IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
WASHINGTON MUTUAL, INC., *et al.*,[1]	)	Case No. 08-12229 (MFW)
	)	Jointly Administered
Debtors.	)	**Reply Deadline: August 10, 2011**
		Hearing Date (if necessary): August 24, 2011 at 9:30 a.m. (ET)

APPALOOSA MANAGEMENT L.P.'S POST-HEARING BRIEF IN CONNECTION WITH CONFIRMATION OF THE MODIFIED SIXTH AMENDED JOINT PLAN OF REORGANIZATION

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August 10, 2011

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[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification numbers, are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

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Appaloosa Management L.P. ("Appaloosa"), on behalf of certain of its managed funds that are creditors of the above captioned debtors and debtors in possession (collectively, the "Debtors"), by and through their undersigned counsel, hereby submits this post-hearing brief in connection with confirmation of the Modified Sixth Amended Joint Plan of Reorganization (the "Plan" or "Modified Sixth Amended Plan").

PRELIMINARY STATEMENT

In what can only be considered an unfounded and unprecedented legal position, the Official Committee of Equity Security Holders (the "Equity Committee") appears to seek legal redress against Appaloosa without asserting a single, particularized allegation against it. Remarkably, it seeks to do so even though the Equity Committee's own investigation showed that Appaloosa's conduct in these cases was entirely proper, and indeed was helpful to the Debtors.

The Equity Committee began this odyssey by pursuing a lone security holder's speculation of insider trading, speculation that never had any basis, particularly with respect to Appaloosa. Upon the completion of discovery, all of the interested parties acknowledged there was no evidence of any wrongdoing by Appaloosa: the Debtors and Creditors' Committee said so explicitly in their pre-hearing submissions, and the Equity Committee said so implicitly, by making such allegations against others <u>but not against Appaloosa</u>. The evidence at the Confirmation Hearing confirmed this conclusion beyond any doubt.

Having failed to establish any improper trading, the Equity Committee shifted its theory in a transparent attempt to find wrongdoing where there is none, and rehashed the very same arguments that the Court rejected in January – namely, that the Settlement Noteholders[1] dominated and controlled the Debtors and the process. That claim, too, is belied by the evidence.

The uncontroverted evidence at the Confirmation Hearing showed that the Debtors "led the negotiations; the settlement noteholders did not. . . . And ultimately the debtor exercised its judgment, its sole judgment in entering into the global settlement agreement." (7/21/2011 (Kosturos) Tr. 137 (JAOC 145)[2] (emphasis added)). For the Equity Committee to argue otherwise contradicts the evidence and defies logic and common sense. These cases involve some of the world's largest and most sophisticated financial institutions and professionals. To assert that any of these parties would jeopardize their businesses or reputations is, quite simply, absurd. (7/20/2011 (Bolin) Tr. 79-80 (JAOC 84)). There is not a shred of evidence to suggest that they did.

What the evidence has shown is that Appaloosa and each of the parties acted in good faith and at arms-length. And, far from acting inequitably, because Appaloosa's participation in this process "helped facilitate the successful resolution of the underlying disputes, the estates have been enhanced by billions of dollars." (Debtors'

[1] The "Settlement Noteholders" refers to Appaloosa, Owl Creek Asset Management, L.P., Centerbridge Partners LP, Aurelius Capital Management LP, and several of their respective affiliates.

[2] References to JAOC are to the Joint Appendix of Appaloosa Management L.P., Owl Creek Asset Management, L.P. and Centerbridge Partners L.P., submitted herewith.

Supplemental Response to the Objection of the Official Committee of Equity Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization (D.I. 8188) at ¶ 45 (emphasis in original)). This type of conduct, in a "multi-faceted litigation that cries out for settlement," should be encouraged, not penalized. (Opinion, dated January 7, 2011 (D.I. 6528) ("Opinion") at 59).

As Appaloosa stated in its pre-hearing submission, the time for speculation and innuendo – of which there has been far too much in these cases – is over. The evidence is now in, and it is overwhelming: Appaloosa conducted itself ethically, legally and with integrity throughout the course of these proceedings. There is no evidence to the contrary. The Equity Committee's Objection should be overruled. The Modified Sixth Amended Plan should be confirmed.

FACTUAL BACKGROUND

1. On January 7, 2011 the Court issued an opinion denying confirmation of the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Sixth Amended Plan"), but noted that the Plan was "fair and reasonable" in most material respects. (Opinion at 2). In denying confirmation of the Sixth Amended Plan, the Court mentioned, in dicta, the (false) speculations of an individual security holder, who "sought to introduce evidence that the Settlement Noteholders used their position in the negotiations to gain non-public information about the Debtors which permitted them to trade in the Debtors' debt." (Id. at 69).

2. On January 18, 2011, the Equity Committee moved to conduct a Rule 2004 examination on these issues. (Motion of the Official Committee of Equity Security Holders for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 (D.I. 6567) (the "EC Rule 2004 Motion")).

3. On February 7, 2011, the Debtors filed the Modified Sixth Amended Plan. (D.I. 6696).

4. On February 8, 2011, after hearing arguments on the EC Rule 2004 Motion, the Court granted the motion, in part, and allowed discovery to proceed on certain limited topics. (2/8/2011 Tr. at 81-84 (JAOC 21-24); Order Granting, In Part, Motion of the Official Committee of Equity Security Holders for an Order Directing the Examination of the Washington Mutual, Inc. Settlement Note Holders Group (D.I. 6725)).

5. Consistent with the Court's order, on February 25, 2011, Appaloosa produced to the Equity Committee more than 15,000 pages in discovery, including all applicable trading records and documents reflecting information that Appaloosa received from the Debtors during the settlement discussions.

6. On June 23, 2011, the Equity Committee deposed Appaloosa on: (a) its buying and selling of the Debtors' securities; (b) its receipt of confidential information, if any, during settlement negotiations; (c) its internal screening procedures; (d) its analysis and valuation of the Debtors; and (e) its participation in settlement negotiations. (Official Committee of the Equity Security Holders' First Deposition Notice to Appaloosa Management L.P., dated June 15, 2011 (D.I. 7896)).

7. After reviewing all of the evidence, the Equity Committee filed an objection to confirmation of the Modified Sixth Amended Plan on July 1, 2011 ("EC Objection" or the "Objection"). (D.I. 8073 (sealed); 8192 (unsealed)). The Objection asserted that two other entities traded on the basis of material, nonpublic information – assertions which are themselves misguided and wrong – but did not include any allegations of improper trading by Appaloosa. The Objection nonetheless asserted, without basis, that Appaloosa had engaged in inequitable conduct because it, along with the other Settlement Noteholders, purportedly "dominated most of the negotiations that led to the Global Settlement Agreement and Plan" and "hijack[ed] the Debtors' bankruptcy case to maximize their own profits." (Objection at ¶¶ 35, 70).

8. Subsequently, on July 12, 2011, the Equity Committee filed a motion for an Order authorizing the Equity Committee to commence and prosecute certain claims of the Debtors' Estates ("Motion to Prosecute"). (D.I. 8181 (sealed)). Similar to its Objection, in the Motion to Prosecute, the Equity Committee asserted claims against two other entities, but did not include any allegations against Appaloosa.

9. On July 13, 2011, the Court commenced an evidentiary hearing to consider confirmation of the Plan (the "Hearing," "Confirmation Hearing" or "Confirmation"). The Hearing began on July 13, 2011 and ended on July 21, 2011. An extensive documentary record was established and numerous witnesses testified live. With respect to the Equity Committee's allegations of inequitable conduct against the Debtors and the Settlement Noteholders, the Hearing included the introduction of trading records, emails, and many other documents, as well as the testimony of (a) Dan Gropper,

a partner at Aurelius Capital Management, LP ("Aurelius"); (b) Daniel Krueger, a managing director at Owl Creek Asset Management, L.P. ("Owl Creek"); (c) James Bolin, a partner at Appaloosa; (d) Vivek Melwani, a partner at Centerbridge Partners, L.P. ("Centerbridge"); and (e) William Kosturos, the Chief Restructuring Officer for the Debtors. As discussed below, the Confirmation Hearing conclusively established that Appaloosa acted appropriately and in good faith at all times.

