judicially estopped from now claiming differently for strategic purposes. See Yoo Wong

Park, 472 F.3d at 73 ("Judicial estoppel is 'a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding.'").

(ii) There Is No D&O Liability.

70. The Debtors also classify certain contingent, unliquidated director and officer indemnification claims against the estates under Class 18. There is absolutely no evidence in the record establishing the sustainability of any such claims. Quite the contrary, the Senate Report reflects strong likelihood that all such claims will be expunged. See Wash. Rev. Code § 23B.08.510 (2010) ("A [Washington] corporation may not indemnify a director [ ]: (a) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or (b) in connection with any other proceeding in connection with any other proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director was adjudged liable on the basis that personal benefit was improperly received by the director."). Alternatively, all such claims will be covered by D&O insurance. See Docket Nos. 8367, 8368 and 8385 (App. P, Q & R).

71. Based on the findings of the Senate Report, there is no reason to suspect the estates will ever write a check to WMI executives. But, based on the findings of the Senate Report, there is every reason to suspect WMI executives ultimately will be writing very large checks to the estates. The D&O claims do not stand in the way of Class 19 distributions.

(iii) There Is No Other Class 18 Liability.

72. Similarly, there is nothing in the record establishing Class 18 liability owed on any other claim placed in that class. As such, the Court should not entertain any non-evidentiary

statements of counsel regarding some significant, yet undefined, body of subordinated claims standing between Class 19 and its due entitlement to estate value once the PIERs are paid in full.

73. In sum, even if the TPS Consortium is unsuccessful on its appeal in Blackhorse Capital LP v. JPMorgan Chase Bank, N.A., there is still value worth hundreds of millions, perhaps billions, of dollars due to holders of TPS Securities. That is true even if the Court again determines to approve the Global Settlement Agreement. The Plan deprives the TPS Consortium of that entitlement in violation of Bankruptcy Code Section 1129. No argument or evidence put before this Court directs a different conclusion. The Plan should not be confirmed.

B. The Plan Deprives Rejecting Holders Of TPS Securities (Class 19) Of Their Legal Entitlement To (1) The Proceeds Of Estate Causes Of Action And (2) Participate In The Governance Of Post-Consummation Litigation, And Nothing Has Been Presented To Support Any Different Conclusion.

1. The TPS Holders Are Legally Entitled To Proceeds Of Unsettled Estate Causes Of Action, And Nothing Has Been Presented To Support Any Different Conclusion.

a. The Plan's "Death-Trap" Provision Foists A Significant Added Evidentiary Burden On The Debtors: That The Value Of Estate Causes Of Action To Be Vested In The Liquidation Trust Is Less Than The "Delta" Before Holders Of TPS Securities Are "In-The-Money".

74. As indicated in previous sections of this Brief, settlement cash is not the only value being distributed under the Plan. There are also interests in the Liquidation Trust. The Trust is to receive all the estate causes of action not being compromised under the Plan. Mr. Kosturos will be the Liquidation Trustee. He reports to a four-person Trust Advisory Board that is 75% appointed by the Official Creditors' Committee; including indenture trustees for bond debt fully satisfied under the Plan. See Plan, § 1.201 (App. A). Trust beneficial interests are delivered to holders of PIERs, then to Class 18 claimants (until those claims are withdrawn or

otherwise disallowed). Then, the beneficial interests in the Trust would be delivered to holders of TPS Securities and preferred stock.

75. But, that last sentence is not quite accurate. Plan Section 43.6 provides as follows:

> provided, however, that each Entity that has elected not to grant the releases set forth in this Section 43.6, including, without limitation, any Entity that fails to execute and deliver a release following notice in accordance with the provisions of Section 32.6(c) hereof, shall not be entitled to, and shall not receive, any payment, distribution or other satisfaction of its claim pursuant to the Plan.

(App. A). Since members of the TPS Consortium voted against the Plan and did not tender the release, they are deprived of any distributions under the Plan. Section 43.6 is, in other words, a "death-trap" provision and, for the members of the TPS Consortium, the death-trap has sprung.

76. In so doing, the Debtors have imposed upon themselves a tremendous added evidentiary burden. To be sure, the Plan cannot "death-trap" distributions to which a party is otherwise entitled. If there is value due to members of the TPS Consortium, the Debtors have no legal entitlement to build into the Plan a "carrot and stick" provision because: (a) the members of the TPS Consortium are legally entitled to the "carrot;" and (b) the Debtors have no legal entitlement to wield the "stick." Such a plan would not pass the "best interests" test of Bankruptcy Code Section 1129(a)(7) and it most assuredly would not be "fair and equitable" under Bankruptcy Code Section 1129(b). In this regard, <u>In re MCorp Fin., Inc.</u>, 137 BR 219 (Bankr. S.D. Tex. 1992), is directly on point:

> Debtors have included in their plan(s) a provision authorizing some possible payout to equity (MCorp classes 15, 16, 17) upon a favorable vote by Class 15 (Shearson), but none to these three classes upon a negative vote by Class 15. Shearson has colorfully labeled this the "death trap provision." While Shearson's choice of language is indeed colorative, it is also reasonably descriptive. . . .
>
> The asset which the MCorp plan conditionally made available to Shearson and equity classes junior to it was potential "overflow" from the Debtors' Dallas

> Federal District Court litigation with the FDIC . . . . This provision is egregious in its "carrot and stick" approach to the problem of how to treat, in a plan of reorganization, an asset as highly speculative as possible recovery on a lawsuit won thus far at the United States District Court level as to liability against the FDIC. . . .
>
> The court finds that this MCorp Plan provision results in the plan's not being fair and equitable.

Id. at 236.

77. The Debtors have thus forced the following evidentiary question: What is value of the estate causes of action to be vested in the Liquidation Trust? By this point in the legal analysis discussed herein, the question is academic; holders of the TPS Securities are already "in-the-money." Thus, the "death-trap" provision is unto itself a fatal Plan infirmity, given that the Debtors have no entitlement to withhold value rightfully due to the TPS Consortium. But, if the Court were to determine that post-petition interest should be calculated using the federal judgment rate in effect as of the Petition Date (rendering the TPS Securities, according to the Goulding Declaration, \$96 million out-of-the-money) or using the contract rate (rendering TPS Securities, according to the Goulding Declaration, \$781 million out-of-the-money), the Plan theoretically may be confirmed only if the Debtors have proven to the Court that the value of the estate causes of action to be vested in the Liquidation Trust is less than the shortfall before holders of TPS Securities are "in-the-money."

b. The Debtors Have Failed To Carry Their Burdens Of Proof And Persuasion; To The Contrary, The Evidence Suggests That The Estate Causes Of Action May Be Worth Hundreds Of Millions, Perhaps Billions, Of Incremental Dollars.

