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: August 24, 2011 at 9:30 a.m. (ET) (if necessary)**

OWL CREEK ASSET MANAGEMENT, L.P.'S POST-CONFIRMATION HEARING MEMORANDUM SUPPORTING CONFIRMATION OF THE MODIFIED SIXTH AMENDED PLAN OF REORGANIZATION

Wilmington, Delaware
Dated: August 10, 2011

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- and -

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Suite 2500, Seattle, Washington 98104.

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Owl Creek Asset Management, L.P., on behalf of the funds it manages or advises (collectively, "Owl Creek"), by and through its undersigned counsel, respectfully submits this Post-Confirmation Hearing Memorandum Supporting Confirmation of the Modified Sixth Amended Plan of Reorganization.

INTRODUCTION

After taking extensive discovery, the Official Committee of Equity Security Holders (the "EC") filed an objection to the plan of reorganization in which it made no claim that Owl Creek traded in securities of Washington Mutual, Inc. ("WMI") while in the possession of material nonpublic information."[1] Owl Creek noted in its response to the EC's Objection that no such allegation was made,[2] and the EC has not disputed that. Moreover, shortly before the confirmation hearing commenced, the EC filed a motion seeking standing to bring equitable disallowance claims against two other "Settlement Note Holders" ("SNH")[3] based on purported insider trading, but not against Owl Creek.

As such, the confirmation hearing proceeded with no claim of insider trading against Owl Creek having been made, much less any particularization of such a claim that would have provided appropriate notice, and it would be late in the day indeed for the EC to attempt now to make that claim after the fact. Indeed, in the EC's description of its position as recently as August 3—subsequent to the hearing—the EC referred to its objection as involving insider

[1] *See* Objection of the Official Committee of Equity Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization [D.I. 8073] (the "EC Objection").

[2] *See* Owl Creek Asset Management, L.P.'s Response to the Objection of the Official Committee of Equity Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization [D.I. 8132] ("Owl Creek's Response to the EC Objection") ¶ 2.

[3] SNH refers to Owl Creek, Aurelius Capital Management LP ("Aurelius"), Appaloosa Management L.P. ("Appaloosa") and Centerbridge Partners, L.P. ("Centerbridge"). The SNH label has no significance beyond the fact that the SNH each signed a version of the global settlement agreement and the EC took Rule 2004 discovery from each of them. As reflected herein, the SNH did not act as an indivisible unit, as the EC attempts to suggest, and were even part of different ad hoc creditor groups represented by different counsel for much of the time.

trading claims only "with respect to certain of the Settlement Note Holders."[4] Given the evidence adduced at the hearing and fundamental legal principles, there would be no basis whatsoever for a claim of insider trading against Owl Creek. However, in light of the seriousness of the issue and the fact that Owl Creek will not be receiving the EC's post-hearing written submission prior to the filing of this submission, Owl Creek addresses the insider trading issue herein, as well as the EC's claim that the SNH "hijacked" the settlement process.

First, as set forth below and in Owl Creek's Response to the EC Objection, Owl Creek did not have a duty to refrain from trading under the federal securities laws except during the periods covered by confidentiality agreements it executed in March and November of 2009, and it is undisputed that Owl Creek did not trade in WMI securities during those periods.

Second, even outside of those periods, Owl Creek never traded while in possession of material nonpublic information. None of the settlement proposals that the EC suggests constituted material nonpublic information was even in the ballpark of materiality. The record flatly contradicts the EC's suggestion that term sheets seen by Owl Creek provided it with inside information that a settlement was imminent, or even likely, much less did they indicate what any such settlement ultimately would be. During the periods when Owl Creek traded in WMI securities, the term sheets of which it was aware were ancient history, having been "dead upon arrival" and followed by litigation, met with counteroffers that had "reset the bookends," or otherwise failed to result in a deal among all of the relevant parties. Nor is there anything in Owl Creek's trading to suggest that Owl Creek thought that any of the information it had was material. Moreover, the SNH traded differently while in possession of the same allegedly

[4] Application to Employ/Retain Frank Partnoy as Securities Litigation Consultant Filed by Official Committee of Equity Holders [D.I. 8379], ¶ 6.

material nonpublic information, further belying any claim that Owl Creek or any of the other SNH had any material nonpublic information.

The record also makes clear that Owl Creek took significant measures to avoid trading while in the possession of material nonpublic information. Among other things, Owl Creek (i) maintained detailed policies and procedures with respect to insider trading; (ii) regularly trained its employees with respect to the insider trading policies; (iii) periodically restricted its trading in WMI securities, including during the periods of the March and November, 2009 confidentiality agreements; and afterwards when it received drafts of plans or disclosure statements; (iv) required the Debtors to disclose any material nonpublic information provided under the confidentiality agreements upon termination of the agreements; (v) sought and received confirmation from the Debtors that all such material nonpublic information had been publicly disclosed before trading; (vi) considered internally whether it had any material nonpublic information before trading in WMI securities; and (vii) made requests to its own counsel and Debtors' counsel to exclude material nonpublic information from any discussions at times when it was trading.

In short, to the extent the EC attempts to claim belatedly in its post-hearing submission that Owl Creek engaged in insider trading, it will be making those very serious allegations on a record that does not offer any support for such a claim—and despite the unequivocal conclusion reached by both the Debtors and the Official Committee of Unsecured Creditors ("Creditors' Committee") that neither Owl Creek nor any of the other SNH engaged in insider trading.

The evidentiary record also squarely refutes the EC's allegations that Owl Creek and the other SNH dominated and controlled the Debtors so as to "hijack" the settlement

negotiations. Owl Creek's and the other SNH's involvement in settlement discussions represents typical behavior of creditors with significant holdings and, if anything, enhanced the recovery of the Debtors' estates. Indeed, this Court has already concluded that the settlement process in these cases was proper in determining that the global settlement agreement is "fair and reasonable." *In re Washington Mutual, Inc*., 442 B.R. 314, 322 (Bankr. D. Del. 2011). The record also makes clear that the Debtors frequently engaged in settlement negotiations of which the SNH either were never aware, or learned of only later. The Debtors did not abdicate their role in this process, they embraced it.

In addition, the record reflects that the SNH did not act as a monolithic group. Indeed, the label "Settlement Note Holders" itself merely refers to the fact that the four creditors it describes became signatories to the global settlement agreement (as did others) late in the process, after March 2010. Before that time, there was no SNH group and indeed, for much of the time, these four creditors were represented by different counsel. The four creditors had different levels of involvement in settlement discussions at different times, and often were not aware of what each other was doing. Owl Creek had limited involvement in settlement negotiations. For example, it did not participate in the efforts of some of the other SNH to engage JPMorgan Chase Bank, N.A. ("JPMC") in the summer of 2009, and never met with JPMC at any time. The fact that the SNH plainly did not act as an indivisible unit makes clear that they did not conspire to "hijack" the settlement process, and that any claims of insider trading must be considered separately for each SNH. As discussed below, there is no basis whatsoever to conclude that Owl Creek engaged in improper trading, or hijacked the settlement process.

THE LAW OF INSIDER TRADING

To the extent any allegations of insider trading are made against Owl Creek in the EC's post-hearing submission and are considered by the Court, they should be analyzed through the lens of well-established federal securities law. The federal securities law has extensively developed the principles governing when it is appropriate to trade, and the SNH were entitled to rely on them. Conduct that was fully compliant with those laws should not be deemed inequitable in the bankruptcy context.

The prohibition of insider trading under federal securities law is predicated on Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act")[5] and SEC Rule 10b-5 promulgated thereunder.[6] Under well-established case law, a person violates those provisions if he or she trades in a security on the basis of material nonpublic information in breach of a duty. *See Dirks v. SEC*, 463 U.S. 646, 657-58, 663 (1983); *Chiarella v. United States*, 445 U.S. 222, 227-30 (1980). Thus, for the EC to establish insider trading, it must show that Owl Creek traded in WMI securities: (1) in breach of a duty; and (2) on the basis of material nonpublic information.

The Breach Of Duty Requirement

The classical theory of insider trading prohibits corporate insiders from trading while in possession of material nonpublic information because those insiders—*i.e.*, officers, directors and others who act on behalf of the company—owe a fiduciary duty of undivided

[5] Section 10(b) of the Exchange Act provides: It shall be unlawful for any person, directly or indirectly, . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe. 15 U.S.C. § 78j(b) (2006).

[6] Rule 10b-5 states: It shall be unlawful for any person, directly or indirectly, . . . (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit a material fact necessary in order to make the statements made, in light of the circumstances . . . , not misleading or (c) To engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5.

loyalty to all the company's shareholders. *See Chiarella*, 445 U.S. at 227-28 (1980). An insider who trades on the basis of material nonpublic information breaches that duty by unfairly using such secret information to take advantage of other, less informed, shareholders. *See id.* at 228-29. Accordingly, an insider in possession of such information has a "duty to disclose or abstain." *See Deutschman v. Beneficial Corp.*, 841 F.2d 502, 506 (3d Cir. 1988) (citing *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968)).

In addition to prohibiting corporate insiders from trading on the basis of material nonpublic information about their companies, the courts have developed a "misappropriation theory" of insider trading, which applies to a non-insider who "misappropriates material nonpublic information in breach of a fiduciary duty or similar relationship of trust and confidence and uses that information in a securities transaction." *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991); *see also, United States v. O'Hagan*, 521 U.S. 642, 652 (1997) (under the misappropriation theory, one violates securities laws when "he misappropriates confidential information for securities trading purposes, in breach of a fiduciary duty owed to the source of the information").

Under the misappropriation theory, when one receives confidential information that is material from a person to whom one is duty-bound not to use that information, one cannot use that information in making trading decisions. *O'Hagan*, 521 U.S. at 652-53. The type of relationships that generally gives rise to insider trading liability under the misappropriation theory are "hornbook fiduciary relations. . . attorney and client, executor and heir, guardian and ward, principal and agent. . . ." *Chestman*, 947 F.2d at 568.

In addition, insider trading liability can arise under the misappropriation theory when a party enters into an express agreement not to trade on the basis of material nonpublic

information in consideration for receiving such information. *See, e.g., SEC v. Lyon*, 605 F. Supp. 2d 531 (S.D.N.Y. 2009) (purchase agreement containing requirements to use information contained therein for sole purpose of evaluating investment can establish predicate duty for application of misappropriation theory); *SEC v. Northern*, 598 F. Supp. 2d 167 (D. Mass. 2009) (contract providing a corporate outsider access to confidential information may be sufficient to create a duty from which misappropriation liability may arise). Because the duty arises purely from the parties' agreement, the insider trading laws would prohibit the recipient of the information from trading only during the period that the agreement is in effect.

Thus, in order to establish that Owl Creek engaged in insider trading, the EC must prove as a threshold matter that Owl Creek was either an insider or that it misappropriated information that it was under a duty not to use at the time that it traded. Owl Creek clearly was not an insider. *See Tse v. Ventana Medical Sys., Inc*., No. C.A. 97-37-SLR, 1998 WL 743668, at *8 (D. Del. Sept. 23, 1998) (insiders traditionally include officers, directors, or controlling stockholders). As set forth in detail in Owl Creek's Response to the EC Objection, Owl Creek also was not a "temporary insider" of the Debtors as a result of its involvement in these Chapter 11 cases, nor did it owe any other type of fiduciary duty. *See* Owl Creek's Response to the EC Objection at 11-18. Indeed, as Owl Creek noted therein, this Court has already concluded that, "[t]he Settlement Noteholders [including Owl Creek] were not acting in this case in any fiduciary capacity; their actions were taken solely on their own behalf, not others." *In re Washington Mutual, Inc*., 442 B.R. 314, 349 (Bankr. D. Del. 2011).

Here, the only source of a duty to refrain from trading while in possession of material nonpublic information arose from, and was defined by, the March and November, 2009 Confidentiality Agreements (collectively, the "Confidentiality Agreements"), in which Owl

Creek agreed to "use Confidential Information only for the purpose of participating in the [Chapter 11 Cases]." Because that duty arose from the Confidentiality Agreements, it was coextensive with the terms of those agreements, not perpetual. *See Spa Time, Inc. v. Bally Total Fitness Corp.*, 28 Fed. App'x 131 (3d Cir. 2002) (unpublished disposition) (affirming lower court's finding that parties' awareness of limited nature of the parties' relationship belied any intention that agreement would be perpetual). In addition, as more fully described herein, the Confidentiality Agreements required the Debtors to disclose any material nonpublic information that had been provided during the terms of the agreements.