ARGUMENT

I. Appaloosa Did Not Engage In Improper Trading

10. The evidence at the Confirmation Hearing demonstrated that Appaloosa did not improperly trade in the Debtors' securities, and there are no allegations by the Equity Committee, or by any other party, that it did.

11. The evidence showed that Appaloosa accumulated almost its entire position in WMI securities prior to engaging in any settlement discussions with the Debtors and prior to becoming privy to any nonpublic information, material or otherwise. (AOC 62 (Appaloosa's trading records); 7/21/2011 (Kosturos) Tr. 99-100 (JAOC 136)). Indeed, the only two investments that Appaloosa made in WMI securities after March 9, 2009 (the date Appaloosa entered into the first confidentiality agreement) occurred outside the term of any confidentiality period – namely, on May 12, 2009, involving a relatively small amount of subordinated bonds, and on October 23, 2009, after the Worker, Homeownership, and Business Assistance Act of 2009, which allowed businesses to carry back net operating losses ("NOLs") up to five years, passed the House

of Representatives by a roll call vote and was widely anticipated to become law. (AOC 62).

12. More importantly, the evidence demonstrated that Appaloosa was scrupulous in its compliance with the securities laws. Appaloosa never traded in securities of the Debtors when it was under a confidentiality agreement (AOC 62), and did not remove its trading restrictions in WMI securities until it received confirmation from the Debtors that the confidentiality periods were over, that all material, nonpublic information had been disclosed, and that it was free to trade. (7/20/2011 (Bolin) Tr. 53, 71 (JAC 77, 82)). See United States v. O'Hagan, 521 U.S. 642, 654-55 (1997) (holding that disclosure of one's intent to trade in the securities of a company is fatal to a claim of insider trading brought under the misappropriation theory); Dirks v. SEC, 463 U.S. 646, 665 (1983) (requiring, as a prerequisite to an insider trading claim, an expectation of confidentiality).

13. In fact, Appaloosa went above and beyond compliance with the securities laws and regulations in order to ensure that it comported itself responsibly and equitably. Thus, for example, Appaloosa was conservative in its trading decisions – it voluntarily refrained from trading even during periods in which it determined that it was not in possession of material, nonpublic information, in order to prevent any after-the-fact mischaracterizations by interested parties. (7/20/2011 (Bolin) Tr. 44-45, 59-60, 74, 102 (JAOC 75, 79, 83, 87)). Additionally, Appaloosa used its external counsel as a screen to ensure that it did not inadvertently receive information it was not intended to have. (7/20/2011 (Bolin) Tr. 78-79 (JAOC 84)).

14. It is, therefore, clear that Appaloosa did nothing wrong. Indeed, as noted in Appaloosa's response to the Equity Committee's Objection, the Equity Committee – after reviewing all of the documents produced by the parties as well as the documents contained in the Debtors' document depository, and taking the depositions of the Debtors and all of the Settlement Noteholders – never asserted that Appaloosa had engaged in insider trading. (Response of Appaloosa Management L.P. to the EC Objection (D.I. 8190) at pp. 2-3). And the Debtors and Creditors' Committee, after reviewing the same record, made this point in no uncertain terms. (See Reply of the Official Committee of Unsecured Creditors to Insider Trading and Equitable Conduct Arguments Set Forth in the EC Objection (D.I. 8142) at pp. 1-2 ("[T]he Creditors' Committee believes that [there is] no evidence . . . that any of the Settlement Note Holders impermissibly traded upon material, non-public information ('MNPI') during these cases"); Debtors Supplemental Response to the EC Objection (D.I. 8188) at ¶ 20 ("[T]he allegations of insider trading collapse of their weight on even a cursory review of the settlement term sheets and other data claimed by the Equity Committee to be material non-public information on which the Settlement Noteholders traded. [And], the assertion that the interests of the estate have been harmed by the trading activity of the Settlement Noteholders is absurd.")).

15. In the event any belated claims to the contrary are made at this late stage, they should be denied as mere opportunistic, false assertions that are belied by the record in these cases.

A. Any Suggestion of Insider Trading Would Fail as a Matter of Law

16. The applicable legal framework makes it abundantly clear that any allegation of improper trading by Appaloosa would fail as a matter of law.

17. Section 10(b) of the Exchange Act makes it unlawful "for any person, directly or indirectly, by the use . . . of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device . . . ." 15 U.S.C. § 78j(b). See also 17 C.F.R. § 240.10b-5.

18. The Supreme Court has interpreted Section 10(b) of the Exchange Act to prohibit insider trading under two complementary theories, the "classical theory" and the "misappropriation theory." O'Hagan, 521 U.S. at 652.

19. The "classical theory" of insider trading imposes liability on corporate insiders who trade on the basis of confidential information obtained by reason of their position with the corporation. See Chiarella v. United States, 445 U.S. 225, 228 (1980). Insiders of a corporation include officers and directors, as well as "temporary insiders" such as attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation. See O'Hagan, 521 U.S. at 652; Dirks, 463 U.S. at 655 n.14.

20. As discussed in Appaloosa's pre-hearing submission, which it incorporates fully herein, Appaloosa was not an "insider" of the Debtors, temporary or otherwise. (Response of Appaloosa Management L.P. to the EC Objection (D.I. 8190) at ¶¶ 17-35). The Equity Committee did not elicit a single fact at the Confirmation Hearing tending to show that Appaloosa had any level of control over or special relationship with

the Debtors. See Dirks, 463 U.S. at 655 n.14; In re Winstar Comm'ns, Inc., 554 F.3d 382, 399 (3d Cir. 2009). Indeed, as Mr. Kosturos and Mr. Bolin made clear, the Debtors controlled the reorganization, and Appaloosa and the other Settlement Noteholders played no role "whatsoever" in making decisions on behalf of the Debtors with respect to settlement negotiations in these cases. (7/20/2011 (Bolin) Tr. 79-80 (JAOC 84); 7/21/2011 (Kosturos) Tr. 96, 137, 157 (JAOC 135, 145, 149)). Thus, Appaloosa was not a "temporary insider" or fiduciary of the Debtors. (7/20/2011 (Bolin) Tr. 57-58, 79-80 (JAOC 78-79, 84)).

21. The "classical theory" also extends liability to insiders who improperly "tip" an outsider about material, nonpublic information concerning the company. Tippee liability, in turn, is derivative of tipper liability. Dirks, 463 U.S. at 662.

22. Importantly, the Supreme Court has held that "tipper/tippee" liability only exists "when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should have known that there has been a breach." Dirks, 463 U.S. at 660.

23. To determine whether there has been a breach by the insider/tipper, the Supreme Court has directed "courts to focus on objective criteria, i.e., whether the insider [here, a representative of the Debtors] receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or reputational benefit that will translate into future earnings." Id. at 663. See also SEC v. Anton, No. Civ. A. 06-2274, 2009 WL 1109324, at *1, *9 (E.D. Pa. Apr. 23, 2009) (finding that the lack of any social

relationship between the alleged tipper and tippee made it unlikely that there was any motive to give material, nonpublic information). The "benefit" requirement is essential to sustaining liability under the classical theory of insider trading, as "[n]ot all breaches of fiduciary duty in connection with a securities transaction come within the ambit of Rule 10b-5. There must also be manipulation or deception." Dirks, 463 U.S. at 654 (internal quotations and citations omitted). "Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach." Id. at 662.

24. There has been no allegation, let alone evidence, that the Debtors or their professionals breached any duty whatsoever in connection with these cases, which would be a prerequisite for finding any of them to be a "tipper" under the securities laws. Indeed, the Equity Committee did not even raise this theory as a possibility in its pre-hearing submissions, and adduced no evidence at the Hearing that would support it. Because Appaloosa is not an insider of the Debtors, and there is no allegation or evidence of any professional of the Debtors providing "tips" to Appaloosa in breach of a fiduciary duty, Appaloosa cannot be liable under the classical theory of insider trading.

25. Under the "misappropriation theory," an entity can be found liable for insider trading when it engages in "conduct constituting secreting, stealing, purloining or otherwise misappropriating material non-public information in breach of a[] . . . fiduciary duty of confidentiality." United States v. Carpenter, 791 F.2d 1024, 1031 (2d Cir. 1986), aff'd, 484 U.S. 19 (1987). Central to the theory of misappropriation is that

the owner of the information expected the information to remain confidential. See O'Hagan, 521 U.S. at 654-55; Dirks, 463 U.S. at 665.