78. Of course, since this is the Debtors' Plan, the Debtors exclusively bear the burdens of proof and persuasion respecting the value of estate claims. See, e.g., In re Draiman, No. 09-17582, 2011 WL 1486128, at *24, 26 (Bankr. ND Ill. April 29, 2011) (concluding that

the "Debtor has not carried his burden of showing the best interests test has been met" because the "Debtor failed to present any evidence of the value of the assets to be transferred to the Litigation Trust, the value of any potential recovery claims to be transferred to the Liquidation Trust, [or] a potential recovery estimate from the Liquidation Trust.")

79. The law clearly instructs how the Debtors were supposed to carry their burdens of proof and persuasion at trial. In Polis v. Getaways, Inc. (In re Polis), 217 F.3d 899 (7th Cir. 2000), Circuit Judge Richard Posner explained: "Legal claims are assets whether or not they are assignable, especially when they are claims for money; as a first approximation, the value of [the debtor's] claim is the judgment that she will obtain if she litigates and wins multiplied by the probability of that . . . happy outcome." Id. at 902. The Debtors were, in other words, required to present to the Court: (a) factual evidence regarding the estate claims to be vested in the Liquidation Trust; (b) documentary or testimonial support establishing the aggregate amount of anticipated judgment demands; and (c) expert opinion or other evidence establishing the percentage likelihood that those demands will be realized.

80. And, it bears repeating that, on this point, the Debtors' burdens of proof and persuasion to achieve Plan confirmation are "heavy." See, e.g., Everett v. Perez (In re Perez), 30 F.3d 1209, 1214 n.5 (9th Cir. 1994) ("The burden of proposing a plan that satisfies the requirements of the Code always falls on the party proposing it, but it falls particularly heavily on the debtor-in-possession or trustee since they stand in a fiduciary relationship to the estate's creditors."); Smart World Tech., LLC v. Juno Online Servs. (In re Smart World Tech., LLC), 423 F.3d 166, 175 (2d Cir. 2005) ("As fiduciary, the debtor bears the burden of maximizing the value of the estate, including the value of any legal claims.") (citations and internal quotations omitted). This aspect of the confirmation hearing is not a "canvassing" of the issues; this is not

part of settlement approval. Allocation of the proceeds of unsettled estate causes of action is a material component of the Plan itself. The Debtors must fully prove that such allocation is fair and appropriate by a preponderance of the admitted evidence.

81. This they did not do. Not a single piece of evidence, not a single utterance of witness testimony, not a single document admitted into the trial record supports any particular valuation for the estate causes of action to be vested in the Liquidation Trust. Indeed, the Debtors aggressively opposed introduction of evidence that would allow the Court to reach a conclusion as to the significant potential value of such claims. Even if the Court were to find that post-petition interest should be calculated using the contract rate, the Plan still may not be confirmed because the Court has absolutely no evidence on which to support the required conclusion that the estate causes of action to be vested in the Liquidation Trust are not worth $1 (or even $1 billion) more than is necessary to satisfy in full the claims ahead of Class 19.

82. In fact, there is substantial evidence in the record that unsettled estate causes of action are likely worth hundreds of millions, if not billions, of incremental dollars past the Class 19 threshold. As excerpted in Exhibit B hereto (see also Docket No. 8312), the Senate Report concludes WMI directors and officers grossly mismanaged the Debtors' business enterprise, imposing vastly unsustainable risk and eventually ruining the Debtors' asset-base. Such findings give rise to substantial estate claims sounding in breach of fiduciary duty and corporate waste, among other theories. The Senate Report gives reason to suspect that certain individual members of management have personal wherewithal to satisfy large judgments; but, regardless, Mr. Kosturos testified as to the existence of at least $250 million in available D&O insurance coverage. See Transcript of July 21, 2011 Hearing (Testimony of William Kosturos), at 270:10-18 (App. K). Moreover, the Senate Report concludes that "deep-pocket" Wall Street firms,

including Goldman Sachs and Deutsche Bank, knowingly assisted in such mismanagement for their own substantial economic gain, giving rise to substantial complicity liability to the WMI estate. Rating agencies and appraisal firms also bear considerable estate liability, according to the findings contained in the Senate Report.

83. The Debtors and the FDIC baldly retort that there are inhibitions on successfully realizing on such claims. Nothing in the evidentiary record supports such a contention, which is otherwise belied by: (1) the Debtors' pending application to retain the law firm of Klee Tuchin Bogdanoff & Stern, LLP [Docket No. 8111] "to investigate, assess, and, if requested, potentially prosecute claims of the WMI estate against former officers and directors and other third parties, including former auditors, investment banking advisors, rating agencies, and others that may be identified" (¶ 6) (App. S); and (2) Mr. Goulding's testimony as to the parties' intent to invest $50 million to $75 million to fund, among other things, the prosecution of estate litigation. (Transcript of July 14, 2011 Hearing, at 133:15-17 (App. K). <u>It is simply too incredible to be believed that the sophisticated parties involved in the negotiation of this Plan would have agreed to invest tens of millions of dollars to pursue litigation without the expectation of exponential returns on that investment</u>.

84. Apparently realizing the evidentiary shortcoming, the Debtors and the FDIC now resort to claiming that the mismanagement and complicity claims really belong to the Debtors' bank subsidiary and, in turn, the FDIC. Utter nonsense. The law is quite clear that, when the directors or officers of a parent-holding company squander the corporation's primary asset (a cash-generating subsidiary) by running that subsidiary into the ground and/or failing to take actions necessary to prevent the collapse of the subsidiary, those directors or officers bear liability to the parent-holding company itself. <u>See</u>, <u>e.g.</u>, <u>Case Fin., Inc. v. Alden</u>, Civ Action No.