As described herein, Owl Creek had no continuing duty under the Confidentiality Agreements once they terminated. Thus, when the Confidentiality Agreements terminated, so did any duty with respect to the information Owl Creek received. *See Hinnant v. American Ingenuity, LLC*, 554 F. Supp. 2d 576, 583 (E.D. Pa. 2008) ("'[C]ontractual obligations will cease, in the ordinary course, upon termination of the [contract].'") (*quoting Litton Fin. Printing Div. v. Nat'l Labor Relations Bd.*, 501 U.S. 190, 207-08 (1991)). It is undisputed that Owl Creek did not trade in any WMI securities during the terms of the Confidentiality Agreements (*i.e.*, between March 9 and May 8, 2009 and between November 16 and December 30, 2009), the only periods during which Owl Creek owed the Debtors a duty. For that reason alone, any claim that Owl Creek engaged in insider trading is without merit.

The Materiality Requirement

In addition to requiring breach of a duty, a violation of the insider trading laws would require that the trading be based on material nonpublic information. Information is material only if "there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest]." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). The materiality of contingent events "'will depend at any given time upon a balancing of both

the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" *Id*. at 238 (quoting *SEC v. Tex. Gulf Sulphur Co*., 401 F.2d 833, 849 (2d Cir. 1968)). The probability of uncertain events is central to the analysis of their materiality because reasonable investors will "base trading decisions only on information that [is] at least moderately definite and reliable." *United States v. Heron*, 525 F. Supp. 2d 729, 735 (E.D. Pa. 2007), *rev'd on other grounds*, 323 Fed. App'x 150 (3d Cir. Apr. 2, 2009) (unpublished disposition); *see also In re Craftmatic Sec. Litig.*, 890 F.2d 628 (3d Cir. 1989) (affirming district court's conclusion that the omitted predictions in the company's prospectus would have been sufficiently speculative and unreliable to be immaterial as a matter of law)*; see also Gay v. Axline*, 23 F.3d 394 (1st Cir. 1994) (unpublished opinion) (holding discussions regarding contract for significant product sale nevertheless immaterial due to the contract's extremely uncertain and contingent status).

Furthermore, material information may become immaterial if it becomes "stale" due to age or its inability to be relied upon by the market. *Ross v. A. H. Robins Co.*, 465 F. Supp. 904, 908 (S.D.N.Y. 1979), *rev'd on other grounds*, 607 F.2d 545 (2d Cir. 1979); *see also In re Kidder Peabody Sec. Lit.*, 1995 WL 590624 (S.D.N.Y. Oct. 4, 1995) (holding that stale information is not material as a matter of law); *Rand v. Cullinet Software, Inc*., 847 F.Supp. 200 (D. Mass. 1994) (holding that statements made about sales prospects may have been important for some period of time but became stale and immaterial when information entered the market reflecting the outcome of sales prospects). The materiality of the information is determined as of the date of the commitment to purchase or sell the securities, not the date on which the trader received the information. *See Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 890-91 (2d Cir. 1972).

The description of materiality in Owl Creek's insider trading policies is consistent with the case law, and states that "[i]nformation is material where there is a substantial likelihood that a reasonable investor would consider that information important in making his or her investment decisions." AOC 014.[7] The policies further state that "[m]aterial information often relates to a company's financial results and operations, including, for example, dividend changes, earnings results, changes in previously released earnings estimates, significant merger or acquisition proposals or agreements, major litigation, liquidity problems, and extraordinary management developments." *Id*.

It is far more likely that a merger or acquisition proposal, especially if "significant" as provided in the Owl Creek policy, would be material than would a term sheet exchanged in the bankruptcy context. Whereas a merger or acquisition represents a uniquely critical event in a company's history, settlement proposals involving the input of creditors arise as a necessary and ordinary component of bankruptcy cases. To hold that the exchange of settlement term sheets in bankruptcy cases are material absent some clear indication that an agreement in principle has been reached, or virtually reached, by all major parties in interest would chill creditor participation in the bankruptcy process and undermine bankruptcy's emphasis on the resolution of cases in a consensual manner. That is particularly so here, where there were major differences in the parties' positions reflected in the term sheets that the EC claims are material. At no point did Owl Creek trade while in possession of any material nonpublic information.

[7] The exhibits admitted into evidence at the confirmation hearing have been designated as follows: "AOC"-designations refer to exhibits jointly designated by Appaloosa, Centerbridge, and Owl Creek; "AU"-designations refer to exhibits designated by Aurelius; "DX"-designations refer to exhibits designated by the Debtors; and "EC"-designations refer to exhibits designated by the Equity Committee.

While the EC's Objection insists that "[t]he materiality of the term sheets . . . cannot be gainsaid," it cited no case law to support that proposition. EC Objection ¶ 45. And while the EC does cite *No. 84 Employer Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 935 (9th Cir. 2003) for the proposition that "courts have found that facts about the settlement of a litigation can be material within the meaning of Rule 10b-5," that proposition is as unremarkable inasmuch as the facts of that case do not resemble those here. *Id.* The *No. 84 Employer Teamster Joint Council Pension Trust Fund* case did not concern term sheets or settlement proposals. Rather, it dealt with an insider who traded with knowledge of negotiations with the FAA regarding serious safety violations while at the same time issuing knowingly false statements about the negotiations and the effect a settlement with the FAA would have on the airline.

Significantly, the EC did not offer an expert for the proposition that the information that it suggests was material would, in fact, have influenced the market, as is commonly done in securities cases. *See* Alan R. Bromberg & Lewis D. Lowenfels, Bromberg & Lowenfels on Securities Fraud & Commodities Fraud § 6:159 (2011) ("Experts, e.g., broker-dealers, analysts, market makers or stock exchange specialists, should be able to testify that the information would have had a substantial effect on the market price or that reasonable investors would have considered it important."); Michael J. Kaufman, Expert Witnesses: Securities Cases § 1:23 (2010) ("[A] professional investor with tremendous experience in making investment decisions in the relevant market could opine on what is likely to be considered by a 'reasonable' investor in making such decisions."). Indeed, the EC offered no affirmative evidence whatsoever with respect to materiality, much less expert testimony.

IN RE CORAM HEALTHCARE CORP.

The Equity Committee suggests that this Court's holding in *In re Coram Healthcare Corp.*, 315 B.R. 321 (Bankr. D. Del. 2004) supports its position that the claims held by the SNH should accrue interest at the federal judgment rate rather than the contract rate of interest. It does not. In *Coram*, this Court found that an undisclosed consultation agreement between the debtors' chief executive officer and the debtors' largest creditor "created an actual conflict of interest that tainted the debtors' restructuring of its debt, the debtors' negotiation of a plan, and the debtors' ultimate emergence from bankruptcy." *Id*. at 346. This Court further found that the debtors' chief executive officer advanced the interests of this creditor over the interests of the estate. *Id.* at 347. Finally, this Court noted that notwithstanding the Court's conclusions regarding these significant conflicts of interest at the first confirmation hearing, the conflicts of interest were not addressed and were still present and problematic at the second confirmation hearing. In summarizing its decision, this Court found that "[a]s a result of these peculiar facts, we conclude that allowing the noteholders to accrue post-petition interest would not be fair and equitable." *Id*.

As discussed below, the evidence presented at the hearing in these cases makes clear that neither Owl Creek nor any or the other SNH engaged in any conduct of this sort. What the evidence does show is that the SNH sought to contribute constructively to the resolution of one of the largest bankruptcy cases in U.S. history. In this Court's opinion denying confirmation of the Debtors' Plan, the Court noted that "[i]n this case the Court does not have enough evidence to conclude that there were conflicts of interests that tainted the reorganization process or other equitable reasons warranting payment at the federal judgment rate rather than the contract rate." *In re Washington Mutual, Inc*., 442 B.R. 314, 359 (Bankr. D. Del. 2011). After extensive discovery and a lengthy hearing, the EC still has adduced no such evidence. There is

no merit to the EC's claim that Owl Creek, or any of the other SNH, "hijacked" the settlement process. Owl Creek also scrupulously sought to adhere to the requirements of the securities laws, which set forth the rules governing securities trading in this country, and there is no basis whatever to claim that Owl Creek's—or any of the other SNH—somehow acted inequitably in this regard.

OWL CREEK DID NOT "HIJACK" THE SETTLEMENT NEGOTIATIONS OR ENGAGE IN IMPROPER TRADING

I. Owl Creek's Policies and Initial Investment in WMI Securities

A. Nature of Owl Creek's Business

Owl Creek manages and advises seven investment funds. 7/19/11 Hearing Tr. at 118:25-119:2 (Krueger) (JAOC 56).[8] The seven Owl Creek funds are divided into two fund families: the "flagship" fund family and the Asia fund family. *Id.* at 119:2-14 (JAOC 56). Owl Creek's flagship funds invest globally, and the Asia funds focus primarily, but not exclusively, on companies based in Asia. *Id.* at 119:4-14 (JAOC 56). Within each fund family, the funds are invested *pari passu*. *Id.* (JAOC 56). Owl Creek invests in securities across a company's capital structure, including both debt and equity. *Id.* at 118:5-7 (JAOC 56).

Owl Creek has approximately sixty employees, including both staff and investment professionals. *Id.* at 119:18-21 (JAOC 56). Its senior management consists of a portfolio manager and three assistant portfolio managers. *Id.* at 120:5-7 (JAOC 56). Owl Creek's portfolio manager, lead principal, and founder is Jeffrey Altman. *Id.* at 120:8-17 (JAOC 56). Daniel Krueger, who was called to testify at the confirmation hearing by Owl Creek and by the EC, was the person at Owl Creek principally involved in its investment in WMI securities.

[8] Citations to "Hearing Tr." herein refer to the transcripts of the confirmation hearing that took place July 13-21, 2011. Citations are further identified by the date of the hearing and the witness who offered the testimony. Relevant pages of the transcripts are included in the Joint Appendix of Appaloosa, Owl Creek and Centerbridge filed contemporaneously herewith ("JAOC").

Id. at 120:18-22 (JAOC 56). He is a managing director and one of the three assistant portfolio managers who, along with Mr. Altman, constitute Owl Creek's senior management. *Id.* at 115:25-116:2; 120:6-7 (JAOC 55-56). Mr. Krueger has worked at Owl Creek since it commenced operations in February 2002. *Id.* at 117:23-25 (JAOC 55). He earned his A.B. in Economics from Harvard College and his M.B.A. from Columbia Business School, where he is currently an adjunct professor teaching distressed debt investing. *Id.* at 117:3-12 (JAOC 55).

B. Owl Creek's Policies and Procedures Regarding Insider Trading

Owl Creek takes its legal obligations with respect to the insider trading laws very seriously, and maintains rigorous policies and procedures to ensure that it does not trade while in possession of material nonpublic information. *Id.* at 120:23-25 (JAOC 56). Among other things, Owl Creek's written policies and procedures—which were drafted in conjunction with its outside counsel and are updated approximately annually—prohibit Owl Creek's employees from (1) trading, either personally or on behalf of others (including on behalf of any funds managed by Owl Creek) while in possession of material nonpublic information, and (2) communicating material nonpublic information to others in violation of the law. *Id.* at 123:23-124:8 (JAOC 57); AOC 014. Employees who believe they may have access to material nonpublic information must immediately bring the issue to the attention of Owl Creek's Chief Operating Officer and General Counsel, who then decide what further actions are required. AOC 014.

Pursuant to its policies and procedures, Owl Creek's Chief Operating Officer and General Counsel maintain a "restricted list" of securities. 7/19/11 Hearing Tr. at 125:5-12 (Krueger) (JAOC 57); AOC 014. The restricted list contains securities in which Owl Creek has prohibited itself and its employees from trading. *Id.* at 125:13-14 (JAOC 57); AOC 014. Owl Creek's General Counsel immediately circulates the restricted list via email to each of the firm's employees whenever a security is added to the list, and a hard copy is distributed to each

employee shortly thereafter. *Id.* at 125:17-23 (JAOC 57). Securities may not be removed from the restricted list without the approval of both the Chief Operating Officer and the General Counsel. AOC 014.