26. The mere receipt of confidential information is not enough to give rise to a duty of confidentiality. United States v. Falcone, 257 F.3d 226, 234 (2d Cir. 2001) (citing United States v. Chestman, 947 F.2d 551, 567 (2d Cir. 1991)) (noting that a fiduciary duty "cannot be imposed unilaterally by entrusting a person with confidential information"). Instead, there must be an "explicit acceptance of a duty of confidentiality" or an implied acceptance based on "a similar relationship of trust and confidence between the parties" for the duty to arise. Falcone, 257 F.3d at 234 (citing Chestman, 947 F.2d at 567-68).

27. Where there is an express understanding between the parties that information will not be kept in confidence past a certain period of time, there can be no duty of confidentiality, and thus, no liability. See generally Dirks, 463 U.S. at 665. Similarly, if the "fiduciary discloses to the source that he plans to trade on the information, there is no 'deceptive device' and thus no § 10(b) violation." O'Hagan, 521 U.S. at 655.

28. Here, Appaloosa did not trade during the pendency of the confidentiality periods. (AOC 62). And, as Mr. Kosturos made clear, at the termination of each of the periods, all "the parties [we]re free to do whatever they want[ed] to do" with the information, including trade. (7/21/2011 (Kosturos) Tr. 101-02, 122-23, 153 (JAOC 136-37, 142, 148)). Thus, Appaloosa did not misappropriate or steal any information from the Debtors, and the misappropriation theory too must fail.

29. This should end the insider trading inquiry – there was no insider trading. But the Equity Committee seeks to ignore its inability to establish the essential elements of liability by arguing that it is somehow "improper[]" for the Settlement Noteholders to equate compliance with the securities laws – which are specifically designed to prevent unfair informational advantages and maintain integrity in our capital markets – with good behavior. (EC Objection (D.I. 8192) at ¶ 47). The Equity Committee is wrong. It does not cite a single authority for such a proposition, which is nothing but its own ipse dixit used to improperly malign innocent parties after the fact. Cases in the Third Circuit, as well as in the Supreme Court, require that all of the elements of insider trading be present in order for trading to be actionable, and Appaloosa is not aware of any cases in bankruptcy courts or elsewhere which hold otherwise.

B. The Back-and-Forth During Intermittent Settlement Discussions Was Not Material Information

30. In addition, regardless of what legal theory is applied, any claim of insider trading would fail as a factual matter because the soft "information" focused on by the Equity Committee – the back-and-forth during 18-24 months of intermittent settlement negotiations, rather than the hard information (like multi-billion dollar tax refunds) that the Equity Committee admits was publicly disclosed – was not in any way material.

31. If the evidence at the Hearing did anything, it conclusively established that this back-and-forth was not material, just as the Debtors had determined and confirmed to the Settlement Noteholders at the time.[3]

32. Materiality is defined as information that "significantly alter[s] the 'total mix' of information made available," TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976), and thus is "'important to a reasonable investor in making his or her investment decision.'" Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000) (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (3d Cir. 1997)). See also Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988) (holding that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information"); Klein v. Gen. Nutrition Cos., 186 F.3d 338, 343-45 (3d Cir. 1999); In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 371-77 (3d Cir. 1993).

33. The Supreme Court has cautioned courts against setting too low a standard of materiality. See, e.g., Basic, 485 U.S. at 231-32; TSC Indus, 426 U.S. at 448-49. The Supreme Court has explained that setting too low a standard would undermine the purpose of the securities laws because "not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to

[3] That is the same conclusion the Court reached in connection with the discovery determinations in this matter: "[You should produce] [o]nly the information received during the settlement negotiations. The settlement negotiations themselves I don't think are relevant." (2/8/2011 Tr. 83 (JAOC 23) (emphasis added)).

bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decisionmaking." TSC Indus., 426 U.S. at 448-49.

34. Thus, in assessing materiality, courts must "take[] into account considerations as to the certainty of the information, its availability in the public domain, and the need for the information in light of cautionary statements being made." Klein, 186 F.3d at 342. See In re Donald Trump Casino Sec. Litig., 7 F.3d at 364.

35. Courts should also consider whether the information at issue "is of a specific or general nature. This determination is important because it directly bears upon the level of risk taken by an investor. . . . [T]he ability of a court to find a violation of the securities laws diminishes in proportion to the extent that the disclosed information is so general that the recipient thereof is still undertaking a substantial economic risk that his tempting target will prove to be a 'white elephant.'" SEC v. Monarch Fund, 608 F.2d 938, 942 (2d Cir. 1979) (citations and internal quotation marks omitted).

36. Whether an event – such as an actual settlement – is likely to occur should be evaluated in light of the facts as they existed at the time, and not with the benefit of hindsight. See In re General Motors Class E Stock Buyout Secs. Litig., 694 F. Supp. 1119, 1127 (D. Del. 1988) ("The probability of a transaction occurring must be considered in light of the facts as they then existed, not with the hindsight knowledge that the transaction was or was not completed.").

37. Additionally, a generalized confirmation of an event that is "fairly obvious" to every market participant who is knowledgeable about the company or the particular instrument does not constitute material, nonpublic information. See Elkind v.

Liggett & Myers, Inc., 635 F.2d 156, 166 (2d Cir. 1980) (finding that the confirmation of facts that "were fairly obvious to all who followed the stock . . . cannot be deemed 'reasonably certain to have a substantial effect on the market price of the security.'"); SEC v. Rorech, 720 F. Supp. 2d 367, 410 (S.D.N.Y. 2010) (finding that the generalized confirmation of an event that is "'fairly obvious' to every market participant who was knowledgeable about the company or the particular instrument at issue is not material information"). Because settlement talks are so commonplace in bankruptcy proceedings, the fact that such discussions occurred here is immaterial as a matter of law. See generally Oran, 226 F.3d at 282. See also In re Donald J. Trump Casino Sec. Litig., 7 F.3d at 377 (finding that the federal securities laws do not require corporations "to state the obvious"); Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 (8th Cir. 1997) ("There are a variety of reasons why an alleged misrepresentation or omission may, as a matter of law, be immaterial. Some matters are such common knowledge that a reasonable investor can be presumed to understand them.").

38. In fact, the Debtors publicly discussed that such negotiations were occurring. See, e.g., January 11, 2010 Motion of Washington Mutual, Inc. and WMI Investment Corp. for an Order (A) Disbanding the Official Committee of Equity Holders Appointed by the United States Trustee or (B) Limiting the Fees and Expenses which May be Incurred by Such Committee (D.I. 2132) at 9 ("While many issues remain in flux . . . the debtors believe that the addition of the Equity Committee at this juncture in the cases would disrupt, and possibly even derail, the delicate ongoing negotiations between the parties.") (emphasis added).

39. The Equity Committee's Objection in this case is predicated on the notion that the parties had "agreements" with respect to how certain assets or claims of the Estates would be treated.[4] According to the Equity Committee, the parties had "agreed from the first term sheet [that] JPMC would receive the Trust Preferred Securities and WMI would receive more than $4 billion in contested deposits," and that, thereafter, the "term sheets progressed on a steady upward trajectory that gave the estate more and more money." (EC Objection (D.I. 8192) at ¶ 42).

40. However, the evidence at the Hearing demonstrated quite the opposite. The evidence showed that the Global Settlement Agreement was not the product of a steady negotiation between the Debtors and JPMC, but rather the result of "very complex negotiation[s]" between multiple parties that "ebb[ed] and flow[ed]" over the course of 18 months to two years. (7/21/2011 (Kosturos) Tr. 97 (JAOC 135)).

41. The evidence also showed that, far from there being any agreement between the parties "from the first term sheet" (EC Objection (D.I. 8192) at ¶ 42), there was no agreement with respect to any of the items, including the handling of the deposits and the Trust Preferred Securities.

42. All of the witnesses made this clear. As Mr. Kosturos put it, the proposals set forth in each of the term sheets cannot be viewed individually, but rather

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[4] In its Objection, the Equity Committee also claimed that, in addition to the term sheets, two of the Settlement Noteholders "had access to significant aspects of the Debtors' litigation strategies, analyses, and other material confidential information that was not made available to the public." (EC Objection (D.I. 8192) at ¶ 43). Despite this assertion, the Equity Committee did not introduce a single exhibit, or elicit any testimony in support of this statement.