1184, 2009 WL 2581873 (Del. Ch. Aug. 21, 2009) (parent-holding company successfully alleged claim for breach of fiduciary duty against executive for actions deteriorating the value of the company's principal, wholly-owned subsidiary); Grace Bros., Ltd. v. UniHolding Corp., Civ. Action No. 17612, 2000 WL 982401, at *12 (Del. Ch. July 12, 2000) (Strine, V.C.) ("To the extent that members of the parent board are on the subsidiary board or have knowledge of proposed action at the subsidiary level that is detrimental to the parent, they have a fiduciary duty, as part of their management responsibilities, to act in the best interests of the parent and its stockholders."); see also Official Comm. of Unsecured Creditors of Verestar, Inc. v. Am. Tower Co. (In re Verestar, Inc.), 343 B.R. 444, 473-74 (Bankr. S.D.N.Y. 2006) ("Any situation where a wholly-owned and controlled subsidiary enters the zone of insolvency obviously requires all responsible parties to act with the utmost care and responsibility.").

85. The law is also quite clear that third-parties who knowingly aid and abet wrongful management activities at the parent-holding company also bear complicity liability to the parent-holding company. See, e.g., Rosener v. Majestic Mgmt., Inc. (In re OODC, LLC), 321 B.R. 128, 144 (Bankr. D. Del. 2005) (Walrath, J.) ("To establish liability for aiding and abetting a breach of fiduciary duty, the plaintiff must prove three elements: a) that the fiduciary's conduct was wrongful; b) that the defendant had knowledge that the fiduciary's wrongful conduct was

occurring; and c) that the defendant's conduct gave substantial assistance or encouragement to the fiduciary's wrongful conduct.") (citations and internal quotations omitted).[17]

86. Thus, evidence contained in the Senate Report proving that WMI directors and officers ran the bank in a manner that effectively squandered WMI's principal, cash-generating asset (its interest in the bank) and/or failed to act appropriately to remedy mismanagement of the bank gives rise to substantial D&O liability to the WMI Chapter 11 estate. And, proof that Wall Street investment banks (e.g., Goldman Sachs and Deutsche Bank), rating agencies, appraisal firms, and others knowingly aided and abetted such wrongful WMI director and officer activity gives rise to substantial complicity liability also to the WMI Chapter 11 estate.

87. The evidence before this Court can only support a factual finding of potentially extraordinary incremental value, distributable in part to holders of the TPS Securities. The Plan violates Bankruptcy Code Sections 1129(a)(7) and 1129(b), and should not be confirmed.

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17 Even the in pari delicto defense is of lesser concern in this case, given that complicity claims likely arise under West Coast law, and the Ninth Circuit has perhaps the most bankruptcy-friendly view of that defense. See Fed. Deposit Ins. Corp. v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir. 1995) ("[T]he equities between a party asserting an equitable defense and a bank are at such variance with the equities between the party and a receiver of the bank that equitable defenses good against the bank should not be available against the receiver."). Moreover, there recently has been substantial dilution of the defense, especially in claims asserted on behalf of a bankruptcy estate. See Official Comm. of Unsecured Creditors of Allegheny Health Educ. and Research Fund v. PricewaterhouseCoopers LLP, 989 A.2d 313 (Pa. 2010); NCP Litig. Trust v. KPMG LLP, 187 N.J. 353 (N.J. 2006). And, of course, the claims at issue here would be brought against rather unsympathetic defendants, including Wall Street firms that (i) reaped extraordinary profits betting against the deals they helped construct that, in turn, precipitated the nation's macro-economic collapse, and (ii) thereafter, accepted TARP bailout funding for American taxpayers.

c. The Plan Wrongfully Allocates Trust Value For The Primary Benefit Of The Settlement Noteholders.

88. The evidence establishes that the Settlement Noteholders own $955.7 million of TPS Securities. See First Supplemental Verified Statement of Fried, Frank, Harris, Shriver & Jacobson LLP [Docket No. 3761] ¶ 2 and Exs. A & D (the "Settlement Noteholder Rule 2019 Statement") (App. T). The evidence also establishes that few holders of TPS Securities and preferred stock actually tendered a release with their Plan vote. In fact, only approximately 34% of Class 19 (or, approximately 1.36 billion shares) and only approximately 20% of Class 20 (or, approximately 600,000 shares) did so and will, therefore, share in the proceeds of the Liquidation Trust. As a result, the evidence establishes that, due to the "death-trap" Plan mechanic, the Settlement Noteholders (as holders of approximately one-half of the preferred securities that tendered releases and became eligible to participate in Trust distributions) are entitled to receive approximately one-half (uncapped) of all litigation proceeds and other future distributions from the Liquidation Trust. According to the Settlement Noteholder Rule 2019 Statement, all of the TPS Securities owned by those parties were purchased after the Petition Date, at pennies (or even fractions of pennies) on the dollar of liquidation preference.

89. It is hard to fathom how this result is anywhere near a "fair and equitable" resolution of this Chapter 11 proceeding. The Plan is not confirmable.

2. TPS Holders Are Legally Entitled To Meaningful Participation In The Post-Consummation Governance Of Estate Litigation, And Nothing Has Been Presented To Support Any Different Conclusion.

90. Parties entitled to participate in the proceeds of estate litigation (vested post-consummation in a liquidation trust) also are entitled to assurance that any such litigation will be properly managed post-consummation by that trust. A plan may not, in other words, replace: (a) the debtor's trustee-like stewardship, under the Bankruptcy Court's watchful eye, pre-

consummation; for (b) a post-consummation trustee and oversight board beholden only to certain parochial interests, to the exclusion of other trust beneficiaries. See 11 U.S.C. § 1123(a)(7). As explained by Collier:

> Section 1123(a)(7) is derived from Section 216(11) of the former Bankruptcy Act, which prescribed that a Chapter X reorganization plan shall include provisions which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy, with respect to the manner of selection of the persons who are to be directors, officers or voting trustees, if any, upon the consummation of their plan, and their respective successors.
>
> The Senate Report accompanying the Chandler Act stated with respect to Section 216(11) that such provision "directs the scrutiny of the court to the methods by which the management of the reorganized corporation is to be chosen, so as to ensure, for example, adequate representation of those whose investments are involved in the reorganization."