Owl Creek also requires that all of its employees attend periodic training programs that address insider trading issues. For example, at least annually, Owl Creek's outside counsel conducts a seminar regarding Owl Creek's insider trading policies for all Owl Creek employees. 7/19/11 Hearing Tr. at 125:24-126:8 (Krueger) (JAOC 57-58). In addition, employees also must attend a mandatory annual compliance meeting at which insider trading issues are discussed. *Id.* at 126:8-10 (JAOC 58). Owl Creek has never been the subject of an investigation into insider trading by a regulatory agency or been charged with insider trading. *Id.* at 126:11-13 (JAOC 58).

C. Owl Creek's Decision to Invest in WMI Securities

Owl Creek made the initial decision to invest in WMI securities in late 2008, around the time that the Office of Thrift Supervision ("OTS") seized Washington Mutual Bank ("WMB"), WMI's wholly-owned subsidiary. *Id.* at 126:14-17 (JAOC 58). In the weeks leading up to the seizure of WMB, Owl Creek researched a possible investment in WMI, including a review of WMI's financial statements and other publicly-available documents. *Id.* at 126:21-22; 158:7-16 (JAOC 58, 66). When the OTS seized WMB and placed it in FDIC receivership, WMI's bond prices dropped and Owl Creek decided to invest. *Id.* at 126:23-127:1 (JAOC 58). Owl Creek's decision to do so was based solely on its analysis of publicly-available information. *Id.* at 127:2-4 (JAOC 58). Owl Creek has invested across WMI's corporate structure, owning senior bonds, subordinated bonds, junior subordinated debentures known as "PIERS," and WMI preferred stock. *Id.* at 127:5-8 (JAOC 58).

II. Owl Creek's Limited Involvement in Settlement Negotiations

A. January 2009: The White & Case Term Sheet

1. The Term Sheet Was Not Material Nonpublic Information

After Owl Creek made its initial investment in WMI securities, it joined an ad hoc group made up primarily of senior noteholders (the "White & Case Group") represented by White & Case LLP ("White & Case"). *Id.* at 160:1-4 (JAOC 66); 7/18/11 Hearing Tr. at 49:17-21 (Gropper) (JAOC 34). During the period Owl Creek was part of the White & Case Group, the group had between approximately twenty to thirty members. 7/18/11 Hearing Tr. at 49:6-9 (Gropper) (JAOC 34); 7/19/11 Hearing Tr. at 129:20-23 (Krueger) (JAOC 58). Appaloosa and Centerbridge, with whom Owl Creek purportedly has been acting in concert to hijack settlement negotiations, were never members of the White & Case Group.

In January 2009, White & Case prepared an initial settlement term sheet that its group would have been prepared to support (the "W&C Term Sheet"). EC 7; EC 107. On January 22, 2009, an attorney at White & Case, Gerald Uzzi, sent the W&C Term Sheet to an attorney at Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank") as well as to one of its clients. At that time, Fried Frank only represented Appaloosa and Centerbridge (clients represented by Fried Frank are referred to herein as the "Fried Frank Group"). EC 107. In his cover email, Mr. Uzzi summarized the W&C Term Sheet as follows:

1. WMI gets the deposits free and clear.
2. JPM gets the REIT Trust Preferreds free and clear.
3. JPM gets the pension assets free and clear.

4. WMI gets the first $2 billion of net tax refunds, the FDIC/JPM[9] gets the next $1 billion and we then share 50/50 any excess.

5. We share 50/50 the goodwill litigation.

6. We exchange mutual releases.

EC 107. In addition to sending the W&C Term Sheet to the Fried Frank Group, a member of the White & Case Group sent it to counsel for the Debtors on January 29, 2009. EC 7. There is no evidence that the W&C Term Sheet was ever sent to JPMC.

The W&C Term Sheet clearly did not constitute material nonpublic information. As Mr. Krueger testified, the term sheet was prepared by people who were "on the same side" of the negotiating table, and "to have an agreement amongst people who own the same bonds. . . is not material." 7/19/11 Hearing Tr. at 164:8-17 (Krueger) (JAOC 67). *Cf*. Donald C. Langevoort, *Insider Trading Regulation, Enforcement, and Prevention* § 1:12 (2011) ("First and foremost, the law is quite clear that a person can properly profit from *his own* private information . . . This is the reason, for example, that companies are allowed to buy stock in another even after they have formed a confidential plan to launch a tender offer for that company (at least up to the 5 percent threshold set, as an entirely separate matter, by Section 13(d) of the Securities Exchange Act). Unlawful trading comes when one uses *someone else's* information."). The W&C Term Sheet merely represented an initial position expressed by some creditors, before any negotiations with JPMC, or any other adverse parties, had even commenced.

The W&C Term Sheet also bore no resemblance to the terms of the settlement agreement announced in court on March 12, 2010 (the "March 12 Terms"), and the final settlement agreement, as set forth in the Sixth Amended Joint Plan (the "Approved GSA").

[9] The terms of the W&C Term Sheet itself actually provide for an allocation of the tax refund solely between WMI and the FDIC, noting that the FDIC would be free to allocate its portion of those refunds with JPMC as those parties may agree. *See* EC 7.

Among other things, the allocation of the tax refunds under the W&C Term Sheet is radically different from either the March 12 Terms or the Approved GSA, both in the amounts of the allocation and the parties participating in the allocation.[10] The W&C Term Sheet also differed significantly from the first settlement proposal Debtors' counsel and counsel for the various noteholders delivered to JPMC at the March 10, 2009 meeting. (*See infra* at p. 21)

2. Owl Creek's Trading in January 2009 Does Not Support a Claim that the White & Case Term Sheet Was Material

Owl Creek's trading pattern at the time the W&C Term Sheet was prepared and sent to the Fried Frank Group on January 22, 2009, and when it was sent to counsel for the Debtors on January 29, 2009, further belies any suggestion that the term sheet was material. *See S.E.C. v. Wyly*, __ F. Supp. 2d __, 2011 WL 1226381, at *18 (S.D.N.Y. 2011) (materiality determined in part by reviewing the nature of the trading that took place). Owl Creek's January 2009 trading records reflect a continuation of its 2008 trading pattern of purchasing WMI securities across the capital structure. AOC 018; AOC 019. Throughout January 2009, Owl Creek purchased senior notes, senior subordinated notes, and PIERS. AOC 018. During the week between the transmittal of the term sheet to the Fried Frank Group and the Debtors, Owl Creek continued the same practice of increasing the size of its position in WMI securities,

[10] Under the W&C Term Sheet, WMI would receive the first $2 billion in tax refunds, the FDIC would receive the next $1 billion in tax refunds, and any excess refunds would be divided equally between the two parties. EC 7. The Approved GSA allocated the tax refunds among *four* entities—WMI, JPMC, the FDIC, and WMB Bondholders. *See* Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, Exhibit H, [D.I. 5548]; EC 7. The March 12 Terms allocated the tax refunds between three entities: WMI, JPMC, and the FDIC. AOC 058. In addition, under the W&C Term Sheet, WMI would receive two-thirds of the first $3 billion of refunds and half of the remainder (the W&C Term Sheet did not even contemplate the availability of additional tax refunds arising from a change in the law), whereas under the March 12 terms and the Approved GSA, WMI would receive approximately $1.9 billion and $2.4 billion respectively (based on an approximation of the estimated tax refunds derived from the monthly operating reports, AU 24 and AU 32). AOC 058 at 20, 22; Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, Exhibit H, [D.I. 5548]; EC 7. Moreover, unlike the March 12 Terms and the Approved GSA, the W&C Term Sheet did not even deal with the Visa shares, rabbi trusts, BOLI/COLI policies and intellectual property. AOC 058 at 20, 22; Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, Exhibit H, [D.I. 5548]; EC 7.

purchasing senior notes in the same quantity that it had purchased those notes the previous week. *Id*. After January 29, 2009, when a member of the White & Case Group (not Owl Creek or Aurelius) sent the W&C Term Sheet to the Debtors, Owl Creek did not make any trades in WMI securities for almost a month, until February 25, 2009. *Id*.; EC 7.

Divergent trading patterns among the SNH during this period, all of which were aware of the W&C Term Sheet,[11] further disproves any notion that the W&C Term Sheet was material. Appaloosa sold WMI preferred stock on January 27, 2009, while Owl Creek purchased preferred stock on that day. AOC 018; AOC 062. Moreover, Centerbridge reduced its position in subordinated notes in late January as Owl Creek continued to purchase those notes. AOC 018; AOC 054.

B. The First Confidentiality Agreement Period: March 9, 2009-May 8, 2009

Owl Creek's first involvement in settlement negotiations occurred in March, 2009, when the Debtors invited the White & Case Group and other noteholders to a meeting on March 10, 2009 (the "March 10 Meeting") to explore potential settlement ideas with major constituencies, including the FDIC and JPMC. 7/18/11 Hearing Tr. at 51:3-8 (Gropper) (JAOC 35); 7/19/11 Hearing Tr. at 127:9-13 (Krueger) (JAOC 58).

1. The March Confidentiality Agreement

In advance of that meeting, on or about March 9, 2009, Owl Creek and the Debtors entered into a "Confidentiality Agreement (Limited) with Owl Creek Asset Management, L.P." (the "March Confidentiality Agreement"). EC 141. Appaloosa, Centerbridge, Aurelius, and other members of the White & Case Group entered into similar agreements. 7/18/11 Hearing Tr. at 55:13-19 (Gropper) (JAOC 36); AU 16; EC 24; EC 111.

[11] Aurelius personnel were copied on the transmittal email contained in EC 7 and Centerbridge and Appaloosa personnel were forwarded the term sheet, *see* EC 107.

Owl Creek understood that material nonpublic information might be conveyed during the March 10 Meeting, and entered into the March Confidentiality Agreement to make certain there was a mechanism in place whereby such information would eventually be disclosed to the public. 7/19/11 Hearing Tr. at 166:25-167:7 (Krueger) (JAOC 68). The agreement expressly required that, upon its termination, the Debtors disclose "within the meaning of Rule 101 of Regulation FD. . . a fair summary, as reasonably determined by the Debtors, of any Confidential Information that constitutes material nonpublic information under U.S. federal securities law." EC 141 ¶ 13.

Under the March Confidentiality Agreement, Owl Creek agreed that, during the period in which the agreement was in effect (the "March Confidentiality Period"), it would use all Confidential Information furnished by, or on behalf of, the Debtors for the sole purpose of participating in the Chapter 11 Cases. EC 141 ¶ 1 ("Participant agrees to use Confidential Information only for the purpose of participating in the Cases . . ."). Owl Creek placed WMI on its restricted list upon execution of the March Confidentiality Agreement and completely halted all trading in the Debtors' securities during the entire period covered by the agreement.[12] 7/19/11 Hearing Tr. at 128:24-129:1; 167:13-17 (Krueger) (JAOC 58, 68). There is no question that Owl Creek did not trade during the period of the March Confidentiality Agreement. AOC 018.

By its terms, the March Confidentiality Agreement was to end no later than sixty days after its execution, and there is no dispute that it terminated on May 8, 2009. EC 141 ¶ 13. The agreement expressly provided that none of its provisions would continue in effect after termination unless the agreement expressly so provided. *Id.* ("Other than any provision hereof

[12] In this regard, Owl Creek went beyond the requirements of the March Confidentiality Agreement, which only restricted trading on the basis of Confidential Information. *See* EC 141.

that by its terms survives termination, this Agreement shall remain in full force until the earlier to occur of . . .”). Neither the use restriction nor any other part of the agreement so provided. Accordingly, Owl Creek was under no obligation not to trade after the agreement terminated. That was confirmed by the Debtors’ representative, Mr. Kosturos:

> Q: Do you have an opinion—does the debtor have an opinion whether or not it would be a breach of the confidentiality agreement for the [SNH] to have traded based on the information that they learned during the pendency of the agreement?
>
> A: I believe that at the conclusion of the confidential period in agreements, the parties are free to do whatever they want to do, that the agreement is no longer in place.

7/21/11 Hearing Tr. at 152:25-153:7 (Kosturos) (JAOC 148).