"need[] to be taken in its whole. Whether individual line items would use the word 'Agreed', really, unless you agree to the entire offer, you're not agreeing really to anything in these proposals." (7/21/2011 (Kosturos) Tr. 109 (JAOC 138)).

43. Looking at the proposals as a whole, it is obvious that the parties "were very far apart throughout most of the period when [they] were negotiating" and had not reached an agreement until shortly before the terms were announced. (7/21/2011 (Kosturos) Tr. 97, 108, 112-13 (JAOC 135, 138, 139) (demonstrating that the parties were billions of dollars apart at the end of each confidentiality period), 135-36 (JAOC 145) ("We had come to a verbal agreement the night of March 11th.")).

44. In fact, during the two-year period of negotiations, the parties had walked away from positions that they had previously set forth, and even "reset[] the book ends" on proposals. (EC 120 (email from B. Kosturos to J. Bolin and V. Melwani, dated Nov. 30, 2009); 7/20/2011 (Bolin) Tr. 58-59, 68-70 (JAOC 79, 81-82); 7/21/2011 (Kosturos) Tr. 125-26 (JAOC 142-43)).

45. To add more complexity (and uncertainty) to the negotiations, "at some points in time, the negotiations were a two-way negotiation with JPMorgan. But [at] some points, it be[came a] three-way negotiation and, ultimately, became a four-way negotiation." (7/21/2011 (Kosturos) Tr. 97 (JAOC 135)). Indeed, the final Global Settlement Agreement involved not only the Debtors and JPMC, but also the WMB bondholders and the FDIC – parties who were not involved in (let alone had agreed to) any of the negotiations involving the term sheets at issue, and who had significant, multi-

billion dollar claims against the Estates. (7/21/2011 (Kosturos) Tr. 120-22 (JAOC 141-42)).

46. Given the lack of certainty surrounding the negotiations – including not only with regard to whether an agreement could be reached, but also under what terms and by whom – any "information" gleaned from the failed discussions would be so speculative in nature that it is immaterial as a matter of law. See, e.g., Klein, 186 F.3d at 342-43 (noting that a determination of materiality takes into account, inter alia, "the certainty of the information"). See also Rorech, 720 F. Supp. 2d at 411 ("speculative information" – something less than "the ultimate decision as to whether or not to actually issue a holding company tranche" – does not meet the standard for materiality); Shamrock Holdings, Inc. v. Polaroid Corp., 709 F. Supp. 1311, 1320 (D. Del. 1989) (finding that the status of settlement talks were not material because they "have the same potential to mislead as they do to help a shareholder make a considered decision").

C. Appaloosa Never Traded While in Possession of Material, Nonpublic Information

47. Moreover, Appaloosa was scrupulous in ensuring that it never had material, nonpublic information regarding the Debtors during the (relatively few) periods in which it made trades in the Debtors' securities, and that it conducted itself properly at all times. Each of the key time periods discussed during the Confirmation Hearing is summarized below:

i. Appaloosa Did Not Have Any Material, Nonpublic Information Prior to March 9, 2009

48. The uncontroverted evidence at the Hearing showed that the Debtors did not provide any nonpublic information to the Settlement Noteholders prior to March 9, 2009 – the date on which the Debtors entered into a confidentiality agreement with each of the Settlement Noteholders as well as with other stakeholders. (7/20/2011 (Bolin) Tr. 198 (JAOC 101); 7/21/2011 (Kosturos) Tr. 99-100 (JAOC 136)).

49. The Equity Committee focuses on a January 22, 2009 term sheet that was prepared by a different set of creditors, the "WMI Noteholders" (a group of approximately thirty-five holders of senior notes represented by White & Case). (EC 107 (email from B. Pfeiffer to V. Melwani, dated Feb. 25, 2009); 7/18/2011 (Gropper) Tr. 49 (JAOC 34); 7/20/2011 (Bolin) Tr. 113-14 (JAOC 89-90)).

50. As the evidence established, this term sheet was nothing but an overly aggressive "ask" by the White & Case group that was never taken seriously by any party and never went anywhere. (7/20/2011 (Bolin) Tr. 199 (JAOC 101)). And, while the term sheet was sent to the Debtors on January 29, 2009, there is no evidence that the Debtors commented to White & Case about the terms the WMI Noteholders had proposed, and if it did, Appaloosa certainly did not learn of any such response. (EC 7 (email from G. Balasingam to B. Rosen, dated Jan. 29, 2009); 7/21/2011 (Kosturos) Tr. 99-100 (JAOC 136)). In addition, there is no evidence that the term sheet was ever sent to JPMC or that JPMC ever responded to it.

51. Despite the fact that there clearly was nothing material about White & Case's one-sided term sheet, the Equity Committee asked questions at the Hearing regarding Appaloosa's January 23, 2009 and January 28, 2009 trades. These trades were completely proper and no party has made or could make any allegations to the contrary.

52. First and foremost, Appaloosa had no material, nonpublic information at the time – the evidence is uncontroverted that White & Case's term sheet was not material. Moreover, Appaloosa's trades in the PIERS on January 23 and January 28 were entirely consistent with Appaloosa's trading history in this time period.[5] (AOC 62 (showing that Appaloosa made a number of purchases in PIERS securities in early January 2009)). See generally Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1005 (9th Cir. 2009) (internal citations omitted) ("[T]rading is suspicious only when it is dramatically out of line with prior practices at times calculated to maximize the personal benefit from undisclosed inside information.").

53. More importantly, no court has ever held that a company outsider's own thoughts or ideas – without even a single significant corporate step by the company (here the Debtors) – can constitute material, nonpublic information that would trigger the "disclose or abstain from trading" rule, and the Court should not be the first to endorse such a theory. In fact, other courts that have reviewed somewhat analogous situations

[5] Other than its May 12, 2009 purchase of subordinated notes and its October 23, 2009 purchase of PIERS securities, Appaloosa acquired all of its holdings in WMI securities prior to entering into any confidentiality agreements with the Debtors. (AOC 62).

have concluded that such "ideas" are immaterial as a matter of law. See, e.g., L.L. Capital Partners v. Rockefeller Ctr. Props., Inc., 921 F. Supp. 1174, 1180-81 (S.D.N.Y. 1996) ("Here, the likelihood of a deal with Mitsubishi, given the existence only of RCP's desire to explore such a possibility, was so speculative that RCP's desire was immaterial as a matter of law irrespective of the unquestioned importance of such a transaction were it to have occurred."); In re General Motors Class E Stock Buyout Sec. Litig., 694 F. Supp. at 1127-28 (finding that the decision to pursue a merger was immaterial given that the decision was made solely by company management).

54. As in L.L. Capital Partners, the likelihood of a deal between the Debtors and JPMC being reached in January 2009, given the existence of only the WMI Noteholders' desire to explore such a possibility, was so speculative, it is clearly immaterial, and any arguments to the contrary should be rejected. L.L. Capital Partners, 921 F. Supp. at 1180-81.

ii. Appaloosa Did Not Trade in Securities of the Debtors During the First Confidentiality Period

55. On the evening of March 9, 2009, Appaloosa entered into the first of two confidentiality agreements with the Debtors. (EC 24 (Confidentiality Agreement between the Debtors and Appaloosa, dated March 9, 2009). Under the terms of the agreement, Appaloosa had a duty to maintain the confidentiality of all nonpublic information it received until May 8, 2009. (EC 24).

56. The Debtors, in turn, had a contractual obligation to disclose publicly at the end of the agreement all material, nonpublic information shared with

Appaloosa during the term of the agreement. (EC 24 at ¶ 13). Additionally, as the confidentiality agreement itself explicitly stated, the Debtors also had a legal obligation, pursuant to Regulation FD (Fair Disclosure) of the federal securities laws, to disclose all material, nonpublic information Appaloosa received. See 17 C.F.R. § 243.100-.103.

57. There is no dispute that during the first confidentiality period Appaloosa learned the Debtors' estimate of the first tax refund – approximately $2.6 - 3 billion. This was obviously a material fact, and it was disclosed to the public in the Debtors' Monthly Operating Report, filed on April 30, 2009, and also in the Debtors' Form 8-K, filed on the same date. (7/20/2011 (Bolin) Tr. 46-47 (JAOC 76); DX 427 (Form 8-K); AU 24 (March 2009 Monthly Operating Report)).