7 Collier on Bankruptcy ¶ 1123.LH[6] (16th ed. 2011).

91. A plan trust that engenders insecurity and suspicion – because of its governance structure – is almost by definition not advanced in "good faith" per Bankruptcy Code Section 1129(a)(3). See, e.g., In re Coram Healthcare Corp., 271 B.R. 228, 234 (Bankr. D. Del. 2004) (finding the "good faith" requirement considers whether the plan effects "results consistent with the objectives and purposes of the Bankruptcy Code."). It also is not "fair and equitable" to the dissenting class of beneficiaries.

92. This is a corollary to the fundamental Chapter 11 precept that post-consummation management must be made to answer to beneficiaries of the enterprise going forward. It is precisely for this reason Bankruptcy Code Section 1123(a)(6) prohibits the issuance of non-voting stock and also provides for "an appropriate distribution" of equity voting power among classes:

> This section codifies a position long supported by the Securities and Exchange Commission that participation in, and control of, the selection of the management of a reorganized debtor must be considered as a part of a fair and equitable plan

> and provided for accordingly. It is thus not enough to determine merely which of the new securities will be entitled to vote; the securities must be distributed so that the allocation of voting power – i.e., the control of the company – properly recognizes the respective position of the claimants and stockholders according to their rank and rights they surrender. Consequently, creditors who are forced to take stock in the new company, or whose rights as creditors are modified or altered so that they assume some risk of the success of the reorganized corporation, are entitled to an allocation of voting power and a voice in the selection of management that will protect their interests.

See 7 Collier on Bankruptcy ¶ 1123.01[6] (16th ed. 2011). In other words, the law conclusively presumes that, for an interest in the enterprise to be meaningful, and not illusory, the beneficiaries should be afforded reasonable management participation and/or oversight to prevent their value entitlement from being squandered in the future.

93. The Plan is inconsistent with these legal principles. The Liquidation Trust will be administered by Mr. Kosturos, who was selected by the Debtors and negotiating creditors without any input from holders of the TPS Securities or equity securities. Mr. Kosturos will answer to a four-person Trust Advisory Board. Three members sit on, and were appointed by, the Official Creditors' Committee. They include indenture trustees for WMI bond debt that is fully repaid under the Plan – meaning that the holders of such debt have absolutely no right to participate in Trust distributions. This smacks of political patronage. Holders of TPS Securities have perhaps the largest economic interest in the Liquidation Trust and, yet, have absolutely no representation on the Board, let alone the majority voice that their position in the capital structure warrants. The Plan should not be confirmed.

III. The Debtors Have Failed To Carry Their Burden Of Proof For Continued Approval Of The Global Settlement, Especially In Light Of Substantial New Evidence And The Appellate Reversal Of ANICO.

A. The "Law Of The Case" Doctrine Does Not Foreclose Evaluation Of The Global Settlement.

94. The Debtors and JPMorgan contend that the "law of the case" doctrine forecloses any discussion whatsoever of the Global Settlement. That is wrong. The "law of the case" doctrine requires that there be a final order. For the doctrine to apply, there must be "law" actually issued "in the case" binding the parties. See Gander Mountain Co. v. Cabela's, Inc., 540 F.3d 827 (8th Cir. 2008); Council of Alt. Political Parties v. Hooks, 179 F.3d 64, 69 (3d Cir. 1999); Cable v. Millennium Digital Media Sys., L.L.C. (In re Broadstripe, LLC), 435 B.R. 245 (Bankr. D. Del. 2010) (Sontchi, J.). The Court's January 7th Opinion did not culminate in a final order. So, there is no "law" binding the parties.[18] Indeed, it is precisely because the Debtors have renewed their request for final approval of the Global Settlement Agreement that the record from the December 2010 trial was incorporated into the record of the July 2011 trial. Simply stated, there is no "law of the case" precluding the Court's evaluation of the Global Settlement Agreement in connection with the Debtors' current request for Plan confirmation.

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18 The Debtors and JPMorgan advocated that position quite emphatically in their opposition of the Official Equity Committee's request for direct appeal of the January 7th Opinion to the Third Circuit Court of Appeals. See JPMC's Objection to the Equity Committee's Petition for Certification of Direct Appeal, at ¶ 4 [Docket No. 6656] (App. U) ("As of now, there is no confirmation order, no final plan . . . and no final settlement for an appellate court to review. . . . [T]he Equity Committee's appeal therefore is premature"); see also Debtors' Objection to the Equity Committee's Petition for Certification of Direct Appeal, at ¶ 2 [Docket No. 6653] (App. V) ("Any appeal of the Court's findings regarding the Global Settlement Agreement must await entry of an order confirming a plan."). Here again, principles of estoppel come into play.

B. Even If The Court Had Issued A Final Order Regarding The Global Settlement Agreement, Reconsideration Of That Order Would Be Warranted By Significant Factual Developments Since December 2010.

95. Even if the Court had issued a final order approving the Global Settlement Agreement in the January 7th Opinion denying confirmation, the "law of the case" doctrine would not stand in the way of the Court's reconsideration of that order in light of significant factual developments since the first confirmation trial concluded in December 2010. See Fed. R. Bankr. P. 9024 (incorporating Federal Rule of Civil Procedure 60(b)(2) and contemplating relief from a final order or judgment based on new evidence). More specifically, the Court's reconsideration of any approval of the Global Settlement Agreement would be warranted in light of: (a) the subsequently-issued Senate Report; and (b) the Circuit-level reversal of the ANICO decision.

96. The evidentiary record of the December 2010 trial established that the largest potential claims against JPMorgan and the FDIC arose under avoidance and business tort theories. See, e.g., Transcript of December 2, 2010 Hearing (Testimony of William Kosturos) at 199:13-201:18 (App. L). Such claims included potential actions against the FDIC seeking recovery: (a) for a breach of the FDIC's duty to maximize the value of WMB; (b) under the "Takings" Clause of the 5th Amendment to the United States Constitution; and (c) on claims sounding in conversion under the Federal Tort Claims Act.[19] See Complaint Against Federal

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[19] The heavy-handed tactics of the FDIC during the 2008/2009 financial crisis (and potential liability therefore) have come under increasing scrutiny in other cases – including, inter alia, with respect to potential liability for facilitating intentional fraudulent transfers from bank holding companies to banks that were subsequently seized by the FDIC. See e.g., Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, at 2, Schoenmann v. FDIC, Case No. 10-03989, 2011 U.S. Dist. LEXIS 43375, *2 (N.D. Cal. April 21, 2011) (App. W) (denying FDIC motion to dismiss claims for actual fraud). The record before the Court shows WMI has similar claims against the FDIC, and nothing in the record demonstrates such claims are not viable.