2. March 10 Meeting

The March 10 Meeting was held at the offices of JPMC’s counsel, Sullivan & Cromwell LLP. *Id.* at 101:9-10 (JAOC 136); 7/18/11 Hearing Tr. at 64:25-65:1 (Gropper) (JAOC 37). The meeting was in no way dominated by the SNH. Not only were two of them in one group and two of them in another at this time, but numerous parties were also in attendance: the Debtors, the Creditors’ Committee, White & Case and four or five of its clients, Fried Frank, Appaloosa, Centerbridge, JPMC, and the FDIC. 7/19/11 Hearing Tr. at 129:19-25 (Krueger) (JAOC 58); 7/21/11 Hearing Tr. at 101:13-16 (Kosturos) (JAOC 136). During the meeting, Owl Creek did not have any face-to-face negotiations with JPMC or the FDIC, nor did it do so at any other point thereafter. 7/19/11 Hearing Tr. at 132:1-7; 183:14-18 (Krueger) (JAOC 59, 70A). Each of the groups had its own conference room, and the Debtors and their counsel shuttled between the rooms, having separate discussion with each of the constituent parties. *Id.* at 129:25-130:6 (JAOC 58-59); 7/21/11 Hearing Tr. at 102:22-103:11 (Kosturos) (JAOC 137).

Early in the day, the Debtors met with the White & Case constituents, the Fried Frank constituents, and the Creditors' Committee to discuss terms that might be included in an offer to be delivered to JPMC. 7/21/11 Hearing Tr. at 103:7-11 (Kosturos) (JAOC 137). As a starting point for the discussion, the Debtors distributed a term sheet containing blank spaces that they had prepared prior to the meeting. 7/19/11 Hearing Tr. at 130:14-131:25 (Krueger) (JAOC 59). During that session, the White & Case Group, the Fried Frank Group, and the Creditors' Committee organized a proposal to present to JPMC. 7/20/11 Hearing Tr. at 50:8-14 (Bolin) (JAOC 77); 7/21/11 Hearing Tr. at 103:22-104:7 (Kosturos) (JAOC 137). Although it was a somewhat more aggressive opening offer than the Debtors had initially intended to make, the group collectively agreed to deliver that proposal to JPMC. 7/21/11 Hearing Tr. at 103:22-104:7; 106:11-14 (Kosturos) (JAOC 137, 138). Given that the proposal was *more* favorable to the estates than what the Debtors initially planned to present, the EC hardly can complain.[13]

The group that conveyed the proposal to JPMC was made up of attorneys from White & Case and Fried Frank, a representative from the Creditors' Committee, the Debtors, and Debtors' counsel. *Id.* at 105:3-10 (JAOC 137); 7/18/11 Hearing Tr. at 66:16-20 (Gropper) (JAOC 38). The attorney from White & Case and the representative from the Creditors' Committee orally presented the offer to JPMC. 7/21/11 Hearing Tr. at 105:3-10 (Kosturos) (JAOC 137). As Mr. Kosturos testified, "it was very important that [the Debtors have] consensus with the unsecured creditors' committee and with the noteholders and the major creditors, that we were all on the same page and present that offer together." *Id*. at 106:14-17

[13] The EC also seeks to introduce testimony from the deposition of Travis Epes of JPMC (the "Epes Deposition") to suggest that the SNH were acting solely in their own interests during the course of settlement negotiations. *See* Joint Submission of the Official Committee of Equity Security Holders and JPMorgan Chase Bank, N.A. Concerning the Equity Committee's Oral Motion to Admit Designations from the Deposition of Travis Epes, [D.I. 8359]. Apart from the fact that designations from the Epes Deposition are not admissible for the reasons expressed in other papers filed with the Court, there obviously is nothing improper about parties seeking to maximize their own recovery. Doing so clearly enhances the value of the estate.

(JAOC 138). JPMC considered the offer briefly, rejected it, and excused the parties from the premises. *Id*. at 105:24-106:6 (JAOC 137-38).

3. March 11, 2009 Term Sheet

After the March 10 Meeting, Debtors' counsel memorialized in writing the offer that had been made orally to JPMC, and sent it to JPMC on March 12, 2009 (the "March 11 Term Sheet"). *Id*. at 106:18-22 (JAOC 138); EC 142; EC 143. Owl Creek received a copy of the March 11 Term Sheet on March 13, 2009, the day after it was transmitted to JPMC. EC 142; EC 143.

Among other things, the March 11 Term Sheet proposed that the Debtors were to receive the funds in certain deposit accounts (the "Deposit Accounts") and proceeds from certain pending litigation, assuming the parties agreed to an overall deal. Under the proposal, JPMC would receive certain Trust Preferred Securities, the Visa shares, and WMI intellectual property. EC 143. The March 11 Term Sheet also included proposals regarding tax refunds owed by state and federal taxing authorities (the "Tax Refunds"). *Id.* With respect to Tax Refunds already received, WMI proposed to retain them in their entirety. *Id.* As to anticipated Tax Refunds, WMI would be entitled to the first $500 million currently owed, with the remainder of the anticipated refunds to be split between WMI and JPMC 60/40 in favor of WMI. *Id.* If any additional tax refunds were to arise due to a change in law, WMI and JPMC would split those refunds 80/20 in favor of WMI.[14] *Id.*

On March 18, 2009, JPMC responded by emailing a four-page term sheet (the "March 18 JPMC Term Sheet") to the Debtors and the Creditors' Committee. EC 144; EC 145. Owl Creek received a copy of the March 18 JPMC Term Sheet from its counsel the following

[14] As further described below, WMI would have been entitled to additional tax refunds in the event that Congress revived certain legislation extending the carryback period from two to five years.

day, as did a number of other creditors. *Id*. The March 18 JPMC Term Sheet was a "slap in the face" to the Debtors and its creditors, and indicated to Owl Creek that JPMC was "not negotiating." 7/19/11 Hearing Tr. at 177:13-17 (Krueger) (JAOC 69). Significantly, JPMC refused to entertain any compromise on the issue of the Tax Refunds, the estates' largest potential asset. Whereas the Debtors had proposed an allocation of the Tax Refunds between themselves and JPMC, JPMC proposed that it take the Tax Refunds in their entirety. EC 145. Furthermore, although JPMC's term sheet provided for the transfer of the Deposit Accounts to WMI, even that transfer was qualified by significant caveats.[15]

The JPMC response left no doubt that the parties' views regarding what an eventual settlement should entail were "light years apart." 7/18/11 Hearing Tr. at 69:19-71:12 (Gropper) (JAOC 38-39). Every witness who testified about the subject matter of JPMC's response agreed that it was a non-starter. *See id*. at 68:24-25 (JAOC 38) ("I think at the time I referred to their response as the nonresponse response."); 7/19/11 Hearing Tr. at 135:9-11 (Krueger) (JAOC 60) ("[Y]ou see that their idea of a settlement was to take all of the tax refunds, which was obviously a nonstarter for us as creditors."); 7/20/11 Hearing Tr. at 51:12-14 (Bolin) (JAOC 77) ("[I]t was a petulant if not disingenuous proposal. They clearly were upset at the proposal they received. It was in effect a nose thumbing at the bond holders."); 7/20/11 Hearing Tr. at 237:18-19 (Melwani) (JAOC 109) ("[The parties] were very far apart. They were nowhere close to an agreement or common ground."); 7/21/11 Hearing Tr. at 108:18-19 (Kosturos) (JAOC 138) ("[T]hey [had a] poor offer delivered the following week.").

[15] JPMC agreed to turn over the deposits less the $250 million in tax refunds that had already been received. EC 145. Further, whereas the Debtors proposed that JPMC pay 25 basis points on the $4 billion in the Deposit Accounts, JPMC proposed that the interest would be due at "agreed upon rates." EC 145; 7/18/11 Hearing Tr. at 157:22-158:3 (Gropper) (JAOC 47-48).

Not surprisingly, after JPMC delivered its response on March 18, "negotiations kind of died." 7/18/11 Hearing Tr. at 72:17-19 (Gropper) (JAOC 39). To make matters worse, just six days later, on March 24, 2009, JPMC commenced an adversary proceeding (Adv. Case No. 09-50551) to determine the ownership of many of the assets involved in the settlement discussions, including the Deposit Accounts. 7/21/11 Hearing Tr. at 109:19-110:9 (Kosturos) (JAOC 138-39). It is a matter of public record that JPMC's adversary proceeding asserted multi-billion dollar claims, and was met with a counterclaim that also asserted multi-billion dollar claims, as well as a separate turnover action and an action against the FDIC. *Id*. at 110:1-9; 118:13-14 (JAOC 139, 141). The litigation was vigorously fought in multiple jurisdictions and was the subject of extensive motion practice. As Mr. Kosturos testified, JPMC's adversary proceeding "put a chill into the [settlement] negotiations, [and] stopped the information that was ongoing between JPMorgan and the debtor." *Id*. at 110:23-25 (JAOC 139). At no point did JPMC concede ownership of any asset of the estates.

Notwithstanding all of this, the EC has suggested that the JPMC response provided the SNH with material nonpublic information because, in one of the line items in the response, JPMC wrote "agreed" next to the Deposit Accounts. However, there was no agreement as to the Deposit Accounts. It was clear that there would be no deal regarding the Deposit Accounts without an agreement as to *all* proposed terms, which were presented as a package deal. 7/20/11 Hearing Tr. at 269:21-25 (Melwani) (JAOC 117); *see also* 7/21/11 Hearing Tr. at 143:20-144:1 (Kosturos) (JAOC 146) ("Q. But it was an offer that turned over the deposits to the estate…[i]s that not true? A: Only if you agreed to all the other terms. I mean, you can't single out one line item. Negotiations and term sheets don't work that way.").[16]

[16] In an effort to suggest that settlement negotiations were far along, the EC also has pointed to other parts of JPMC's response in which it wrote "agreed." *See* EC Objection ¶ 20. Apart from the fact that any "agreed" terms

What is more, early in the Chapter 11 Cases, Owl Creek and the other SNH already had concluded that JPMC was not entitled to the Deposit Accounts based on public information. 7/18/11 Hearing Tr. at 42:21-44:25 (Gropper) (JAOC 33); 7/19/11 Hearing Tr. at 151:2-151:25 (Krueger) (JAOC 64). Indeed, Owl Creek's quarterly investor letter reflects that it was Owl Creek's view from the very beginning of the cases that the Deposit Accounts were a true asset of the Debtors.[17] 7/19/11 Hearing Tr. at 158:7-23 (Krueger) (JAOC 66). Moreover, the motion that the Debtors filed in October 2008 seeking approval of a stipulation providing for the turnover of the Deposit Accounts provided further evidence to the market that JPMC understood that the Deposit Accounts belonged to the Debtors.[18] Furthermore, the turnover proceeding filed by the Debtors provided extensive public information with respect to the bases of the competing parties' claims to the Deposit Accounts, which further supported the Debtors' position.

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were contingent on acceptance of all other terms, these items were "miniscule in the context of this case . . . [and] don't compare at all to the . . . multibillion dollar [tax] issue." 7/18/11 Hearing Tr. at 71:21-72:9 (Gropper) (JAOC 39).

[17] At the hearing, the EC attempted to suggest that the letter indicated that the market had not appreciated the strength of the Debtors' claim to the Deposit Accounts by the beginning of 2009. 7/19/11 Hearing Tr. at 152:2-5 (Krueger) (JAOC 64). In fact, the letter makes clear that it is referring to the market's perceptions earlier in the cases. *Id*. at 152:5-14; 156:14-19 (JAOC 64, 65). What is more, the price of senior bonds in early 2009 reflected the market's view by that time that the Deposit Accounts were a true asset of the estate. *See* 7/21/11 Hearing Tr. at 55:2-14 (Melwani) (JAOC 130). Even if Owl Creek *had* been ahead of the market in early 2009 with respect to the question of who owned the Deposit Accounts, there is no grounds whatsoever to suggest that Owl Creek's understanding was formed on the basis of nonpublic information.

[18] *See* Motion of Debtors Pursuant to Sections 105(a), 361, 362 and 542(b) of the Bankruptcy Code Seeking Approval of a Stipulation and Agreement Concerning Deposit Accounts at JPMorgan Chase Bank, National Association, [D.I. 74] (AOC 069). As the EC points out, the Debtors later withdrew this motion on January 26, 2009. *See* Notice of Withdrawal re: Motion of Debtors Pursuant to Sections 105(a), 361, 362 and 542(b) of the Bankruptcy Code Seeking Approval of a Stipulation and Agreement Concerning Deposit Accounts at JPMorgan Chase Bank, National Association, [D.I. 611] (Jan. 26, 2009). However, the EC cannot have it both ways: the March 18 JPMC proposal was effectively withdrawn as well, inasmuch as it was never agreed to and was superseded by different proposals.