58. As Mr. Kosturos made clear, the Debtors determined, in consultation with their counsel at Weil, Gotshal & Manges LLP, that in disclosing its estimate of the tax refund through its filing of the Form 8-K and March 2009 Monthly Operating Report, all material, nonpublic information shared during the term of the confidentiality agreement was now in the public domain. (7/21/2011 (Kosturos) Tr. 115 (JAOC 140)). At that point, the Debtors had also determined that the Settlement Noteholders were free to do whatever they wanted, including trade in securities of the Debtors. (7/21/2011 (Kosturos) Tr. 153-54 (JAOC 148-49)). This was confirmed by the Debtors in writing at the time. (7/19/2011 (Krueger) Tr. 137 (JAOC 60); 7/20/2011 (Bolin) Tr. 71 (JAOC 82); EC 146 (email from G. Uzzi to D. Krueger, dated May 8, 2009)).

59. There is no dispute that Appaloosa did not trade in securities of the Debtors during the first confidentiality period, but instead waited until May 12, 2009 – nearly two weeks after the estimate had been publicly disclosed, and the Debtors had confirmed that all material, nonpublic information had been publicly disclosed – to purchase a relatively small amount of subordinated notes, and until May 20, 2009 to sell certain of its senior notes. (AOC 62; 7/20/2011 (Bolin) Tr. 52 (JAOC 77)).

60. Moreover, "[c]entral to the issue of materiality is 'whether the tipped information, if divulged to the public, would have been likely to affect the decision of potential buyers and sellers.'" Elkind, 635 F.2d at 166. As the evidence at the Hearing demonstrated, the negotiations in March failed, and no reasonable investor would have attached any significance to them.

61. The negotiations themselves were a "disaster." (7/20/2011 (Bolin) Tr. 55 (JAOC 78); 7/21/2011 (Kosturos) Tr. 105 (JAOC 137)). Far from reaching an agreement as to any terms, the negotiations resulted in JPMC filing an action against the Debtors on March 24, 2009 and the Debtors filing their own adversary proceeding against JPMC on April 27, 2009.[6] (DX 41 (Complaint filed by JPMC on Mar. 24, 2009 (D.I. 807)); DX 48 (Complaint for Turnover of Estate Property filed by Debtors on Apr. 27, 2009 (D.I. 960))).

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[6] Appaloosa was not aware until July 1, 2009 that the Debtors had engaged in another round of (failed) negotiations with JPMC in April 2009. (7/20/2011 (Bolin) Tr. 56-57 (JAOC 78); EC 215 (Summary Comparison of WMI and JPMC Term Sheets (stating "we understand that the term sheets have not been the subject of active negotiations since their exchange in April 2009"))).

62. Thus, as far as Appaloosa knew, "to the extent [settlement negotiations had] ever happened, they were clearly over and dead" by May 8, 2009. (7/20/2011 (Bolin) Tr. 52 (JAOC 77); 7/21/2011 (Kosturos) 110-111 (JAOC 139)).

63. It is, therefore, not surprising that Appaloosa (a sophisticated investor in the securities markets) attached no significance to the negotiations, and both bought and sold securities of the Debtors in May 2009.[7] (AOC 62). See Elkind, 635 F.2d at 166 (finding that an "indication of the lack of materiality may be found in the reaction of those who were exposed to the inside information").

64. It is also not surprising that the Debtors and their professionals independently concluded that the failed negotiations were not material to the investing public, and confirmed to Appaloosa that all material, nonpublic information had been disclosed. (7/20/2011 (Bolin) Tr. 53 (JAOC 77); 7/21/2011 (Kosturos) Tr. 128 (JAOC 143)).

65. The Debtors – who had no personal relationship with Appaloosa, and did not stand to benefit from any of Appaloosa's trades – had every reason to be conservative in this evaluation. (7/20/2011 (Bolin) Tr. 54 (JAOC 78)). After the termination of the confidentiality agreement, the Debtors were required by the federal securities laws to make public any material information that had been provided to

[7] The Equity Committee did not elicit the fact that Appaloosa also sold notes after the first confidentiality period ended, focusing solely on the May 12, 2009 purchase. This came out on redirect examination. (7/20/2011 (Bolin) Tr. 200 (JAOC 101)).

Appaloosa, and thus faced civil and regulatory exposure for making inadequate disclosures pursuant to Regulation FD. See 17 C.F.R. § 243.100-.103.

66. It was against this backdrop that Appaloosa removed its restriction in WMI securities and determined it was free to trade. Accordingly, Appaloosa's May 12, 2009 trade was entirely proper. See O'Hagan, 521 U.S. at 654-55.

iii. Appaloosa Did Not Have Material, Nonpublic Information – and in any Event, Did Not Trade in Securities of the Debtors – During its Discussions with JPMC in July - August 2009

67. After the first confidentiality period ended, Appaloosa was not involved in any settlement discussions until July 2009. At that time, Appaloosa and Centerbridge decided to approach JPMC to try "to find a common ground, [for] [w]hat ultimately could become the basis for . . . a settlement agreement." (7/20/2011 (Bolin) Tr. 54-55 (JAOC 78)).

68. Despite Appaloosa's best intentions, the settlement talks in the summer of 2009 among Appaloosa, Centerbridge and JPMC failed to result in an agreement. (7/20/2011 (Bolin) Tr. 58-59 (JAOC 79)).

69. The negotiations not only failed, but on September 2, 2009, JPMC refused to negotiate any further with Appaloosa and Centerbridge, and withdrew the proposal it had previously made in August. (7/20/2011 (Bolin) Tr. 59 (JAOC 79)). In fact, JPMC informed Appaloosa and Centerbridge that it "wanted to let the litigation go a couple of more rounds, and did not want to . . . have further discussions." (7/20/2011 (Bolin) Tr. 59 (JAOC 79)).

70. Significantly, even prior to JPMC withdrawing its offer on September 2, 2009, the parties were very far apart. (EC 14 (comparison of Appaloosa/Centerbridge 7/29/2009 proposal with JPMC 8/18/2009 proposal)). In an attempt at misdirection during the Hearing, the Equity Committee improperly suggested that this was not so – that there was only a five percentage point difference (which would still represent a $130 to $150 million difference) between JPMC and Appaloosa/Centerbridge on the first tax split, rather than the fifteen percentage point difference (which would represent a $390 to $450 million difference) reflected on the face of the term sheet. (7/20/2011 (Bolin) Tr. 135-36 (JAOC 93); EC 14). Mr. Bolin corrected the Equity Committee counsel's inaccurate suggestion:

> Q: What, the final deal was seventy/thirty; is that right, the March 26th?
>
> A: Well, the final deal didn't exist at that time. At that time all we had was the two proposals, and we're still a significant amount apart. So I disagree with the representation.

(7/20/2011 (Bolin) Tr. 135 (JAOC 93)).

71. Even after that exchange, Equity Committee counsel persisted with the line of questioning:

> Q: Far apart. The final deal in March 26, 2010 was seventy/thirty on the first tax split; is that right?
>
> A: The final deal did not exist in --
>
> Q: That's not my question.
>
> A: You know the tax plan -- I don't remember the final deal, but I'll take your word for it. But regardless, at this point, we were still far apart on those two points.

Q: Five percentage points?

A: No, we were a little further than that, fifteen percentage points.

(7/20/2011 (Bolin) Tr. 135-36 (JAOC 93) (emphasis added)).

72. The facts are clear: the parties were still very far apart, and the discussions collapsed on September 2. Any attempt to distort these facts in order to fit a flawed theory is improper.

73. In any event, Appaloosa did not trade in any securities of the Debtors during this entire period, from July through September 2009. This was one of the periods during which Appaloosa voluntarily refrained from trading despite possessing no material, nonpublic information. (AOC 62).

iv. Appaloosa Did Not Trade in Securities of the Debtors During the Second Confidentiality Period

74. Appaloosa entered into a second confidentiality agreement with the Debtors on November 16, 2009. (EC 37 (Confidentiality Agreement between the Debtors and Appaloosa, dated November 16, 2009)). The term of the second confidentiality agreement lasted from November 16, 2009 through December 30, 2009.[8] (EC 37; 7/21/2011 (Kosturos) Tr. 128-29 (JAOC 143)).

