IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALICE GRIFFIN, **Appellant,** **v.** **WMI LIQUIDATING TRUST,** **Appellee.**	Civil Action No. 19-775 (RGA) BAP No. 19-27

WMI LIQUIDATING TRUST'S ANSWERING BRIEF

Mark D. Collins (No. 2981)
Marcos A. Ramos (No. 4450)
Amanda R. Steele (No. 5530)
Cory D. Kandestin (No. 5025)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

– and –

Brian S. Rosen
PROSKAUER ROSE LLP
Eleven Times Square
Eighth Avenue and 41st Street
New York, New York 10036-8299
Telephone: (212) 969-3000
Facsimile: (212) 969-2900

Attorneys to WMI Liquidating Trust

Dated: July 22, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1(a)(2) of the Federal Rules of Civil Procedure and Rule 8012 of the Federal Rules of Bankruptcy Procedure, WMI Liquidating Trust states that it has no parent corporation and that there is no publicly held corporation owning 10% or more of its stock.

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW 4

STATEMENT OF THE CASE 6

A. The Parties 6

B. The Underwriters file general unsecured indemnification claims against WMI 7

C. WMI objects to the claims' classification as general unsecured claims, and obtains subordination of those claims 7

D. WMI confirms its bankruptcy plan, and the Trust is established to liquidate assets and resolve claims 9

E. Class 18 may receive further distributions under the Plan, but Class 19 likely will not 11

F. The Trust objects to allowance of the Underwriters' claims 12

G. The Trust discloses the settlement's terms in 10-Ks and in its quarterly summary report, all posted on the Trust's website 14

H. In 2019, Griffin objects to the Allowance Stipulation as a breach of fiduciary duty 16

I. The Bankruptcy Court denies the objection as untimely and baseless 16

SUMMARY OF ARGUMENT 18

ARGUMENT 19

I. The Bankruptcy Court correctly ruled that objecting to a settlement six years after its consummation is too late 19

A. Because Griffin's objection is premised on a breach of fiduciary duty, it is time-barred under the three-year statute of limitations 20

B. The record also supports a finding of laches 25

C. Griffin's arguments against laches are unavailing 29

II. The Bankruptcy Court did not abuse its discretion in finding that the Allowance Stipulation was a reasonable exercise of the Trust's business judgment...31

III. Because Griffin requests "substantial contribution" for the first time on appeal, this Court should not entertain the request...39

CONCLUSION 41

TABLE OF AUTHORITIES

Cases

A.C. Aukerman Co. v. R.L. Chaides Const. Co.,
960 F.2d 1020 (Fed. Cir. 1992)....................25

Bermuda Express, N.V. v. M/V Litsa (Ex. Laurie U),
872 F.2d 554 (3d Cir. 1989)....................4

Burke v. Gateway Clipper, Inc.,
441 F.2d 946 (3d Cir. 1971)....................24

Davenport v. Djourabchi,
316 F. Supp. 3d 58 (D.D.C. 2018)....................29

EEOC v. Great Atl. & Pac. Tea Co.,
735 F.2d 69 (3d Cir. 1984)....................25

Ieradi v. Mylan Labs., Inc.,
230 F.3d 594 (3d Cir. 2000)....................13

In re Columbia Gas Sys. Inc.,
50 F.3d 233 (3d Cir. 1995)....................20

In re Dean Witter P'ship Litig.,
1998 WL 442456 (Del. Ch. July 17, 1998) 21, 22

In re Ins. Brokerage Antitrust Litig.,
579 F.3d 241 (3d Cir. 2009).................... 5, 39

In re Nortel Networks, Inc.,
522 B.R. 491 (Bankr. D. Del. 2014)....................31

In re Radnor Holdings Corp.,
564 B.R. 467 (D. Del. 2017).................... 4, 22

In re Tropicana Entm't LLC,
498 F. App'x 150 (3d Cir. Aug. 31, 2012) 40

In re W.R. Grace & Co.,
475 B.R. 34 (D. Del. 2012).................... 5, 31

Kushner v. Winterthur Swiss Ins. Co.,
620 F.2d 404 (3d Cir. 1980)..36

McKesson Inf. Solutions LLC v. Trizetto Group, Inc.,
426 F. Supp. 2d 203 (D. Del. 2006)... 24, 25