4. Negotiations Between the Debtors and JPMC in April 2009

In April 2009, Mr. Kosturos reached out on his own to Donald McCree of JPMC to try to resume negotiations, and Mr. McCree indicated that he was interested in pursuing settlement discussions. 7/21/11 Hearing Tr. at 111:8-10 (Kosturos) (JAOC 139). On or about April 16, 2009 the Debtors—without the knowledge or involvement of Owl Creek or any of the other creditors who later became the SNH—made a written proposal to JPMC (the "April WMI Proposal"). *Id*. at 111:10-12 (JAOC 139); AU 22 ("We understand . . . that, without any prior consultation with White & Case, the Debtor revised the prior proposal to JPM . . ."). Approximately a week later, on or around April 24, 2009, JPMC made a counterproposal to the Debtors (the "April JPMC Response"). 7/21/11 Hearing Tr. at 111:13-112:1 (Kosturos) (JAOC 139); EC 11.

The fact that the Debtors were negotiating on their own vividly demonstrates that the Debtors remained independent throughout the Chapter 11 Cases. Indeed, Mr. Kosturos testified that there were many instances throughout the cases where "[the Debtors] didn't tell the noteholders or anybody what [they were] doing." 7/21/11 Hearing Tr. at 132:9-12 (Kosturos) (JAOC 144). Similarly, Mr. Gropper of Aurelius described the April negotiations as, "one of a number of times . . . we had not been given the opportunity to suggest to the debtor a course of action . . . because it's the debtor's [sic] case and the debtors ran the case." 7/18/11 Hearing Tr. at 165:23-166:2 (Gropper) (JAOC 49-50).

Upon learning that settlement negotiations between JPMC and the Debtors had taken place in April, Mr. Gropper of Aurelius sent an email on April 29, 2009 to the Debtors and copied to White & Case Group members Owl Creek and Elliott Management, to express displeasure at the Debtors having restarted negotiations without the knowledge or input of the White & Case Group. *Id*. at 73:21-74:19 (JAOC 39-40); AU 22. In his email, Mr. Gropper

further asked for an in-person meeting with the Debtors. AU 22. The Debtors agreed to meet on May 6, 2009. AU 23.

5. May 6, 2009 Meeting

The May 6 meeting was attended by the Debtors, Aurelius, Elliot Management, Owl Creek, and counsel for those parties. 7/18/11 Hearing Tr. at 76:24-77:7 (Gropper) (JAOC 40). At the start of the meeting, the Debtors announced that no nonpublic information would be shared, and the Debtors in fact did not share any nonpublic information at the meeting. 7/21/11 Hearing Tr. at 117:6-7; 117:25-118:5 (Kosturos) (JAOC 140-41); 7/18/11 Hearing Tr. at 78:24-79:10 (Gropper) (JAOC 41). The noteholders expressed disappointment over not having been involved in the April proposal and informed the Debtors of their views as to litigation strategy. 7/21/11 Hearing Tr. at 117:8-17 (Kosturos) (JAOC 140). The Debtors were largely in "listening mode" at this meeting. 7/18/11 Hearing Tr. at 78:2-3 (Gropper) (JAOC 41).

There is no evidence that Owl Creek learned the terms of the April proposals at this meeting, or at any other time.[19] But even if Owl Creek had become aware of them, they plainly were not material. The April WMI Proposal and the April JPMC Response did not result in a deal, and reflected vastly different positions regarding treatment of the Tax Refunds. EC 11. Indeed, Mr. Kosturos testified that, "taking into account the second NOL, I would say that [the two April proposals] were well over $3 billion apart." 7/21/11 Hearing Tr. at 112:23-113:1 (Kosturos) (JAOC 139).[20]

[19] Mr. Gropper of Aurelius testified that he had no recollection of whether the terms of the Debtors' April proposal were discussed at the May 6 meeting, but testified that "I do know that we did not receive that response from JPMorgan." 7/18/11 Hearing Tr. at 77:10-15 (Gropper) (JAOC 40). Two of the other SNH later learned the terms of the April 2009 proposals exchanged by the Debtors and JPMC in connection with negotiations they had with JPMC in July and August of 2009, but Owl Creek was not part of those settlement efforts. 7/20/11 Hearing Tr. at 54:23-55:2; 128:25-129:6 (Bolin) (JAOC 91); *id*. at 281:1-282:7 (Melwani) (JAOC 120-21).

[20] The Debtors proposed that WMI retain all tax refunds that had been received to date (approximately $248 million); that the First Tax Refund (as defined below) be divided equally between WMI and JPMC; and that if there were ever a Second Tax Refund (as defined below), it would be allocated 80/20 between WMI and JPMC (in favor

6. Termination of the March Confidentiality Agreement

The March Confidentiality Agreement terminated on May 8, 2009. 7/19/11 Hearing Tr. at 128:21-23 (Krueger) (JAOC 58). Despite being free to trade thereafter, Owl Creek nonetheless took care to ensure that any material nonpublic information it may have received under the agreement had been publicly disclosed prior to WMI being removed from its restricted list. *Id*. at 136:13-137:7 (JAOC 60).

First, Owl Creek requested that the Debtors confirm that they had fulfilled their obligation under paragraph 13 of the March Confidentiality Agreement to publicly disclose any material nonpublic information shared with Owl Creek during the period covered by the agreement. *Id*. at 137:1-3 (JAOC 60). On May 7, 2009, White & Case sent the Debtors an email emphasizing the importance of such a confirmation:

> I wanted to follow up on one point relating to the expiration of the confidentiality agreement so that there is no confusion. I would like to confirm that, pursuant to the confidentiality agreements, the debtors believe that no further disclosure is required. You[r] confirmation of this point is greatly appreciated. As you can appreciate it [sic], this is an important point to the note holders.

EC 146. The Debtors' response was unqualified, "[t]he Debtors believe that all required disclosure has been made." *Id*.

The record is clear that the Debtors took their disclosure obligation seriously. In conjunction with their advisors and attorneys, the Debtors carefully reviewed the materiality of the information conveyed to the SNH during the pendency of the March Confidentiality Agreement and concluded that certain information, including the estimated size of the Debtors' first tax refund in the approximate range of $2.6 to $3 billion (the "First Tax Refund"), was

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of WMI). EC 11. JPMC's counterproposal was that the tax refunds received to date as well as the First Tax Refund be allocated 85/15 between WMI and JPMC (in favor of JPMC), and the Second Tax Refund, if it were to come into being, be divided equally between WMI and JPMC. *Id.* Neither of the April proposals contemplated the allocation of Tax Refunds to the FDIC or the bondholders of WMB (the "WMB Bondholders). *Id.*

material and needed to be publicly disclosed. 7/21/11 Hearing Tr. at 113:8-11; 114:21-115:6 (Kosturos) (JAOC 139, 140). That disclosure was made in the March 2009 Monthly Operating Report (the "March MOR") filed with the Court on April 30, 2009 and was filed with the SEC in a Form 8-K. *Id*. at 113:22-115:6 (JAOC 139-40); Monthly Operating Report for Washington Mutual, Inc., et al for the Period March 1, 2009 Through March 31, 2009 [D.I. 970] (AU 24); DX 427.

The Debtors and their counsel also specifically considered the settlement proposals between the Debtors and JPMC and concluded that those proposals were not material. As Mr. Kosturos testified,

> Q: Now what determination did the debtor make about disclosing in this March 2009 monthly operating report the back and forth in negotiations between the debtor and JPMorgan during this period?
>
> A: The debtor and its advisors and attorneys determined that there was no additional material nonpublic information that needed to be disclosed.

7/21/11 Hearing Tr. at 115:14-20 (Kosturos) (JAOC 140).

In addition to receiving assurances from the Debtors, Owl Creek performed its own analysis of the information it had received while the March Confidentiality Agreement was in place.[21] It concluded that the term sheets exchanged in March were immaterial given the difference in JPMC's and the Debtors' positions, and removed WMI from its restricted list. 7/19/11 Hearing Tr. at 137:3-7; 138:10-18 (Krueger) (JAOC 60, 61).

The steps Owl Creek took to ensure that it did not trade while in possession of material nonpublic information upon termination of the March Confidentiality Agreement

[21] On July 18, 2011, the Court ruled that the SNH could not testify as to whether they obtained advice of counsel in connection with their analysis without waiving the attorney-client privilege. Accordingly, when Mr. Krueger was asked about the steps Owl Creek had taken to determine whether it was appropriate to remove WMI from its restricted list, he was instructed to exclude any testimony regarding whether Owl Creek consulted with counsel. 7/19/11 Hearing Tr. at 136:19-25 (Krueger) (JAOC 60).

exemplify the care that Owl Creek took throughout the Chapter 11 Cases to avoid trading on the basis of material nonpublic information. Such care would constitute a "good faith" defense under the securities laws even if Owl Creek were found to have traded on the basis of material nonpublic information, which it did not do. *See SEC v. Johnson*, 174 Fed. App'x 111, 114-115 (3d Cir. 2006); *see also SEC v. Caserta*, 75 F. Supp. 2d 79, 94-95 (E.D.N.Y. 1999). And given Owl Creek's efforts in this respect, there certainly is no basis to claim that it acted inequitably for purposes of the bankruptcy laws.

Moreover, to the extent that any theory of insider trading is based on a premise that the SNH misappropriated information from the Debtors, the record clearly shows that no such misappropriation occurred here. Not only had the March Confidentiality Agreement expired, but the Debtors were aware that the SNH would trade in WMI securities after the Debtors made the disclosures required under the Confidentiality Agreements and confirmed that such disclosures had been made. 7/21/11 Hearing Tr. at 152:25-153:7 (Kosturos) (JAOC 148). Thus, the SNH did not deceive the Debtors in violation of the securities laws. *See United States v. O'Hagan*, 521 U.S. 642, 655 (1997) ("if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation").

7. Owl Creek's Trading After May 8, 2009 Does Not Support a Claim that the Settlement Discussions in the March Confidentiality Period Were Material

Owl Creek's trading in WMI securities following the March Confidentiality Agreement period further undercuts any suggestion that Owl Creek's knowledge of the failed settlement discussions conducted during the March Confidentiality Period constituted material nonpublic information. The EC's hypothesis that the SNH were aware of a major concession by JPMC, or somehow knew that settlement was assured, would suggest a trading pattern of

significant purchases immediately following the March Confidentiality Period. But Owl Creek made only one trade in the week following the termination of the March Confidentiality Agreement—and it was a *sale*. AOC 018. Furthermore, the trade, which occurred on May 11 and was of senior notes, was not particularly large, representing less than five percent of Owl Creek's senior note holdings. AOC 018; AOC 019. After that, Owl Creek did not make another trade until May 18, when it purchased PIERS. AOC 018. The purchase represented an unremarkable continuation of Owl Creek's pre-March Confidentiality Period trading pattern of increasing its PIERS holdings. *Id*. Over the next several months, Owl Creek continued this pattern of selling senior notes and purchasing PIERS.[22] *Id*.

Tellingly, the SNH trading patterns coming out of the March Confidentiality Period deviated substantially from one another, further undermining the EC's allegation that the stale term sheets exchanged in March were material. Whereas Owl Creek sold senior notes on May 11, Aurelius bought *exactly* the same amount of the *identical* security two days later.[23] AOC 018, AU 8. Similarly, on May 20, Owl Creek sold senior notes and Aurelius purchased the identical security that day. AOC 18; AU 8. Had the settlement discussions during this period imparted actual information material to the value of WMI's securities, it is highly unlikely that these sophisticated investors would have engaged in divergent trading patterns.

[22] Months after the confidentiality period, in the summer of 2009, Owl Creek also acquired additional subordinated bonds. AOC 18. Later still, in the fall of 2009 before entering into the November Confidentiality Agreement, Owl Creek both purchased and sold senior notes, subordinated bonds and PIERS. AOC 18.

[23] The fact that the SNH were trading in opposite directions in the same time frame also raises the obvious point that, to the extent anybody was affected by SNH's trading, it was likely other SNH. At any rate, it is impossible to conceive a coherent theory of harm to the equity holders or the Debtors' estates resulting from the SNH trading in WMI's debt securities.