75. There is no dispute that during the second confidentiality period, Appaloosa learned the Debtors' estimate of the second tax refund – approximately $2.6-

[8] The confidentiality period was originally supposed to run from November 16, 2009 through December 31, 2009. At the request of one of the other Settlement Noteholders, and with the agreement of the Debtors, the second confidentiality agreement terminated on December 30, 2009. (7/21/2011 (Kosturos) Tr. 128-29 (JAOC 143)).

2.8 billion. This material fact was disclosed to the public in the Debtors' Form 8-K filing and its November 2009 Monthly Operating Report. (7/20/2011 (Bolin) Tr. 67 (JAOC 81); DX 428 (Form 8-K); AU 32 (November 2009 Monthly Operating Report)).

76. There is also no dispute that Appaloosa did not trade in securities of the Debtors during the term of the second confidentiality period. (AOC 62). Instead, Appaloosa waited until January 11, 2010 to make any trades, at which point it sold WMI senior and subordinated notes – an act wholly inconsistent with the Equity Committee's theory that the Settlement Noteholders bought up the Debtors' securities while in possession of materially positive information relating to a potential settlement.[9] (AOC 62).

77. Finally, there is no dispute that the Debtors were obligated to disclose all material, nonpublic information Appaloosa had received during the term of the second confidentiality agreement, and that prior to removing its restriction in WMI securities, the Debtors confirmed to Appaloosa that the Debtors had done so, and that Appaloosa was free to trade. (7/20/2011 (Bolin) Tr. 71-72 (JAOC 82); 7/21/2011

[9] An "indication of the lack of materiality may be found in the reaction of those who were exposed to the inside information." Elkind, 635 F.2d at 166. While the Equity Committee insinuates that the back-and-forth between the parties during the failed settlement talks was positive information, and that the parties were therefore buying up the Debtors' securities, Appaloosa sold securities of WMI after the conclusion of the confidentiality period. (AOC 62). Other Settlement Noteholders were both purchasing and selling securities of the Debtors at around the same time. The fact that parties to the discussions were trading in opposite directions demonstrates that the information in question was not viewed by reasonable investors as having "significantly altered the 'total mix' of information." Basic, 485 U.S. at 231-32.

(Kosturos) Tr. 128-29, 151 (JAOC 143, 148); 17 C.F.R. § 243.100-.103). Accordingly, Appaloosa acted appropriately with respect to the information it had been given during the second confidentiality period, and there are no allegations to the contrary. See O'Hagan, 521 U.S. at 654-55; Dirks, 463 U.S. at 665.

78. Moreover, the Debtors' determination that they had disclosed all material, nonpublic information through the filing of the November 2009 Monthly Operating Report and Form 8-K was both reasonable and consistent with the law, as there was nothing about the failed settlement discussions that would have been material to a reasonable investor.

79. Focusing on the facts as they existed at the time, the evidence at Confirmation showed that the parties were "very far apart" at the end of December, and that there was no certainty that negotiations would resume or "what the outcome was ultimately going to be." (7/20/2011 (Bolin) Tr. 70, 72 (JAOC 82); 7/21/2011 (Kosturos) Tr. 129 (JAOC 143)). Indeed, despite the Equity Committee's best efforts to gloss over this fact, the only thing that had become clear by December 2009 was that a settlement with the Debtors could not be reached unless the FDIC and the WMB bondholders were also on board. (7/20/2011 (Bolin) Tr. 72 (JAOC 82); 7/21/2011 (Kosturos) Tr. 129-30 (JAOC 143-44)).

80. Importantly, as far as Appaloosa was aware, the FDIC and WMB bondholders had never been consulted about the terms of a settlement during the second confidentiality period, let alone agreed to them. (7/20/2011 (Bolin) Tr. 70-71, 72 (JAOC 82)). If anything, the WMB bondholders had indicated that they were not interested in

reaching an agreement. As Mr. Kosturos testified, the WMB bondholders made clear to the Debtors in December 2009 that "it was their position that the FDIC receivership owned the second NOL . . . and that they were going to proceed with litigation [against the Debtors] . . . and . . . [had] begun lobbying in efforts to make sure that we are unable to get the second NOL ourselves." (7/21/2011 (Kosturos) Tr. 190 (JAOC 153)). And even by mid-January 2010, the Debtors still did not believe that they could reach a settlement with the WMB bondholders given "the numbers that they had discussed." (7/21/2011 (Kosturos) Tr. 131 (JAOC 144)).

81. It is therefore not surprising that all the parties involved in settlement discussions during the second confidentiality period made independent and contemporaneous determinations that the terms of settlement discussions previously proposed were immaterial, and need not be disclosed. (7/18/2011 (Gropper) Tr. 113-14 (JAOC 45-46); 7/19/2011 (Krueger) Tr. 142-43 (JAOC 62); 7/20/2011 (Bolin) Tr. 72-73 (JAOC 82); 7/20/2011 (Melwani) Tr. 252-53 (JAOC 113); 7/21/2011 (Kosturos) Tr. 128-29 (JAOC 143)).

v. Appaloosa Did Not Have Any Material, Nonpublic Information in the Winter of 2010, and in Any Event Did Not Trade in Securities of the Debtors until the Announcement of a Settlement on March 12, 2010

82. After the termination of the second confidentiality period, Appaloosa and the other Settlement Noteholders "had no involvement in the negotiations." (7/20/2011 (Bolin) Tr. 75 (JAOC 83); 7/21/2011 (Kosturos) Tr. 136 (JAOC 145)). In fact, the Debtors did not share any nonpublic information with the

Settlement Noteholders in January and February 2010. (7/20/2011 (Bolin) Tr. 74 (JAOC 83); 7/21/2011 (Kosturos) Tr. 130-32, 134 (JAOC 144, 145)).

83. However, despite the fact that Appaloosa did not receive any nonpublic information from the Debtors during this time period – let alone material, nonpublic information – Appaloosa voluntarily refrained from trading in February 2010 through the beginning of March 2010. (AOC 62). Appaloosa did so because it had inferred from a conversation with JPMC counsel that "discussions between the debtor[s], the FDIC and JPMorgan had gotten some traction," and therefore concluded that it was not "prudent" to trade. (7/20/2011 (Bolin) Tr. 73-74 (JAOC 82-83)). Accordingly, Appaloosa went beyond its obligations under the securities laws, and did not trade in any securities of the Debtors during this time. (AOC 62).

84. Appaloosa only resumed trading in securities of the Debtors after the Debtors had announced the terms of a settlement into the record on March 12, 2010, and after Appaloosa had confirmed that the announcement was disseminated on various newswires. (AOC 62; 7/20/2011 (Bolin) Tr. 76-77 (JAOC 83)).

85. Subsequently, on the evening of March 22, 2010, Appaloosa restricted itself from trading again. That evening, Appaloosa received an advance draft of the Debtors' disclosure statement, which contained the Debtors' view of the "waterfall" or subordination matrix for recoveries. (7/20/2011 (Bolin) Tr. 77 (JAOC 83)). Appaloosa immediately restricted trading in WMI securities upon receiving this draft, and did not remove the restriction until the Debtors filed the Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the "March 26,

2010 Plan"), and the Disclosure Statement for the Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the "March 26, 2010 Disclosure Statement") on March 26, 2010. (7/20/2011 (Bolin) Tr. 77-78 (JAOC 83-84); EC 299 (March 26, 2010 Disclosure Statement (D.I. 2623)); March 26, 2010 Plan of Reorganization (D.I. 2622)).

86. After the Debtors filed the March 26, 2010 Plan and March 26, 2010 Disclosure Statement, Appaloosa sold a small amount of preferred equity on March 29 and March 30. (AOC 62).

87. During the Hearing, the Equity Committee attempted to insinuate that the Debtors, in the March 26, 2010 filing, had not publicly disclosed the subordination matrix that Appaloosa had received on the evening of March 22, 2010. (7/20/2011 (Bolin) Tr. 150-51 (JAOC 95)).