Myers v. Martin (In re Martin),
91 F.3d 389 (3d Cir. 1996).. 5, 17, 31, 37

NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC,
922 A.2d 417 (Del. Ch. 2007)..37

Nebo Ventures, LLC v. Stanziale (In re Novapro Holdings, LLC),
2019 WL 1324950 (D. Del. Mar. 25, 2019) 5

Pouls v. Windmill Estates, LLC,
2010 WL 2348648 (Del. Super. June 10, 2010) 38

S.E.C. v. Jasper,
678 F.3d 1116 (9th Cir. 2012) 24

Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.,
401 F.3d 123 (3d Cir. 2005).. 25, 30

Seidel v. Lee,
954 F. Supp. 810 (D. Del. 1996)...22

Tourscher v. McCullough,
184 F.3d 236 (3d Cir. 1999)..20

Vichi v. Koninklijke Philips Elecs. N.V.,
2009 WL 4345724 (Del. Ch. Dec. 1, 2009)..22

Vieira v. AGM II, LLC (In re Worldwide Wholesale Lumber, Inc.),
372 B.R. 796 (Bankr. D. S.C. 2007)...29

Statutes

11 U.S.C. § 503(b)(3)(D) 39

10 *Del. C.* § 8106 21

INTRODUCTION

In 2012, after almost four years of robust litigation, the Bankruptcy Court confirmed a chapter 11 plan for Washington Mutual, Inc. ("WMI"). The plan created the WMI Liquidating Trust ("Trust") to continue the claims-reconciliation process, and granted the Trust full authority to compromise and settle claims without Bankruptcy Court approval. One year later, in 2013, the Trust did just that—it settled a claims objection after determining that the benefit of settling outweighed the cost, complexity, and risk of litigation. Now six years later, Appellant Alice Griffin asks this Court to second-guess the Trust's business judgment in settling that objection.

The settlement arose from claims asserted by a group of underwriters for certain WMI securities (the "Underwriters"). WMI initially objected to the "classification" of those claims in the general unsecured class. By stipulation and order, WMI obtained subordination of the claims. Specifically, the parties agreed to re-classify claims relating to the underwriting of debt securities to the lowest creditor class (Class 18) (the "$24M Claim"), and claims relating to the underwriting of preferred equity securities to the preferred equity class (Class 20 of the then-current plan, Class 19 of the final plan) (the "$72M Claim"). The Bankruptcy Court approved this stipulation in 2011.

The stipulation preserved further objections to the "amount" of claim that should be allowed in each class, and the Trust later pursued such an objection. In 2013, the Trust settled that objection by negotiating an even better deal for creditors and parties-in-interest: the higher-priority $24M Claim would be disallowed and the lower-priority $72M Claim would be allowed. This is the settlement that Griffin now challenges as a breach of fiduciary duty.

Although Griffin purports to object to the Trust's 2013 settlement of the ***amount*** of the Underwriters' claims, the bulk of her arguments are against the ***classification*** of the $72M Claim in the preferred equity class—an issue that was determined by final order of the Bankruptcy Court in 2011. Griffin cannot collaterally attack that order now.

As for her arguments against settlement of the amount of each claim, the Bankruptcy Court correctly held that Griffin's arguments were untimely, and that even if they were not, the settlement was an appropriate exercise of the Trust's business judgment. This Court should affirm on both grounds.

First, Griffin's objection is untimely because she slept on her rights for six years. The Trust—which is not required to obtain Bankruptcy Court approval of its settlements—disclosed the settlement's terms on April 1, 2013 (four days after the settlement) in the Trust's SEC Form 10-K filing for the period ended December 31, 2012 (the "2012 10-K"). The Trust again disclosed the settlement's terms in its

quarterly report to the Bankruptcy Court on April 30, 2013. The Trust also posted links to both these documents on its website. Because these disclosures were more than adequate, Griffin's six-year delay supports a finding of untimeliness, whether it be under the statute of limitations (as the Trust argued below), or the doctrine of laches (as the Bankruptcy Court held).

Second, the Bankruptcy Court did not abuse its discretion in finding that if the parties had sought Bankruptcy Court approval of the 2013 settlement, the settlement would have been appropriate. Litigation would have been expensive and time consuming, with no guarantee of a result in the Trust's favor, and the settlement improved the estate's position. Further, re-opening litigation today, as Griffin would like, would mean spending real dollars to determine a claim in a class (preferred equity) that likely will not receive any further distribution.