C. The Period Between the March and November Confidentiality Agreements: Owl Creek Has No Involvement in Settlement Discussions

From the time the March Confidentiality Agreement terminated on May 8, 2009 to the time of the November Confidentiality Agreement, Owl Creek did not participate in settlement discussions. 7/19/11 Hearing Tr. at 135:12-136:3 (Krueger) (JAOC 60). The Debtors did not provide any confidential information to Owl Creek during this time. 7/21/11 Hearing Tr. at 122:8-11 (Kosturos) (JAOC 142). The ill-fated settlement discussions of the March Confidentiality Period were followed by what Mr. Kosturos described as a "litigation-commencing" period, which continued with intensity through the summer of 2009. *Id*. at 118:11-20 (JAOC 141). Although there were some, limited settlement discussions during the summer, Owl Creek was not involved in them. 7/20/11 Hearing Tr. at 54:23-55:4 (Bolin) (JAOC 78).

1. Owl Creek Did Not Participate in the Appaloosa and Centerbridge Discussions with JPMC

The one exception to the drought of settlement negotiations involving any of the SNH during this period was an unsuccessful settlement attempt made by Appaloosa and Centerbridge over the summer. *Id*. at 54:23-55:4; 58:13-59:13 (Bolin) (JAOC 78, 79). Not only did that effort go nowhere, but Owl Creek played no role in it. Indeed, there is no evidence that Owl Creek ever learned the substance of these discussions. None of this is surprising. At the time of those discussions, Owl Creek was still represented by White & Case, while Appaloosa and Centerbridge were represented by Fried Frank, and by the time Owl Creek joined the Fried Frank group the Appaloosa/Centerbridge/JPMC discussions were dead. 7/19/11 Hearing Tr. at 139:1-5 (Krueger) (JAOC 61); 7/20/11 Hearing Tr. at 58:13-59:13; 107:1-3 (Bolin) (JAOC 79, 88).

Specifically, the Appaloosa/Centerbridge/JPMC discussions began in July and concluded in early September 2009. 7/20/11 Hearing Tr. at 54:23-59:13 (Bolin) (JAOC 78-79). Owl Creek was in the White & Case Group until mid-October, 2009, and then it joined the Fried Frank Group. 7/19/11 Hearing Tr. at 139:4-5; 180:20-23 (Krueger) (JAOC 61, 70). The EC tried hard, but without success, to elicit testimony at the hearing that when Owl Creek joined the Fried Frank Group, it was informed of the terms of the settlement proposals that had been exchanged in the negotiations Appaloosa and Centerbridge had with JPMC. 7/21/11 Hearing Tr. at 62:1-11 (Melwani) (JAOC 132); 7/19/11 Hearing Tr. at 206:8-13 (Krueger) (JAOC 72). Mr. Krueger did not recall being informed of those negotiations. 7/19/11 Hearing Tr. at 206:8-13 (Krueger) (JAOC 72). While there was testimony from other witnesses that Owl Creek may have been apprised in late October of *the fact* that Appaloosa and Centerbridge had negotiations with JPMC, there was no testimony that Owl Creek ever learned the terms of the settlement proposals. 7/20/11 Hearing Tr. at 176:11-20 (Bolin) (JAOC 97); 7/21/11 Hearing Tr. at 61:14-62:11 (Melwani) (JAOC 131-32).[24] As Vivek Melwani from Centerbridge testified, the Fried Frank Group did not have a "master plan" or "book of secrets" to impart on Owl Creek when it joined the group. 7/21/11 Hearing Tr. at 59:24-60:6 (Melwani) (JAOC 131). Indeed, as discussed below, it was not unusual for members of the Fried Frank Group to act independently.

2. The Summer 2009 Negotiations Were Not Material In Any Event

Even assuming the terms of the settlement negotiations over the summer had been disclosed to Owl Creek in late October 2009, they were plainly not material.. By then, nearly

[24] The fact that the discussions occurred may have been disclosed to Owl Creek during an October 27, 2009 meeting with Appaloosa, Centerbridge, the Debtors and counsel for the Creditors' Committee to discuss how best to restart negotiations with JPMC. 7/20/11 Hearing Tr. at 61:22-62:8; 176:11-20 (Bolin) (JAOC 79-80, 97). The meeting also may have included discussion of a settlement proposal that had previously been shown to the Creditors' Committee by a group of investors who held bonds issued by WMB (the "WMB Bondholders Group") and that went nowhere. *Id*. at 61:22-64:16 (JAOC 79-80).

two months had passed since Appaloosa and Centerbridge had last met with JPMC. 7/20/11 Hearing Tr. at 58:13-59:13 (Bolin) (JAOC 79). Indeed, by September 2, 2009, JPMC had completely withdrawn its offer, rendering the settlement negotiations "dead at that point." *Id*.

Furthermore, the proposals that were exchanged by Appaloosa, Centerbridge and JPMC make clear that the parties were not close to a deal. The tax refunds still represented "the biggest item in the pool, and [they were] not that close." *Id*. at 134:18-25 (JAOC 93); EC 14. Whereas JPMC proposed a split of the First Tax Refunds 75/25 in favor of JPMC, Appaloosa and Centerbridge proposed the First Tax Refunds be split 60/40 in favor of JPMC. EC 14. Particularly given the dollars involved, this was an enormous gap. Additionally, JPMC's offer to split the second tax refund 90/10 in favor of WMI was not particularly meaningful because the potential legislation to create that asset had stalled and, therefore, that asset did not exist at the time. 7/20/11 Hearing Tr. at 133:2-4 (Bolin) (JAOC 92) (Q: "[T]hey offered 90 percent of the tax refund? A: Of [a] hypothetical asset, yes.").[25] In addition, Appaloosa and Centerbridge never had any authority to make a deal and bind the Debtors, which were not part of the discussions and were not even made aware of them at the time. *Id*. at 54:23-55:4 (JAOC 78); 7/21/11 Hearing Tr. at 118:21-119:18 (Kosturos) (JAOC 141).

D. The Second Confidentiality Period: November 16, 2009-December 30, 2009

After the March Confidentiality Agreement ended, Owl Creek's next involvement in settlement negotiations occurred in the second half of November 2009. 7/19/11 Hearing Tr. at

[25] Throughout the confirmation hearing, the EC attempted to ascribe significance to puffery by JPMC from time to time during settlement discussions. For example, the cover email attached to JPMC's response, dated August 18, 2009 provides, "[w]hile it appears that we do have several substantial open areas, on the vast majority of items, I believe we have agreement…" EC 13. However, in view of the gap between the parties, such statements represented little more than "banker happy talk." 7/20/11 Hearing Tr. at 134:13-17 (Bolin) (JAOC 93). The EC called no witness from JPMC to even attempt to elicit evidence to the contrary. Indeed, the next sentence in the email called for the appointment of a professional mediator, which is hardly an indication that the parties were close to a deal. EC 13.

135:12-136:9 (Krueger) (JAOC 60). By that time, Congress had passed the Worker, Homeownership, and Business Assistance Act of 2009 (the "WHBA"), which extended the "look back" period to collect certain tax refunds from two years to five years.[26] *Id*. at 135:17-21 (JAOC 60). It was clear that the Debtors could be entitled to a large tax refund as a result of the WHBA, the prospect of which prompted the parties to restart settlement negotiations. *Id*. at 135:21-136:1 (JAOC 60). Owl Creek's involvement in the discussions during this period was limited. As Mr. Bolin of Appaloosa testified, during this time period "Kosturos, Centerbridge and Appaloosa were having the primary discussions with JP Morgan." 7/20/11 Hearing Tr. at 178:15-16 (Bolin) (JAOC 98).[27]

1. The November Confidentiality Agreement

Prior to any involvement in settlement negotiations at this time, Owl Creek entered into a second confidentiality agreement, entitled "Confidential Agreement (Limited) with Owl Creek Asset Management L.P., on behalf of certain funds for which it acts as investment adviser" (the "November Confidentiality Agreement") on or about November 16, 2009. EC 148. The other SNH entered into similar agreements. EC 117; EC 37; AU 27. The November Confidentiality Agreement was similar to the March Confidentiality Agreement. It contained the same use restrictions as the March Confidentiality Agreement and also required the Debtors to disclose any material nonpublic information that had been provided to the SNH upon termination

[26] The WHBA was enacted into law on November 6, 2009. Worker, Homeownership and Business Assistance Act of 2009, Pub. L. No. 111-92, 123 Stat. 2984 (2009).

[27] The facts bear that out. On November 16, representatives of Appaloosa and Centerbridge met with representatives of the Debtors and JPMC without Owl Creek or Aurelius. 7/20/11 Hearing Tr. at 67:21-68:10 (Bolin) (JAOC 81). In addition, Mr. Kosturos corresponded only with Appaloosa and Centerbridge when he forwarded an email on November 20 indicating JPMC's willingness to engage in settlement negotiations (EC 118); when he sent an email that day discussing a draft WMI proposal (EC 219); when he solicited comments on the proposal on November 23 (EC 220), and forwarded a copy of the proposal as sent to JPMC that day (EC 119); and when he forwarded the JPMC Response on November 30 (EC 120).

of the agreement.[28] EC 148 ¶¶ 1, 13. It is undisputed that Owl Creek did not trade in WMI securities while the November Confidentiality Agreement was in effect (the "November Confidentiality Period").[29] 7/19/11 Hearing Tr. at 140:14-16 (Krueger) (JAOC 61); AOC 018.

The November Confidentiality Agreement provided that it would expire by its terms no later than December 31, 2009, and it could expire earlier if the parties so agreed. 7/19/11 Hearing Tr. at 139:23-140:1 (Krueger) (JAOC 61); EC 148. At the request of Aurelius, the parties agreed to terminate the November confidentiality agreements on December 30, 2009. 7/18/11 Hearing Tr. at 111:11-19 (Gropper) (JAOC 45). Like the March Confidentiality Agreement, the November Confidentiality Agreement provided that it was no longer in effect after its termination except if otherwise expressly provided. EC 148 ¶ 13 ("Other than any provision hereof that by its terms survives termination, this Agreement shall remain in full force and effect until the earlier to occur of . . ."). Like the March Confidentiality Agreement, the November Confidentiality Agreement contained no such survival clauses. EC 148. Accordingly, once the November Confidentiality Agreement terminated, Owl Creek was no longer restricted in its use of information learned during the term of the agreement. Any duty owed to the Debtors during the term of the agreement ceased to exist, and Owl Creek was free to trade in WMI securities as of December 31, 2009. As described above (*see* supra at p. 21), the Debtors had the same understanding of the agreement. 7/21/11 Hearing Tr. at 152:25-153:7 (Kosturos) (JAOC 148).

[28] Paragraph 13 provided, "[u]pon the termination of this Agreement pursuant hereto, the Debtors shall immediately make public disclosure (within the meaning of Rule 101 of Regulation FD) of a fair summary, as reasonably determined by the Debtors, of any Confidential Information that constitutes material nonpublic information under U.S. federal securities laws." EC 148.

[29] Again, this restriction actually went beyond the agreement's requirements, which only restricted Owl Creek's use of Confidential Information.

2. Settlement Negotiations in November

After Owl Creek executed the November Confidentiality Agreement, the SNH, including Owl Creek, attended a meeting hosted by Debtors' counsel at which a term sheet prepared by the Debtors containing blanks with respect to the allocation of Tax Refunds was handed out. 7/19/11 Hearing Tr. at 140:24-141:13 (Krueger) (JAOC 61); EC 150. At that meeting, the Debtors disclosed that WMI could be entitled to an additional tax refund of $2.6 billion as a result of the WHBA (the "Second Tax Refund"). 7/19/11 Hearing Tr. at 141:2-5 (Krueger) (JAOC 61); 7/18/11 Hearing Tr. at 105:11-20 (Gropper) (JAOC 43).

Shortly after the meeting, on November 23, 2009, the Debtors sent JPMC a settlement proposal that, among other things, called for a 39/61 split in favor of JPMC of the tax amounts already received and of the First Tax Refund, and a 50/50 split of the Second Tax Refund between WMI and JPMC (the "November WMI Proposal"). EC 119. The Debtors sent a copy of the proposal in a separate email to Centerbridge and Appaloosa. *Id*. There is nothing in the record to indicate that Owl Creek received a copy of it. The proposal introduced an entirely new concept that the Debtors believed was critical to getting a deal done, *i.e.*, the inclusion of the WMB Bondholders as part of the settlement. At this point, the Debtors believed that they would be unable to execute a two-way deal with JPMC, and would need to involve the FDIC and/or the WMB Bondholders in a three or four-way settlement. 7/21/11 Hearing Tr. at 121:19-122:4 (Kosturos) (JAOC 141-42).[30] Accordingly, the November WMI Proposal provided for a payment to the WMB Bondholders, to be split by WMI and JPMC out of their proposed shares of the Second Tax Refund. EC 119.