88. Specifically, on cross-examination, the Equity Committee showed Mr. Bolin a copy of the March 26, 2010 Disclosure Statement, and directed him to Exhibit C of that Statement. Unlike the Waterfall Recovery Matrix (which is set forth in Exhibit H and reflects the subordination rights of each of the classes of creditors), Exhibit C of the Disclosure Statement is the Debtors' Liquidation Analysis. The purpose of the Liquidation Analysis is to "reflect[] the estimated Cash proceeds . . . that would be available to the Debtors' creditors if the Debtors were to be liquidated in a chapter 7 case," not to reflect the order of priorities in claims. (May 16, 2010 Disclosure Statement (D.I. 3745) at Ex. C-1).

89. Despite the fact that Exhibit C to the March 26, 2010 Disclosure Statement was not a waterfall recovery analysis, but rather a liquidation analysis, the following colloquy between Equity Committee counsel and Mr. Bolin ensued at the Hearing:

> Q: If you'd turn to the last page of the entire disclosure statement, Exhibit C.
>
> A: Yes.
>
> Q: Okay. So the waterfall wasn't published in the March 26 disclosure statement, was it?
>
> A: I believe there's an exhibit in this document that lists out the debtor's view of how principal on the senior notes, post-petition on the senior notes, post-petition interest on the senior subs, principal on the senior subs, and so forth ranks in order of priority.

(7/20/2011 (Bolin) Tr. 150-51 (JAOC 95)).

90. The Equity Committee chose not to show Mr. Bolin the exhibit to which he was referring (i.e., the waterfall recovery or subordination matrix). Instead, the Equity Committee directed him to the subsequent May 16, 2010 Disclosure Statement, and asked him to acknowledge that Exhibit C to that Disclosure Statement was "filled in now." (7/20/2011 (Bolin) Tr. 151-53 (JAOC 95)).

91. As the Equity Committee knew, however, Appaloosa never received an advance copy of the liquidation analysis that was to be reflected in Exhibit C of the March 26, 2010 Disclosure Statement, and the record is devoid of any evidence that it did. Instead, as Mr. Bolin had twice told the Equity Committee during the Hearing, it was "the subordination matrix and how the various claims would work from a

timing standpoint as money was distributed to the estate" – i.e., Exhibit H – that Appaloosa had received and determined to be material, nonpublic information. (7/21/2011 (Bolin) Tr. 147; 148-49 (JAOC 147) ("More specifically that the debtor's view of how the claims should rank in that waterfall was the material nonpublic information.")).

92. This is exactly what Mr. Goulding told the Equity Committee in his testimony the week before. Namely, that the documents Appaloosa and the other Settlement Noteholders received in March 2010 (EC 42-43 (email from J. Goulding to B. Scheler and attached waterfalls)), "are lead-ins to th[e] ultimate Exhibit G" of the Modified Sixth Amended Plan, which is the exact same waterfall recovery matrix that was contained in Exhibit H of the earlier March 26, 2010 filing – not the separate liquidation analysis contained in Exhibit C. (7/14/2011 (Goulding) Tr. 54-56 (JAOC 29)).

93. Thus, it became clear during redirect examination that the Debtors had in fact filed a copy of the subordination matrix on March 26, 2010:

> Q: [T]he point Mr. Ard was making was that on March 26th it appeared like the waterfall matrix wasn't filed with the plan disclosure statement, right?
>
> A: Yes.
>
> Q: And when you said you believed, I recall your testimony, you said you believed that, in fact, it was filed on March 26th, right?
>
> A: Yes.
>
> Q: Can you turn the page, one page. Do you see the chart that's listed here called waterfall recovery matrix as of 3/17/10?

A: Yes.

* * * *

Q: Is that what you were referring to when you said in response to Mr. Ard's questions that, "I think actually the waterfall was disclosed on March 26."

A: Yes, it was.

(7/20/2011 (Bolin) Tr. 192-93 (JAOC 99)).

94. After an interjection by the Equity Committee's counsel, the point was driven home even further:

Q: <u>[W]hatever exhibit it was, whatever exhibit [he] comes back and shows you later, the point is that the waterfall was disclosed on March 26th, right</u>?

A: <u>Yes</u>.

(7/20/2011 (Bolin) Tr. 193, 196 (JAOC 99, 100) (emphasis added)).

95. The Equity Committee's attempted misdirection backfired, and served only to expose its unsuccessful attempt to confuse the issue by showing the witness the wrong exhibit.

96. After the Debtors' filing of the March 26, 2010 Plan and the March 26, 2010 Disclosure Statement, Appaloosa sold shares of preferred equity on March 29 and March 30, 2010. (AOC 62). As a result of the Debtors' March 26 filings, on the dates of those sales the following facts were known to the investing public:

a. The Estate had approximately $7 billion in funds.[10] (EC 299 (D.I. 2623) at 1).

b. The allowable claims and interest through the PIERS totaled in excess of $7 billion. (EC 299 (D.I. 2623) at Ex. A-E; 7/20/2011 (Bolin) Tr. 194 (JAOC 100)).

c. Shares of preferred equity stock were ranked "junior to all senior and subordinated indebtedness of WMI," and thus "[b]ehind more than $7 billion of debt in the capital restructure." (EC 299 (D.I. 2623) at 27; 7/20/2011 (Bolin) Tr. 195 (JAOC 100)).

97. Thus, it was obvious to everyone following these proceedings that holders of preferred equity "were out of the money," and would likely receive no recovery. (EC 299 (D.I. 2623); 7/20/2011 (Bolin) Tr. 196 (JAOC 100)). As such, there

[10] Curiously, during re-cross examination, the Equity Committee showed Mr. Bolin a copy of the subsequent May 16, 2010 Disclosure Statement seemingly to suggest that, two months earlier, he knew that the Estates "actually" had $7.7 billion in funds. (7/20/2011 (Bolin) Tr. 196-97 (JAOC 100)). If that was the Equity Committee's suggestion, it has no good faith basis. Based on a review of the Disclosure Statements, it is clear that the Debtors' estimate of the available net proceeds in the Estates <u>increased</u> by at least $500 - $600 million between March 26, 2010 and May 16, 2010. <u>Compare</u> March 26, 2010 Disclosure Statement (EC 299 (D.I. 2623)) at 8 ("The Debtors currently estimate that their share of the total estimated Tax Refunds of $5.4 to $5.8 billion, will be approximately $1.8 to 2.0 billion) <u>with</u> May 16, 2010 Disclosure Statement (D.I. 3745) at 9 ("The Debtors currently estimate that their share of the total estimated Tax Refunds of $5.4 to $5.8 billion will be approximately $2.3 to 2.6 billion."). There is no evidence (in the form of testimony, documents or otherwise) to suggest that the Debtors had determined in March 2010 that the Estates had approximately $7.7 billion in assets, and certainly nothing to suggest anyone told Appaloosa that – to the contrary, if Appaloosa knew the Estates had approximately $700 million more in assets, it would have been illogical for Appaloosa to have <u>sold</u> shares of preferred equity if the additional assets would have provided any recovery to those shares.

was nothing inappropriate about Appaloosa's March 29, 2010 and March 30, 2010 sales, and any arguments to the contrary should be rejected. See Elkind, 635 F.2d at 166 (finding that the confirmation of facts that "were fairly obvious to all who followed the stock . . . cannot be deemed" to be material).

D. Appaloosa Acted In Good Faith

98. Scienter is a necessary element of insider trading. Aaron v. SEC, 446 U.S. 680, 691 (1980). The Supreme Court has defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). See also SEC v. Infinity Group Co., 212 F.3d 180, 192 (3d Cir. 2000).

99. The Equity Committee has not alleged that Appaloosa intended to "deceive, manipulate, or defraud" the Debtors or the Estates in connection with these proceedings. Nor can it. The undisputed evidence at Confirmation demonstrated that Appaloosa and the Debtors acted at arms-length and in good faith.

100. As the evidence showed, Appaloosa instituted a number of procedures to ensure that, at all times, it was acting appropriately and in compliance with the applicable laws. For instance, prior to receiving nonpublic information from the Debtors, Appaloosa entered into two confidentiality agreements that contractually obligated the Debtors to disclose all of the material, nonpublic information Appaloosa had learned by the end of each term. (EC 24, 37). In compliance with those agreements, Appaloosa did not trade during the pendency of the confidentiality periods, and only

resumed trading <u>after</u> it had confirmed with the Debtors that all the necessary public disclosures had been made. (7/20/2011 (Bolin) Tr. 53, 71 (JAOC 77, 82); AOC 62).