Deposit Insurance Corporation, Washington Mut., Inc. v. FDIC, Adv. Proc. No. 09-00533 (RMC) (D.D.C. Oct. 13, 2009) [Docket No. 1], Debtors' Conf. Ex. 32 (App. X). Potential claims against JPMorgan included: (x) claims to recover, inter alia, approximately $6.5 billion in pre-petition transfers from WMI to WMB and to recover the TPS Securities (valued at $4 billion); see Complaint for Turnover of Estate Property, Washington Mut., Inc. v. JPMorgan Chase Bank, N.A., Adv. Proc. No. 09-50934 (Bankr. D. Del. April 27, 2009) [Docket No. 1], Debtors' Conf. Ex. 48 (App. Y), and (y) myriad potentially "meritorious and highly valuable claims" including unfair competition, tortious interference, interference with prospective economic advantage, breach of contract, misappropriation of confidential information and trade secrets, and conversion, among others. See Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004.1 Directing the Examination of JPMorgan Chase Bank, N.A., at 2, 3, 8 & 10 [Docket No. 974], Debtors' Conf. Ex. 68 (App. Z).

97. In the January 7th Opinion, based on the record then available, the Court concluded WMI's chances of prevailing on business tort claims against JPMorgan were "not high," citing to: (a) the potential failure of the Debtors to properly preserve such rights in the WMB receivership proceedings; and (b) and the then-current status of the ANICO litigation, which had been dismissed on the basis that similar tort-like claims would have had to have been pursued in the WMB receivership rather than against JPMorgan directly. See January 7th Opinion, at 53-56 (App. C). With the reversal of the ANICO decision – in effect, clearing the way for direct WMI claims against JPMorgan without involvement of the WMB receivership – both such bases for the Court's conclusions regarding business tort claims against JPMorgan have disappeared.

98. Moreover, to the extent the Court's conclusions regarding the viability of estate avoidance actions against JPMorgan and/or the FDIC were based on the possibility WMI was not insolvent prior to the petition date, the Senate Report included findings that WMI's pre-petition stock pricing was irrationally inflated, due to market misperception that the company was being appropriately regulated by the Office of Thrift Supervision. See Summary of Senate Report [Docket No. 8312], Ex. A at 4. These findings by the Senate Subcommittee were not available when the Court rendered its January 7th Opinion and must now be taken into account in considering WMI's pre-petition solvency and the viability of WMI's avoidance claims.[20]

C. The Evidentiary Record Cannot Support Approval Of The Global Settlement Agreement.

99. It is a fundamental principle of law that settlement approval in the bankruptcy context requires evidence. See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (noting that a court must "apprise [ ] [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise."); Fry's Metals, Inc. v. Gibbons (In re

[20] The TPS Consortium understands the Court may view pre-petition insolvency as potentially damaging to "business tort" claims the WMI estate might assert. See e.g., January 7th Opinion, at 56 (App. C). Respectfully, given WMI's early abandonment of its investigation into such claims, the record is insufficient with regard to the various types of claims that might be asserted and whether, under applicable law, such claims would be viable notwithstanding WMI's insolvency. Further, to the extent the Debtors conducted any legal analysis of the effect of insolvency on the viability of business tort claims, that analysis was specifically withheld from the parties and the Court, and is not part of the record. Finally, notwithstanding any effect it might have on business tort claims, WMI's pre-petition insolvency directly supports the assertion of avoidance-type estate claims.

RFE Indus., Inc.), 283 F.3d 159, 165 (3d Cir. 2002) (Third Circuit reversed bankruptcy court's approval of a settlement, holding that "the bankruptcy court did not make any findings of fact [regarding the four Martin factors]. . . . Hence, we remand for an examination of the 'fairness, reasonableness and adequacy' of the Settlement in light of the factors listed in Martin.") (citing to Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996)).

100. Unless there is substantial reason to believe the settled claims will be dismissed on pure legal grounds, there must be evidence as to the underlying merits of the claims proposed to be compromised. See Travelers Cas. and Surety Co. v. Future Claimants Representative, No. 07-2785, 2008 WL 821088, at *9 (D.N.J. March 25, 2008) (citing RFE Indus., 283 F.3d at 165 (finding that the bankruptcy court must make specific findings pursuant to the Martin test, and reach an objective and independent opinion as to the reasonableness of the compromise)); In re Barone, No. 07-51621, 2011 Bankr. LEXIS 1267 (Bankr. M.D. Pa. April 11, 2011) (citing to RFE Indus. as the basis for the court's request that trustee's counsel present evidence in support of the motion seeking approval of the settlement); 10 Collier on Bankruptcy ¶ 9019.02 (16th ed. 2011) (discussing how the evidence must enable a court to "make detailed enough findings so that a reviewing court knows that the proper factors were considered and an informed judgment made"); see also Kopp v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.), 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997) (vacating bankruptcy court approval of settlement when such approval was not "an informed one based upon an objective evaluation of developed facts") (citations and internal quotations omitted).

101. With the reversal of the ANICO decision (clearing the primary cited obstacles to asserting business tort claims directly against JPMorgan) and the issuance of the Senate Report (clearing away doubts as to the pre-petition insolvency of WMI), the remainder of the

evidentiary record to support approval of the Global Settlement Agreement consists of pleadings filed in the various different litigations. No underlying evidence as to the viability of the various estate claims or defenses has been provided to the Court. As a matter of law, pleadings do not qualify as evidence. See Fed. R. Bankr. P. 9017 (applying the federal rules of evidence to bankruptcy cases); see also Biggs v. Capital Factors, Inc. (In re Herb Goetz & Marlen Horn Assocs., Inc.), No. 96-55944, 1997 WL 415340, at *2 (9th Cir. July 24, 1997) ("Although a court may take judicial notice of its own records, it cannot take judicial notice of the truth of the contents of all documents found therein."); M/V Am. Queen v. San Diego Marine Constr. Corp., 708 F.2d 1483, 1491 (9th Cir. 1983) ("As a general rule, a court may not take judicial notice of proceedings or records in another case so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.") (citations omitted); Credit Alliance Corp. v. Idaho Asphalt Supply, Inc. (In re Blumer), 95 B.R. 143, 146 (B.A.P. 9th Cir. 1988) ("[A] court [cannot] take judicial notice of the truth of all documents found within a court's records."); MCorp, 137 B.R. at 229 ("The pleadings, including the Disclosure Statement . . . are therefore not accepted for the truth of the allegations contained therein . . . .").