[30] Indeed, as a matter of public record, during this period the WMB Bondholders began aggressively litigating to establish that the disputed assets in fact belonged to WMB.

JPMC responded to the November WMI Proposal by email of November 30, 2009 (the "November JPMC Response"). AU 29. Mr. Kosturos sent the response to Appaloosa and Centerbridge, but not to Owl Creek, which received it only after Mr. Bolin of Appaloosa forwarded it. *Id*. Mr. Krueger did not even recall receiving the response. 7/19/11 Hearing Tr. at 142:5-7 (Krueger) (JAOC 62). It was hardly a memorable step forward. JPMC rejected the Debtors' proposal and instead took what amounted to a major step back from prior negotiations, which Mr. Kosturos aptly described as "resetting the bookends." 7/21/11 Hearing Tr. at 145:7-16 (Kosturos) (JAOC 146); AU 29. Among other things, JPMC proposed that it take 100% of the tax refunds already received as well as all of the First Tax Refund, and that the Debtors take 100% of the Second Tax Refund. AU 29. JPMC also refused to contribute to a settlement with the WMB Bondholders, shifting the "[c]ost of releases from third parties [including the WMB Bondholders]" entirely to WMI.[31] *Id*.

As Mr. Kosturos testified, the November JPMC Response was "really non-responsive and really had changed the whole dynamics and constructs of what [JPMC and the Debtors] had been talking about previously."[32] 7/21/11 Hearing Tr. at 126:2-5 (Kosturos) (JAOC 143). Critically, JPMC had not been responsive to the Debtors' efforts to structure the deal so as to include the WMB Bondholders. *Id*. at 125:20-126:5 (JAOC 142-43). Further, JPMC's proposal regarding the allocation of the Tax Refunds reflected a particularly large

[31] Other provisions that JPMC included in its response further widened the gulf between the parties. 7/20/11 Hearing Tr. at 253:20-254:1 (Melwani) (JAOC 113-14) ("[A]ll [of] the other things that they had in their e-mail about number three . . . the cost of the releases up to 500 million coming out of the estate, the intercompany debt, 177 million being cancelled without payment, all of that adds up. And we viewed it as not even close to the proposal that debtors had made. And it was unacceptable.")

[32] The EC has pointed out a November 20, 2009 email from JPMC to Mr. Kosturos in which JPMC states, "we were ready to engage in substantive negotiations at a 30/70 split of taxes, all subject to final terms and approvals." EC 118. As a threshold matter, there is no indication that Owl Creek was ever aware of this email, which Mr. Kosturos forwarded to Centerbridge and Appaloosa. In any case, the EC's reliance on this email is misplaced inasmuch as the subsequent November JPMC Response rendered it utterly moot.

discrepancy in the parties' positions due to the significant risk tied to the recovery of the Second Tax Refund. Several factors rendered recovery of that refund uncertain: (1) the tax refunds were still subject to review by the Joint Congressional Committee on Taxation; (2) it was uncertain whether Congress would approve a tax refund that would primarily benefit private investment firms; and (3) there was uncertainty regarding whether WMI would get the refund if JPMC were deemed to own it, because of the fact that the legislation precluded TARP recipients like JPMC from benefiting from its passage. 7/18/11 Hearing Tr. at 109:10-110:1 (Gropper) (JAOC 44-45).

It was clear from the November JPMC Response that the parties were "very far apart." 7/21/11 Hearing Tr. at 126:6-8 (Kosturos) (JAOC 143). Mr. Melwani of Centerbridge testified that after reviewing the November JPMC Response, Centerbridge regarded the settlement discussions as "having failed" and believed that "the gap was getting wider as opposed to narrower." 7/20/11 Hearing Tr. at 251:18-23 (Melwani) (JAOC 113). Similarly, Mr. Gropper of Aurelius testified that the November JPMC Response represented a "dramatic, dramatic shift in the risk allocation in the proposal," 7/18/11 Hearing Tr. at 109:24-110:1 (Gropper) (JAOC 44-45), and Mr. Bolin of Appaloosa testified that his reaction to JPMC's response was that JPMC "was playing a little bit cute again," 7/20/11 Hearing Tr. at 68:21 (Bolin) (JAOC 81). As noted above, Mr. Krueger received the response third-hand and did not even remember it. Even JPMC, in the November JPMC Response itself, acknowledged that "we remain fairly far apart in our views." AU 29.

3. The Debtors' December 2009 Settlement Proposal

On December 8, 2009, the Debtors sent JPMC a new settlement proposal ("December 8 Term Sheet"). 7/21/11 Hearing Tr. at 126:9-22 (Kosturos) (JAOC 143); EC 305. As described below, no document or testimony references Owl Creek as having been involved in the preparation of that proposal, and it was not material in any event.

Mr. Kosturos did not recall the proposal having been shared with any of the SNH: "I can't be sure, but not to my recollection did we share [the offer that was delivered to JPMC] with any of the settlement noteholders." 7/21/11 Hearing Tr. at 126:23-127:2 (Kosturos) (JAOC 143); *see also* 7/20/11 Hearing Tr. at 252:6-11 (Melwani) (JAOC 113) (Debtors did not share other term sheets during this period after November 30). Mr. Krueger did not recall any Owl Creek involvement in settlement discussions in December of 2009.[33] Mr. Gropper of Aurelius referred to the SNH as having been involved in developing an offer after the November JPMC Response (7/19/11 Hearing Tr. at 40:20-41:2 (Gropper) (JAOC 53); EC 305), but he did not reference Owl Creek and, as noted above, it is clear that Owl Creek had limited involvement in settlement negotiations during the November Confidentiality Period.[34] Moreover, consistent with Mr. Kosturos' testimony, there is no evidence that *any* of the SNH ever saw the Debtors' December 8 Term Sheet.

In any event, the December 8 Term Sheet plainly was not material. As an initial matter, it only represented the views of some of the parties on the same side of the negotiating table and followed the disheartening November JPMC Response that had "reset the bookends" and taken negotiations backwards. Not surprisingly, settlement discussions in December did not lead to a deal. 7/21/11 Hearing Tr. at 129:19-130:7 (Kosturos) (JAOC 143-44). JPMC's lead negotiator went on vacation in mid-December and did not return until after the November

[33] On cross-examination, the EC showed Mr. Krueger the December 8, 2009 Term Sheet. However, the EC's question relating to this document referred to proposals developed in December *or November*. In his answer, Mr. Krueger testified that Owl Creek had attended a meeting where it had participated in preparing a term sheet; however, he was clearly referring to a November meeting that he had testified about earlier on direct examination. 7/19/11 Hearing Tr. at 186:4-13 (Krueger) (JAOC 71) (Q: [D]oes this [term sheet (EC 305)] refresh your recollection about having worked on putting together a new proposal to JPMorgan in December -- November and December of 2009? A: Well, *I said earlier I do remember a meeting where I was handed the term sheet with blanks in it . . .*" (emphasis added)).

[34] It is therefore also not likely that Mr. Kosturos was referring to Owl Creek when he referenced discussions with his "major creditors" in an email he sent to JPMC in December of 2009 (EC 306), but he testified in any event that he was unsure whether he actually had any such discussions. 7/21/11 Hearing Tr. at 182:19-183:7 (Kosturos) (JAOC 151).

Confidentiality Agreement had terminated, indicating that the negotiations were over and the parties remained far apart. 7/18/11 Hearing Tr. at 111:1-7 (Gropper) (JAOC 45). The December 8 Term Sheet was very unlikely to lead to a deal from the get-go in any case because it was only sent to, and only discussed with, JPMC at a time when it was very clear that any final deal would have to include the WMB Bondholders and, most likely, the FDIC. 7/21/11 Hearing Tr. at 146:10-15 (Kosturos) (JAOC 147).

4. Termination of the November Confidentiality Agreement

Although Owl Creek was free to trade when the November Confidentiality Agreement terminated on December 30, 2009, it nevertheless took steps to ensure that any material nonpublic information it may have received during the term of the agreement had been disclosed before removing the Debtors' securities from its restricted list. *See* 7/19/11 Hearing Tr. at 142:16-144:4 (Krueger) (JAOC 62).

As it had after the first confidentiality period, Owl Creek asked for confirmation from the Debtors that they had fulfilled their contractual obligation to publicly disclose all material nonpublic information given to Owl Creek during the term of the agreement. *Id*. at 142:21-23 (JAOC 62). Fried Frank subsequently relayed to Owl Creek the Debtors' confirmation that all the required disclosures had been made. *Id*. at 143:4-20 (JAOC 62). Prior to providing that confirmation, the Debtors—together with their advisors and attorneys—had assessed the materiality of the information conveyed to the SNH while the agreement was in place, and had concluded that the information regarding the estimated size of the Debtors' Second Tax Refund (approximately $2.6 billion) was material and needed to be publicly disclosed. 7/21/11 Hearing Tr. at 127:3-128:6 (Kosturos) (JAOC 143). That disclosure was made in the November 2009 Monthly Operating Report filed with the Court on December 30, 2009 and filed with the SEC in a Form 8-K. *Id*. at 127:12-128:6 (JAOC 143); Monthly

Operating Report for Washington Mutual, Inc., et al for the Period November 1, 2009 Through November 30, 2009 [D.I. 2077] (AU 32); DX 428. The Debtors and their counsel, who indisputably were closer to the settlement negotiations than Owl Creek, also specifically considered the significance of the settlement proposals between the Debtors and JPMC and determined that those proposals were *not* material. 7/21/11 Hearing Tr. at 128:15-24 (Kosturos) (JAOC 143).

In addition to receiving assurances from Debtors' counsel, Owl Creek internally considered the information it had received while the November Confidentiality Agreement was in place and concluded that it could remove WMI from its restricted list following the end of the November Confidentiality Period. 7/19/11 Hearing Tr. at 142:12-143:3 (Krueger) (JAOC 62).[35]

5. Owl Creek's Trading After the November Confidentiality Period Does Not Support a Claim that the Settlement Negotiations During the November Confidentiality Period Were Material

Owl Creek's trading pattern after the end of the November Confidentiality Period further belies any suggestion that Owl Creek had material nonpublic information. Owl Creek made no trades in WMI securities for almost a week following the end of the November Confidentiality Period, AOC 018, which hardly suggests that Owl Creek believed it knew anything of significance. Moreover, if in fact Owl Creek had information indicating that a resolution was at hand, one would have expected Owl Creek to *buy* WMI securities. However, when Owl Creek began trading again on January 5, 2010, it *sold* WMI securities, namely senior notes. *Id*. In fact, from the end of the second confidentiality agreement through the March 12, 2010 announcement of the terms of a deal that the Debtors thought they had, Owl Creek's *only*

[35] Here again, in light of the Court's ruling on July 18, 2011 with respect to waiver, Owl Creek did not testify as to whether it had consulted with counsel in connection with its decision to remove the Debtors' securities from its restricted list. 7/19/11 Hearing Tr. at 142:16-20 (Krueger) (JAOC 62).

transactions in WMI securities were sales.[36] *Id*. What is more, Owl Creek did not trade at all during this period after January 12, 2010. *Id*.

Divergent trading patterns of Owl Creek and the other SNH during this period, as in prior periods, further undercut the EC's argument that Owl Creek or the other SNH were trading on material nonpublic information. For example, on January 7, 2010, Owl Creek sold senior subordinated notes while Centerbridge was a net buyer of such notes on that day. *Id*.; AOC 054. Similarly, while Centerbridge and Aurelius each purchased PIERS on January 11th and Centerbridge made additional PIERS purchases on January 12th, Owl Creek sold PIERS on January 12th. AOC 018; AOC 054; AU 8.

E. Events After the November Confidentiality Period Up To the March 12, 2010 Announcement

Owl Creek was not involved in settlement negotiations from the end of the November Confidentiality Period through March 12, 2010, when the Debtors announced in Court the terms of a global settlement agreement that later fell apart (the "March 12 Announcement"). 7/19/11 Hearing Tr. at 144:11-14 (Krueger) (JAOC 62). Owl Creek also did not enter into another confidentiality agreement with the Debtors. Far from being dominated and controlled by Owl Creek or the other SNH, the Debtors "led the negotiations [and] exercised [their] sole judgment in entering into the global settlement agreement." 7/21/11 Hearing Tr. at 137:2-17 (Kosturos) (JAOC 145). Indeed, when asked what role the SNH had in making decisions with respect to these settlement negotiations with JPMC, Mr. Kosturos responded, "[n]one whatsoever." *Id*. at 96:9-12 (JAOC 135).