Griffin is one of a group of equity holders in the bankruptcy case who remain upset that they will not receive additional value on account of their equity interest in WMI. But, that is the result of the congressionally chosen priority scheme mandated by the Bankruptcy Code. Over the past seven years, WMI and the Trust have done everything possible to maximize recoveries, distributing over $7 billion to stakeholders, which is far more than initially expected. The Trust also has managed to obtain significant value for equity holders, even though stakeholders that are more senior remain impaired. But, the well has been tapped,

and no additional distributions are likely to be made to holders of preferred equity-level claims or lower. Griffin's attempts to augment her own recovery through litigation are in fact harming her class by consuming scarce resources, and should be rejected for the same reasons found by the Bankruptcy Court.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. ***Untimeliness***. The Bankruptcy Court found that the Trust adequately disclosed the terms of its settlement in 2013. Was Griffin's objection six years later barred by the statute of limitations, or alternatively, did the Bankruptcy Court err in holding that the objection was barred by laches?

The standard of review for statute of limitations questions is *de novo*. *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP (In re Radnor Holdings Corp.)*, 564 B.R. 467, 479 (D. Del. 2017). The standard of review for laches has three components: "We review factual findings such as length of delay and prejudice under the clearly erroneous standard; we review the district court's balancing of the equities for abuse of discretion; and our review of legal precepts applied by the district court in determining that the delay was excusable is plenary." *Bermuda Express, N.V. v. M/V Litsa (Ex. Laurie U)*, 872 F.2d 554, 557 (3d Cir. 1989).

2. ***Appropriateness of Settlement***. Did the Bankruptcy Court abuse its discretion in determining that the settlement was a valid exercise of the Trust's business judgment?

The standard of review for the approval of settlements is abuse of discretion. *Nebo Ventures, LLC v. Stanziale (In re Novapro Holdings, LLC)*, 2019 WL 1324950, at *3 (D. Del. Mar. 25, 2019) ("The Court reviews the Memorandum Order [approving the settlement] for abuse of discretion") (citing *Myers v. Martin (In re Martin)*, 91 F.3d 389, 391–93 (3d Cir. 1996) ("the ultimate issue on appeal is whether the bankruptcy court abused its discretion when it disapproved the compromise")); *In re W.R. Grace & Co.*, 475 B.R. 34, 74 (D. Del. 2012) (applying abuse of discretion standard to bankruptcy court's approval of settlement).

3. ***Griffin's New "Substantial Contribution" Claim***. For the first time on appeal, Griffin appears to ask this Court to compel the Trust to pay at least $3 million to her "whether or not" her appeal is granted, presumably under Bankruptcy Code § 503(b)(3)(D) for "making a substantial contribution" to the case. Should this Court entertain the request when Griffin never raised it below?

"Absent exceptional circumstances, this Court will not consider issues raised for the first time on appeal." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 261-62 (3d Cir. 2009) (citation omitted).

STATEMENT OF THE CASE

A. The Parties

Appellant Alice Griffin was a holder of preferred equity interests in WMI, and upon information and belief, was a mortgagor of property to Washington Mutual Bank, a former subsidiary of WMI. She is classified in the "Preferred Equity Interest" class (Class 19) of the bankruptcy plan (the "Plan").

Although Griffin proceeds *pro se* in this appeal, she is a member of the New York Bar, was admitted *pro hac vice* in the Bankruptcy Court in connection with her objection, and was accompanied by local counsel at the hearing. *See In re Washington Mutual, Inc.* Transcript of Hearing dated April 22, 2019 ("Tr.") at 5:7–5:12 (A868);[1] Bankr. D.I. 12601 (*pro hac vice* order). Upon information and belief, Griffin may have received funding to prosecute this matter from other holders of WMI's Class 19 preferred equity interests.

Appellee WMI Liquidating Trust was established under WMI's bankruptcy plan to liquidate assets, resolve pending claims, and make distributions consistent with the terms of the Plan. Plan § 27.6 (A122–23). WMI filed its bankruptcy case in 2008 and confirmed its Plan in 2012. *See* Confirmation Order p. 1 & ¶ E (A223, 227).