102. Accordingly, the Global Settlement Agreement, devoid of evidentiary support in the record, should not be approved now.

D. Now That Light Has Been Shed On The Plan Negotiations, It Is Clear The Settlement, Negotiated By Conflicted Counsel, Was Designed To Overcompensate Creditors, Leave Equity With Nothing, And Deliver All Remaining Value To JPMorgan.

103. During the December confirmation proceedings, the Settlement Noteholders remained curiously silent regarding the parts they played in negotiating the Plan and Global Settlement Agreement; instead hiding behind the Debtor and its own assertions of privilege. At the July 2011 hearing, however, the Settlement Noteholders were flushed from the back rows of

the courtroom by allegations of their illegal conduct and forced to reveal the roles they played and the course of the Plan negotiations. And, what had been suspected in December 2010 – that the settlement was negotiated to pay creditors in full (or more), with all residual value diverted to JPMorgan and no true analysis of the estate's entitlement to value – has been all too painfully confirmed.

104. The testimony elicited at the July 2011 proceedings establishes the Settlement Noteholders purchased and exploited influence to control the Plan process and richly reward themselves. As the settlement discussions matured, the Settlement Noteholders moved within the capital structure to ensure they would maintain control over the process through ownership of the PIERs – the putative "fulcrum" security they intended to be nominally impaired through the imposition of inappropriately high rates of post-petition interest on senior classes of debt (in which the Settlement Noteholders also maintained significant holdings). See, e.g., Transcript of July 18, 2011 Hearing (Testimony of Daniel Gropper) at 173:25-174:8 (App. K). Transcript of July 19, 2011 Hearing (Testimony of Daniel Gropper) at 50:19-55:15 (App. K); Transcript of July 21, 2011 Hearing (Testimony of Vivek Melwani) at 36:21-37:16, 39:19-40:9 (App.K) (explaining how "the Settlement Noteholders struck a deal with the Debtors that the Plan be drafted in order to provide for the payment of post-petition interest on their debts at the contract rate"); see also Settlement Noteholder Rule 2019 Statement, ¶ 2 (App. T). The record shows that the ultimate settlement result was driven not by some analysis of the strengths and weaknesses of the parties' legal rights (e.g., with respect to the business tort and avoidance claims), but by the introduction of billions of dollars in tax refunds that made it possible to get the Settlement Noteholders a rich recovery and for JPMorgan to walk away from the table further enriched, with the estate's rights in the TPS Securities already in hand. See Transcript of July 18, 2011 Hearing

(Testimony of Daniel Gropper) at 29:2-40:17 (App. K) (claiming that the additional $2.6 billion tax refund "was a very, very material input"); Transcript of July 21, 201 Hearing (Testimony of William Kosturos) at 167:22-168:13 (explaining that the tax refunds were "the key to the proposal"); see also Transcript of December 2, 2010 Hearing (Testimony of William Kosturos) at 73:18-78:8 (App. L) (discussing JPMorgan's minimal out-of-pocket expenses).

105. All the while, the Debtors remained so myopically focused on getting "a" settlement, that they never bothered to do the diligence necessary to determine whether the deal being negotiated around them by the Settlement Noteholders was a "fair" settlement. That neglect continues to this day as the Debtors ask the Court to confirm a Plan that will vest the Settlement Noteholders with significant residual beneficial interests in all remaining estate claims and litigation (through the Liquidating Trust) – yet the Debtors have not bothered to put a value on those assets. See Transcript of July 14, 2011 Hearing (Testimony of Jonathan Goulding) at 179:2-181:5 (App. K); Transcript of July 21, 2011 (Testimony of William Kosturos) at 268:7-270:5 (App. K). Finally, the record now shows unequivocally the primary substantive terms of Global Settlement Agreement – resulting in significant value diversion to JPMorgan – were negotiated by Weil, Gotshal & Manges, LLP and Alvarez & Marsal, both of whom count JPMorgan as a significant source of business in other cases. See Application of the Debtors Pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code For Authorization to Employ and Retain Weil, Gotshal & Manges LLP as Attorneys for the Debtors, Nunc Pro Tunc to the Commencement Date, dated October 13, 2008 [Docket No. 64], at Exhibit B (Affidavit and Disclosure Statement on Behalf of Weil, Gotshal & Manges LLP Pursuant to Sections 327, 328(a), 329 and 504 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2014(a) and 2016(b)), ¶ 15 (App. AA) (identifying JPMorgan Chase Bank, National Association

as a current client); Supplemental Declaration of William C. Kosturos in Support of Motion of the Debtors Pursuant to 11 U.S.C. § 363 for an Order Authorizing the Employment of Alvarez & Marsal North America, LLC and Designating William C. Kosturos as Chief Restructuring Officer Nunc Pro Tunc to October 2, 2008, dated October 24, 2008 [Docket No. 152], at Schedule B (App. BB) (identifying JPMorgan Chase as a current client); Transcript of December 2, 2010 Hearing (Testimony of William Kosturos) at 179:17-181:1 (App. L). And, with the sunlight shed on the negotiations by the insider trading investigation, it is clear that special conflicts counsel for WMI – brought in to address conflicts resulting from Weil Gotshal & Manges LLP's relationship with JPMorgan – played a very limited (if any) role in the actual negotiation of the terms that came to be embodied in the Global Settlement Agreement. See Transcript of December 2, 2010 Hearing (Kosturos) at 184:9-16 (App. L).

106. As such, the estate's analysis of the "fairness" of the settlement amounted to nothing more than determining how much was necessary to pay creditors in full (or more) and then delivering everything else to JPMorgan without regard to the entitlement of WMI equity holders to estate value. Such a tainted result should not be graced with this Court's sanction.