101. Additionally, the evidence further showed that, even during times when Appaloosa did not have a legal obligation to restrict itself from trading, it voluntarily refrained from trading out of an abundance of caution. (7/20/2011 (Bolin) Tr. 44-45, 59-60, 74, 102 (JAOC 75, 79, 83, 87); AOC 62).

102. Under these circumstances, it is clear that Appaloosa acted in good faith, and did not violate the securities laws or otherwise act inequitably.

103. Accordingly, the Equity Committee has not been able to establish the essential elements of insider trading – such as duty, deception, materiality, and scienter – and its claims of impropriety should be rejected.

II. Appaloosa Did Not Control or "Hijack" the Debtors' Reorganization

104. In its Objection, the Equity Committee argues that the Modified Sixth Amended Plan should be rejected because it was not negotiated in good faith. (EC Objection (D.I. 8192) at pp. 12-18). In support of this contention, the Equity Committee asserts that "the Settlement Note Holders dominated most of the negotiations that led to the Global Settlement Agreement and Plan," and "control[led] . . . two of the four members of the Creditors Committee." (<u>Id.</u> at ¶ 35). These assertions are flatly contradicted by the evidence and are entirely unsupported by fact and law.

105. Consistent with the Court's Opinion, the uncontroverted evidence at the Hearing showed that the Debtors controlled the reorganization, and that the parties to the Global Settlement Agreement negotiated at arms-length and in good faith.

(7/20/2011 (Bolin) Tr. at 80 (JAOC 84); 7/21/2011 (Kosturos) Tr. 137 (JAOC 145) (The Debtors "led the negotiations; the settlement noteholders did not.")). The fact that the Debtors included major creditors in these negotiations only bolsters – not detracts from – that finding.

106. As the Court is aware, the Debtors have an obligation to maximize value to the Estates, and as such, have an obligation to consider the interests and opinions of its major credit constituencies. See Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 573 (3d Cir. 2003) (en banc).

107. Appaloosa, as well as the other Settlement Noteholders, held substantial portions of debt in these cases, as well as substantial portions of preferred equity. (AU 8; AOC 19; AOC 62; AOC 54). Because of these holdings, the Settlement Noteholders had an interest in securing a plan of reorganization that would maximize distributions to creditors and equity holders, and had an interest in expressing those views forcefully. (7/20/2011 (Bolin) Tr. 80 (JAOC 84)). There is nothing inequitable about such form of advocacy.

108. In fact, almost every group of creditors in these proceedings tried to advocate for their position and negotiate a favorable settlement. (7/21/2011 (Kosturos) Tr. 158 (JAOC 150) ("[B]ut let's not limit it to that because we certainly got a lot of input from a lot of other creditors. So there were settlement noteholders who certainly voiced their opinion regularly. There w[ere] a lot of people throughout this case who have always [voiced their opinion] – and quite frankly, I think that's very typical [of] [w]hat you might see in many other Chapter 11s"); 7/20/2011 (Bolin) Tr. 79 (JAOC 84)

(“virtually ever[y] distressed debt firm has had a significant position in the claims of WMI,” and each (either individually or as a group) advocated for its position)).

109. Indeed, the earliest term sheet distributed in these cases was authored by the White & Case group of WMI Noteholders – approximately 35 creditors who held substantial portions of senior bonds in these cases. (7/18/2011 (Gropper) Tr. 49 (JAOC 34); 7/20/2011 (Bolin) Tr. 113 (JAOC 89)). And, like Appaloosa, members of the WMI Noteholders group participated in negotiations during the first confidentiality period (7/18/2011 (Gropper) Tr. 51 (JAOC 35)), and counsel for the WMI Noteholders (White & Case) met with the Debtors regarding the Global Settlement Agreement. (See, e.g., May 4, 2010 time entry by B. Rosen noting a 3.1 hour “meeting with Committee, White & Case, Fried Frank re: Settlement Agreement/Plan,” EC 310 (D.I. 5104) (Eighteenth Monthly Application for Weil, Gotshal & Manges LLP, as Attorneys for the Debtors, for Allowance of Compensation for Professional Services Rendered)).

110. Similarly, in the summer of 2009, Paulson & Co., a hedge fund that held a significant amount of senior notes, along with “a couple other noteholders” engaged in negotiations with JPMC and the WMB bondholders. (7/21/2011 (Kosturos) Tr. 119-20 (JAOC 141)).

111. Thus, as is evident from what occurred in this bankruptcy, as well as countless others, there is nothing unusual or suspicious about major debt holders participating in settlement negotiations in a bankruptcy proceeding, and certainly nothing to suggest bad faith. (7/21/2011 (Kosturos) Tr. 158 (JAOC 150)).

112. Moreover, there is nothing about the nature of this type of participation that suggests control or domination. As the evidence showed, the Debtors did not include Appaloosa or any of the other major creditors in all aspects of the negotiations. (7/21/2011 (Kosturos) Tr. 132 (JAOC 144) ("There were many meetings throughout this case where we didn't tell the noteholders or anybody in this case what the debtor was doing. So we found it under no obligation to let people know what the debtor was doing.")).

113. Even during periods in which Appaloosa was under a confidentiality agreement with the Debtors, it did not receive unfettered access to the Debtors' information. For example, during the first confidentiality period, certain creditors (including the Settlement Noteholders) tried to obtain more detailed financial information from the Debtors, and the Debtors refused to disclose it. (7/21/2011 (Kosturos) Tr. 104 (JAOC 137)). Additionally, the Debtors did not inform the Settlement Noteholders that they had continued negotiations with JPMC in April 2009. (7/20/2011 (Bolin) Tr. 56-57 (JAOC 78); 7/21/2011 (Melwani) Tr. 31 (JAOC 127)).

114. Notably, at the most critical point of the negotiations – the period leading to the Global Settlement Agreement – Appaloosa and the other Settlement Noteholders played no role "whatsoever." (7/21/2011 (Kosturos) Tr. 96 (JAOC 135)). Instead, the Debtors spearheaded the negotiations with the involvement of the Creditors' Committee, JPMC, the FDIC and certain senior WMB bondholders. (7/21/2011 (Kosturos) Tr. 131, 135 (JAOC 144, 145)).

115. Thus, far from "engineer[ing]" the Plan, (EC Objection (D.I. 8192) at pp. 1-2), the "global settlement agreement was struck between the debtor, the FDIC, and JPMorgan, and it was handed to [Appaloosa] as a fait accompli." (7/20/2011 (Bolin) Tr. 80 (JAOC 84)). Indeed, when the deal was handed to Appaloosa, it was specifically informed: "You can talk about it, you can comment on it, you can try to negotiate at the edges, but this is the deal, you can take it or leave it." (7/20/2011 (Bolin) Tr. 80 (JAOC 84)).

116. Thus, there is no merit to the Equity Committee's trumped-up tale of "hijack" and "control." (EC Objection (D.I. 8192) pp. 1-2, ¶ 7).

117. Finally, there is no support for the Equity Committee's argument that Appaloosa or anyone else "robbed the Creditor's Committee of its watchdog function." (EC Objection (D.I. 8192) at ¶ 35). The Equity Committee did not introduce a single piece of evidence showing the truth of this statement, and as the Court has undoubtedly observed, the Creditors' Committee has played an active and substantial role in every aspect of these proceedings, including in the negotiation of the Global Settlement Agreement and the Plan. (7/21/2011 (Kosturos) Tr. 158 (JAOC 150)).

118. In the end, the Plan is the result of extensive negotiations among multiple constituencies, including the Debtors, the Creditors' Committee, JPMC, the FDIC, the WMB bondholders and the Settlement Noteholders. It is therefore "naïve" to think that the Global Settlement Agreement was "engineered" to favor Appaloosa or anybody else. (7/20/2011 (Bolin) Tr. 79-80 (JAOC 84)). The Equity Committee's argument that the Settlement Noteholders dominated the process is frivolous.

CONCLUSION

119. For the reasons stated above, Appaloosa respectfully requests that this Court overrule the Objection of the Equity Committee to Confirmation of the Modified Sixth Amended Plan of Reorganization.

Dated: August 10, 2011

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