[36] Specifically, Owl Creek sold senior and subordinated notes on two occasions, and sold PIERS on January 12, 2010. AOC 018.

The SNH's participation in the Chapter 11 Cases during this period was limited to preparing a proposed form of a plan of reorganization. *Id*. at 136:10-17; 7/19/11 Hearing Tr. at 62:20-65:8 (Gropper) (JAOC 53). They wanted to help ensure that a mechanism would be in place to distribute the estates' assets, *if* the Debtors ever reached a settlement agreement with JPMC. 7/21/11 Hearing Tr. at 130:15-20 (Kosturos) (JAOC 144); 7/19/11 Hearing Tr. at 62:21-63:5 (Gropper) (JAOC 53). Along with the other SNH, Fried Frank, the Debtors and Debtors' counsel, Owl Creek attended a meeting on January 12, 2010 to discuss the Fried Frank Group's proposed plan. 7/21/11 Hearing Tr. at 130:8-20 (Kosturos) (JAOC 144). At the start of the meeting, Debtors' counsel announced that the Debtors would not be producing or discussing any material nonpublic information. *Id*. at 130:14-17 (Kosturos) (JAOC 144). That was consistent with Owl Creek's having stressed to the Debtors and Debtors' counsel that it never wanted to inadvertently receive nonpublic information. 7/19/11 Hearing Tr. at 145:9-18 (Krueger) (JAOC 62); *see also* 7/18/11 Hearing Tr. at 78:24-79:1 (Gropper) (JAOC 41) (Debtors' counsel began May 6, 2009 meeting by stating that no material nonpublic information would be disclosed); 7/21/11 Hearing Tr. at 133:25-134:2; 134:23-24 (Kosturos) (JAOC 144-45); EC 276 (nonpublic items not discussed with SNH at February 25, 2010 meeting).[37]

Although the Debtors asked that the proposed plan of reorganization be reduced to writing, the Debtors ultimately did not have much interest in the construct. 7/21/11 Hearing Tr. at 130:21-131:3; 133:4-10 (Kosturos) (JAOC 144). On February 9, 2010, Fried Frank sent the Debtors its written plan proposal. EC 125. Upon receipt of the proposal, the Debtors discussed its terms with the Creditors' Committee, and they collectively decided to not use it.

[37] On the same day as the January 12, 2010 meeting, JPMC sent a term sheet to the Debtors. EC 304. 7/21/11 Hearing Tr. at 189:14-20 (Kosturos) (JAOC 152). However, Mr. Kosturos testified that information regarding the term sheet was not shared with the SNH at the meeting. *Id*. at 189:21-23 (JAOC 152). There is no evidence that Owl Creek ever learned of the existence of this term sheet, let alone its terms.

7/21/11 Hearing Tr. at 133:1-10 (Kosturos) (JAOC 144). At a meeting with the Debtors on February 25, the SNH sought to discuss their proposed plan of reorganization and understand the Debtors' view of it. *Id.* at 194:17-195:1 (JAOC 154). Mr. Kosturos testified that the Debtors did not have any interest in pursuing it. *Id*. at 195:16-17 (JAOC 154).[38]

At the confirmation hearing, the EC devoted significant effort to try to support a theory that the split contemplated by the SNH's plan proposal for the First Tax Refund (70/30 in favor of JPMC) was material nonpublic information because the same split later appeared in the terms announced on March 12.[39] However, as Mr. Bolin of Appaloosa pointed out, the February 9, 2010 proposal was "not predicated on the seventy percent offer; [rather, it] was predicated on a plan structure that was intended to preserve the tax loss carry-forwards that WMI would—potentially could have coming out of bankruptcy." 7/20/11 Hearing Tr. at 86:3-7 (Bolin) (JAOC 86). That structure was never used, and the only other substantive settlement term appearing in the proposed plan (relating to the Second Tax Refund) differed from what was announced on March 12. EC 125; AOC 058. In any case, there could be no claim that Owl Creek improperly traded while in possession of this information because Owl Creek did not make any trades in WMI securities from almost one full month before the proposal was sent until after the terms of the settlement agreement were announced in Court on March 12, 2010. AOC 018.

Even Fried Frank was not involved in the actual settlement discussions the Debtors were having with the FDIC until late February 2010. 7/21/11 Hearing Tr. at 191:17-192:2 (Kosturos) (JAOC 153). There is no evidence that Owl Creek was involved in or in any

[38] At that meeting the Debtors refused to discuss other items listed on an agenda that had been proposed by Fried Frank, including an update on communication with the FDIC, WMB Bondholders and JPMC. 7/21/11 Hearing Tr. at 194:14-16 (Kosturos) (JAOC 154). The Debtors may have provided the SNH with an update of ongoing litigation, but would have limited that discussion to a summary of publicly filed motions. *Id*. at 195:18-196:9 (JAOC 154). To the extent any nonpublic information was discussed at the meeting, it was done only after the SNH left the meeting. *Id*. at 133:25-134:24 (JAOC 144-45).

[39] *See* 7/20/11 Hearing Tr. at 82:7-87:2 (Bolin) (JAOC 85-86); *id.* at 296:1-300:17 (JAOC 123-24).

way informed of these discussions. As is routinely done in bankruptcies, Owl Creek relied on its outside counsel—first White & Case, and later, Fried Frank—to act as a screen, protecting it from the receipt of material nonpublic information. 7/19/11 Hearing Tr. at 145:9-18 (Krueger) (JAOC 62). Owl Creek's instructions to its counsel were that Owl Creek must consent in advance prior to receiving anything that might be considered material nonpublic information. *Id*. Each time it chose to receive such information, Owl Creek restricted its trading until the information had been made public. *Id*. at 144:23-145:8 (JAOC 62). There would be no basis for any claim that Owl Creek somehow learned, and traded on the basis of what was communicated to Fried Frank in any case given that Owl Creek did not have any trades during this period after January 12. *See* AOC 018.

On March 12, 2010, Owl Creek learned the terms of the global settlement agreement when those terms were read into the record. 7/19/11 Hearing Tr. at 144:8-12 (Krueger) (JAOC 62).

F. Events After March 12, 2010

Owl Creek was not involved in any settlement negotiations between March 12, 2010 and October 6, 2010, the date the Debtors filed the Sixth Amended Plan. *Id*. at 144:15-22 (Krueger) (JAOC 62). Owl Creek did receive draft plans and disclosure statements from Fried Frank in advance of their public filing,[40] *id*. at 144:23-25 (JAOC 62), but always restricted itself from trading in WMI securities prior to receiving them. *Id*. at 145:3 (JAOC 62). Consistent with its written policies and procedures, Owl Creek removed WMI from its restricted list only after plans and disclosure statements were filed. *Id*. at 145:4-8 (JAOC 62).

[40] Owl Creek and the other SNH were not in any way acting inappropriately by receiving this information from Fried Frank. Aside from being significant creditors, they had consent rights to the Global Settlement Agreement as signatories thereto. 7/21/11 Hearing Tr. at 253:23-255:9 (Kosturos) (JAOC 158-59). So too did other signatories.

On March 23, 2010, the Debtors provided the SNH with a document titled "High Level Recovery - Proposed Waterfall Distribution," (the "Waterfall") in advance of the Debtors' filing of their reorganization plan and disclosure statement. EC 42, EC 43. At the time Owl Creek received the Waterfall, it was not trading in WMI securities and did not begin trading again until after the Debtors filed a disclosure statement on March 26, 2010 (the "Disclosure Statement"). AOC 018. The EC attempted to suggest at the confirmation hearing that the disclosures in the Disclosure Statement were incomplete, and that the SNH remained in possession of material nonpublic information even after it was filed. However, the information that Owl Creek received clearly was disclosed in the Disclosure Statement and other public filings, or was immaterial.

The Disclosure Statement included both a waterfall recovery matrix as well as exhibits disclosing the estimated amounts of total allowable claims of the various classes of claims. 7/20/11 Hearing Tr. at 193:13-194:15 (Bolin) (JAOC 99-100); Disclosure Statement for the Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code [D.I. 2623] (EC 299). The chart below was prepared using information from exhibits to the Disclosure Statement that set forth the estimated amounts of the various claims as well as information from the Waterfall. EC 299, Exhibits A - E. As the chart illustrates, the estimated principal amounts of the various claims included in the Disclosure Statement are substantially identical to the amounts disclosed in the Waterfall provided to the SNH:[41]

Class of Claims	Amount provided in Disclosure Statement filed March 26, 2010 [EC 299]	Amount set forth in waterfall in EC 43	Difference
Senior Notes	4,132,421,622	4,132,421,622	(0)

[41] The post-petition interest amounts provided in the Disclosure Statement do not reconcile with those set forth in the Waterfall simply because they calculate interest as of a different date. EC 299; EC 43.

Senior Subordinated Notes	1,666,464,970	1,666,464,970	(0)
CCB-1 Guarantees	33,855,056	33,865,018	(9,962)
CCB-2 Guarantees	35,694,791	35,697,421	(2,630)
PIERS Claims	789,353,507	789,353,507	(0)

The EC has pointed out that the $5.2 billion figure for "Proceeds Available for Distribution" used in the Waterfall was not included in the Disclosure Statement. 7/20/11 Hearing Tr. at 155:19-21 (Bolin) (JAOC 96); EC 42; EC 43. However, this figure was merely an illustrative one used to show the estimated recoveries of the various claims at those levels. 7/14/11 Hearing Tr. at 55:9-56:4 (Goulding) (JAOC 29); 7/20/11 Hearing Tr. at 149:6-7; 196:19-197:17 (Bolin) (JAOC 94, 100) ("That was a hypothetical if there were that much cash available, this is how it would flow through the waterfall.").[42]

The EC also has suggested that certain valuations of Reorganized WMI provided to the SNH on March 23, 2010 were material nonpublic information that were not included in the Disclosure Statement. 7/20/11 Hearing Tr. at 154:6-155:2 (Bolin) (JAOC 96). There is no basis for that claim. While the specific valuation models were not included in the Disclosure Statement, the Debtors' valuation of Reorganized WMI was included in the approximately $7 billion identified as available for distribution. *See* EC 299. That was the important figure, not an estimate of a subportion thereof—which constituted only some 2% of it in any event. Even if the Debtors' estimated valuation for Reorganized WMI had been material, which it was not, it could be approximated by subtracting the value of the assets identified in the Disclosure Statement from the approximately $7 billion figure. 7/20/11 Hearing Tr. at 196:6-13 (Bolin) (JAOC 100); EC 299.

[42] The Waterfall also included a $400 million figure for General Unsecured Claims ("GUCS"). EC 43. That figure was not included in the Disclosure Statement, but there is no evidence that—like the figure for available cash—it was anything other than an illustrative plug number to demonstrate how the waterfall worked.

What is more, the SNH can hardly be criticized for believing that the Disclosure Statement contained all material information. Bankruptcy Code §§ 1125(a)(1) and (b) expressly require all such information to be included. *See In re Unichem*, 72 B.R. 95, 97 (Bankr. N.D. Ill. 1987) ("The primary purpose of a disclosure statement is to provide all material information which creditors and equity security holders affected by the plan need in order to make an intelligent decision whether to vote for or against the plan."). In any event, there is no basis to conclude from Owl Creek's trading that it believed it had material nonpublic information. After the Debtors filed the Disclosure Statement on March 26, 2010, Owl Creek continued its unremarkable trading pattern of selling WMI's senior notes that preceded its receipt of the Waterfall. AOC 018. Owl Creek's only purchase during this period was of subordinated notes on April 21, more than three weeks after the Debtors filed the Disclosure Statement. *Id*. After April 21, 2010, Owl Creek stopped trading entirely in WMI securities. *Id*.

CONCLUSION

There is good reason why the EC did not allege insider trading against Owl Creek. The facts—extensively developed through document discovery, depositions and a lengthy confirmation hearing—provide absolutely no basis to make any such claim. Likewise, the record firmly refutes the EC's allegations that Owl Creek and the other SNH dominated and controlled the Debtors to "hijack" settlement negotiations. For all the foregoing reasons, Owl Creek respectfully requests entry of an order (i) overruling the EC Objection, (ii) confirming the Modified Sixth Amended Plan of Reorganization and (iii) granting Owl Creek such other and further relief as the Court may deem just and appropriate.

Wilmington, Delaware
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