E. If The Court Is Inclined To Recommend Settlement Approval To Chief Judge Sleet, The Debtors Should Be Ordered To Identify (With Specificity) Where Evidence Exists In The Record To Support Such A Recommendation.

1. Rules Applicable To The Preparation Of Proposed Findings Of Fact And Conclusions Of Law.

107. Bankruptcy Rule 9033 instructs Bankruptcy Courts to "file proposed findings of fact and conclusions of law." Such a filing precipitates an objection process, focused on "specific proposed findings and conclusions." Fed. R. Bankr. P. 9033(b) (emphasis added). Thereafter, the District Court undertakes a de novo review of the record, comparing it to the

proposed judgment submitted by the Bankruptcy Court. This process marries with Bankruptcy Rule 7052, which is made applicable to this contested matter by Bankruptcy Rule 9014. Bankruptcy Rule 7052 instructs as follows (emphasis added): "In an action tried on the facts . . . the court must find the facts <u>specially</u> and state its conclusions of law separately."

108. Where the trial record is voluminous – as it is here – these rules prompt the Court to include in the proposed judgment explicit evidentiary citations in support of the Court's "specific" and "special" findings of fact. <u>See</u> <u>Mazzeo v. Lenhart (In re Mazzeo)</u>, 167 F.3d 139, 142 (2d Cir. 1999) ("The findings and conclusions must, however, at least be sufficient to permit meaningful appellate review."). Given that the January 7th Opinion denied plan confirmation, it fittingly did not include evidentiary citations. Also, respecting avoidance and business tort claims, the Court's conclusion was based on factual and legal predicates that no longer exist. Thus, the January 7th Opinion is insufficient to deliver to Chief Judge Sleet as proposed findings of fact and conclusions of law.

109. And, of course, when preparing the proposed judgment, care must be taken so as not to inadvertently shift the burden of proof (which, again, falls squarely and "heavily" on the Debtors' shoulders). Rather, the proposed findings of fact must be rooted in the record <u>as established by the Debtors</u> and must demonstrate that the Debtors <u>proved their case with admissible evidence</u>, especially respecting the settlement of the estates' avoidance and business tort claims. In other words, the proposed findings must show the Debtors came forward with sufficient admissible evidence in support of settlement approval and not just factual allegations set forth in pleadings (themselves devoid of any record support demonstrating the estate claims to be compromised suffered from infirmities making compromise preferable to prosecution).

110. This presents a serious problem for the Debtors. The historic record shows potentially enormous avoidance and business tort claims against JPMorgan and/or the FDIC, as discussed in the Debtor's 2004 motion to investigate estate claims,[21] ANICO complaint against JPMorgan,[22] the Order granting the Debtors authority to conduct a Rule 2004 investigation,[23] and the Debtors' second Rule 2004 motion to further the investigation into estate claims.[24] But, there is nothing in the record establishing those claims do not exist or are not likely to generate incremental billions of dollars in value for the estates.

111. More importantly, the record has changed since December 2010. The Senate Report augments the evidentiary record about what happened at corporate headquarters. But, it also bears directly on the Court's evaluation of the "Avoidance Actions" because the Court said there are potential infirmities with the claims because (a) the Debtor's pre-petition stock capitalization suggested solvency; and (b) JPMorgan has asserted a "good faith purchaser" defense. As discussed above, the Senate Report strongly suggests that neither potential infirmity is a fair factual assumption by the Court – certainly not at this point in time, and certainly not on this new record.

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21 Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of JPMC, Debtors' Conf. Ex. 68 (App. Z).

22 American Nat'l Ins. Co., et al. v. FDIC, No. 09-cv-0199, Plaintiffs' Original Petition, Debtors' Conf. Ex. 61 (App. CC).

23 Order Granting Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of JPMC, Debtors' Conf. Ex. 69 (App. DD).

24 Debtors' Motion for an Order Directing the Examination of Witnesses and Production of Documents from Knowledgeable Parties, Debtors' Conf. Ex. 70 (App. EE).

112. And, regarding "business torts," the Court found highly probative that the ANICO case was dismissed for the Plaintiffs' failure to exhaust administrative remedies. But, that decision has since been reversed by the D.C. Court of Appeals, which held that the claims asserted were against JPMorgan specifically for independent profit-making at Washington Mutual's expense. What evidence can now be cited to support the conclusion the Global Settlement is fair vis-à-vis the potentially significant "Business Tort" claims?

2. The Debtors Should Identify Where In The Record Evidence Exists On Which To Base Final Approval Of The Global Settlement Agreement.

113. Lawyers, not judges, should be charged with toiling with a detailing of the record. The Debtors contend the evidentiary record is present and that it trumps the Senate Report and recent developments in the ANICO litigation. As they are so confident in their position, the Debtors should be required to furnish to this Court and to all parties in interest draft findings and conclusions, with specific citations to the evidentiary record, that they believe support Plan confirmation and approval of the Global Settlement Agreement.

114. And, the Court could similarly instruct parties opposing confirmation to prepare a dueling draft proposed judgment in which they may point out how the record actually fails to establish the sufficiency of the Global Settlement, especially in light of the Senate Report and recent developments in the ANICO litigation. The Court would then be positioned to evaluate the proposed orders against the record cited. And, then, the Court can decide what, if anything, should be submitted to Chief Judge Sleet for de novo review and final Order.

IV. The Debtors Have Failed To Resolve Substantial Additional Points Of Objection Raised By The TPS Consortium.

115. In its Objections to Confirmation, the TPS Consortium raised two additional points of objection that bear repeating here.

116. First, Bankruptcy Code Section 365(c)(2) absolutely prohibits implementation of the Plan provisions providing for the assumption of the TPS documents and consummation of the Conditional Exchange. The Conditional Exchange was not consummated pre-petition and cannot be consummated post-petition. Were the Plan to be confirmed, any provision effectuating the Conditional Exchange would facially violate Bankruptcy Code Section 365(c)(2) and, in turn, Bankruptcy Code Sections 1129(a)(1) and 1129(a)(3).

117. Second, the TPS Consortium continues to believe the releases provided for in the Plan (including those summarized in Paragraph 16 of this Brief) are inordinately convoluted, can be simplified considerably, and threaten to be interpreted as prohibiting claims the TPS Consortium has against JPMorgan and others. The Plan continues to provide illegal non-consensual releases to third parties and enjoins actions against assets and properties provided to such third-parties "free and clear" through the Plan.

118. These objections are sufficiently set forth in the Objections to Confirmation, which again are incorporated herein by reference. Standing on its own, each objection provides a sufficient basis to deny confirmation of the Plan.

V. If The Court Determines To Confirm The Plan, The Case Itself And The Particular Matters Raised In Connection With Confirmation Are Sufficiently Important As To <u>Warrant Issue Certification Directly To The Third Circuit Court Of Appeals</u>.

119. To confirm this Plan, the Court must rule for the Debtors on the following six questions of law and fact:

(1) Does this Court have the power to confirm a Plan that incorporates provisions obviously designed to: (i) invade Chief Judge Sleet's exclusive jurisdiction over the TPS Consortium's appeal in <u>Blackhorse Capital LP v. JPMorgan Chase Bank, N.A.</u>, Adv. No. 10-51387 (MFW), <u>on</u> <u>appeal</u>, Civ. Action No. 11-124-GWS; and (ii) moot such appeal before Chief Judge Sleet and the Third Circuit Court of Appeals have had an opportunity to review the merits? **[<u>Answer</u>: No]** Does the Divestiture Rule otherwise

obligate the Debtors to modify the Plan, striking those provisions that advertently or inadvertently hamper the appellate courts' ability to reverse and return the parties to the status quo ante, and adding a disputed-claims reserve to hold the TPS Securities pending ultimate conclusion of the appellate process? **[Answer: Yes]**

(2) Following Stern v. Marshall, does this Court have the Constitutional power to issue a final order approving the Global Settlement Agreement (and the Plan, as its bankruptcy "wrapping"), given that: (a) the settlement involves substantial non-core litigation that otherwise must be adjudicated elsewhere; and (b) the settlement is hotly-contested, resulting in an extended trial over whether it should be forcibly imposed on thousands of disaffected parties-in-interest? **[Answer: No]** Is this Court only authorized by the Constitution to deliver proposed findings of fact and conclusions of law for Chief Judge Sleet's final consideration? **[Answer: Yes]**

(3) In the particular circumstances of this case, can "the legal rate" of post-petition interest (as those words are used in Bankruptcy Code Section 726(a)(5)) refer to any rate other than the federal judgment rate? **[Answer: No]** If it is the federal judgment rate, can the reference date for calculating post-petition interest be any date other than the confirmation date, the most obvious and logical analogue to the date of "judgment" in federal civil litigation? **[Answer: No]**

(4) Can the Plan "death-trap" the TPS Consortium's right to participate in the proceeds of unsettled estate causes of action without the Debtors providing this Court one iota of evidence proving, by a preponderance of the evidence: (1) that the value of all such causes of action is less than the amount needed for the TPS Securities to be "in-the-money"; and, therefore, (2) that the holders of TPS Securities are not otherwise legally entitled to any such value? **[Answer: No]** Absent such evidence, is the Plan "fair and equitable" with respect to the post-consummation governance of such unsettled estate litigation, given that: (1) the litigation is controlled by creditor representatives that have absolutely no interest in that litigation; and (2) disaffected holders of TPS Securities are not afforded any right to participate in future litigation governance? **[Answer: No]**

(5) Does the law allow the Debtors to establish the sufficiency of the Global Settlement Agreement, covering fact-intensive avoidance and business tort claims exceeding $6 billion, with only pleadings (i.e., absolutely no admissible evidence going to the underlying merits of the claims)? **[Answer: No]** Does the law impose a heightened evidentiary burden on the Debtors in light of: (x) the findings contained in the Senate Report (including, especially, findings giving strong challenge to any factual

contention that the Debtors were solvent pre-petition); (y) the ANICO reversal (now enabling the business tort claims to proceed); and (z) substantial new evidence that the Global Settlement was negotiated without any analysis of the value of such claims, by conflicted professionals that turned a blind eye to such claims to enable the deal to finalize? **[Answer: Yes]**

(6) Does Bankruptcy Code Section 365(c)(2) prohibit post-petition "completion" of the Conditional Exchange of TPS Securities for WMI preferred stock that was not issued pre-petition and, today, does not exist? **[Answer: Yes]**

120. As explained herein, the law does not allow the Court to render a ruling in the Debtors' favor on all six of these issues and, therefore, the Plan is not confirmable. The TPS Consortium respectfully submits that, to confirm this Plan, the Court would need to dramatically bend applicable legal principle or establish new ways of thinking about the law, and to ignore incontrovertible fact. Any such ruling would be highly controversial.

121. Under that circumstance, direct certification to the Third Court of Appeals pursuant to 28 U.S.C. § 158(d)(2) would be appropriate. Indeed, each of these issues: (i) is a matter for which there is no controlling precedent; (ii) involves a significant question of public policy; (iii) would, presuming an adverse ruling by the Court, produce severely conflicted case authority; and/or (iv) would be materially advanced by direct, immediate Circuit Court level ruling, rather than years of anticipated appellate proceedings.

122. Indeed, it seems appropriate at this juncture to pause, reset perspective, and take due notice of the fact that this is not just another run-of-the-mill large Chapter 11 case. This bankruptcy involves Washing Mutual, Inc. This company was at the epicenter of nation's recent macro-economic collapse. For very good reason, there was a deep-dive Senate investigation of this Company, culminating in a massive Senate Report (at tremendous expense to American taxpayers). This is a very important and closely-watched bankruptcy case. Should this Court

find it appropriate to confirm the Plan, parties-in-interest (including the many who oppose the Global Settlement and the Plan) are deserving of far better appellate process than the otherwise anticipated Jarndyce v. Jarndyce, with litigation obstruction backed by the largess of JPMorgan and the Settlement Noteholders. Moreover, the law would be advanced greatly by a Circuit-level decision, establishing precedent, on the very difficult issues now before this Court.

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CONCLUSION

WHEREFORE, for all the foregoing reasons, the TPS Consortium respectfully asks this Court to: (1) sustain the Objections; (2) deny confirmation of the Plan; and (3) provide the TPS Consortium such other and further relief as is just and proper.

Dated: Wilmington, Delaware
August 10, 2011

Respectfully submitted,

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