---

[1] Citations of "A__" refer to page numbers in the Trust's Appendix.

B. The Underwriters file general unsecured indemnification claims against WMI

In 2009, the Underwriters filed four proofs of claim in the bankruptcy case. *See* Proof of Claim Nos. 2569, 2584, 2909, and 3794, which were later amended by Proof of Claim Nos. 3935–38 (A1, A5, A9, A13, A18, A22, A26, A30).

The claims related to a multidistrict securities action pending against the Underwriters in the United States District Court for the Western District of Washington, captioned *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litig.*, Case No. 2:08-md-1919 (W.D. Wash.) (MJP).

The Underwriters contended that WMI was contractually obligated to reimburse and indemnify them for attorneys' fees and expenses incurred in the securities action, and for any settlement or judgment amounts. *See* Proofs of Claim at Attachment p. 2 (A4, A8, A12, A17, A21, A25, A29, A33). The Underwriters filed their claims as general unsecured claims. *Id.* at Cover Page, "Item 1" (A1, A5, A9, A13, A18, A22, A26, A30).

C. WMI objects to the claims' classification as general unsecured claims, and obtains subordination of those claims

WMI objected to the "classification" of the Underwriters' claims, which initiated a contested matter in the Bankruptcy Court. [Bankr. D.I. 2574].

In that contested matter, WMI argued that the Underwriters' claims should be subordinated and re-classified into lower-priority classes under Bankruptcy

Code § 510(b), which provides that claims "arising from … a sale of a security of the debtor … or for reimbursement or contribution … on account of such a claim … shall be subordinated to all claims or interests that are senior to or equal the claim represented by such security." 11 U.S.C. § 510(b).

After briefing was completed [Bankr. D.I. 3164, 3737], but before oral argument, the parties settled the contested matter and incorporated their agreement into a written stipulation (the "Classification Stipulation") (A37).

The Classification Stipulation re-classified the Underwriters' claims. It provided for $250,000 to be allowed as a general unsecured claim, and for the remainder to be split into two claims and subordinated. First, the portion relating to underwriting of debt securities was re-classified as a claim in the "Subordinated Claims" class (Class 18), which was the lowest-ranked creditor class. Second, the portion relating to underwriting of preferred equity securities was re-classified as an interest the "Preferred Equity Interest" class (Class 20 of the then-current sixth amended plan). *See* Classification Stipulation ¶ 3 (A40) ("[T]he remainder of the Claims shall be subordinated and be classified as a claim or equity interest against or in the Debtors, as the case may be.... Claim Nos[.] 2584, 3794, 3937, and 3936

… shall be classified in Class 18 of the Plan, and Claim Nos. 2909, 2569, 3935, and 3938 … shall be classified in Class 20 of the Plan.”).[2]

The Classification Stipulation did not fix the amount of claim in each class, because the underlying securities action against the Underwriters was still ongoing. *See* Classification Stipulation Recital D (A38–39). The Classification Stipulation therefore preserved WMI's ability to further object to the allowance and amount (but not to the classification) of the claims. *Id.* ¶ 5 (A40–41). The Underwriters ultimately asserted claims of approximately $24 million in the Subordinated Claims class (the $24M Claim) and $72 million in the Preferred Equity Interest class (the $72M Claim). *See*, *e.g.*, 2012 10-K at 14 (A396) (describing amounts at issue in each class).

The Bankruptcy Court approved the Classification Stipulation by order dated February 4, 2011. (A35). That order finally determined the classification of the Underwriters' claims. No party-in-interest has ever sought relief from the order.

D. WMI confirms its bankruptcy plan, and the Trust is established to liquidate assets and resolve claims

In February 2012, WMI confirmed its Plan. (A223). The Plan went “effective” on March 19, 2012. [Bankr. D.I. 9933] (notice of effective date). The

[2] When WMI later filed its seventh amended Plan (the final plan), the “Preferred Equity Interest” class (previously Class 20) became Class 19. *See* Bankr. D.I. 5548 at § 24.1 (sixth amended plan showing that Preferred Equity Interest was Class 20); Plan § 23.1 (A115) (Preferred Equity Interest class was moved to Class 19).

Bankruptcy Court's confirmation order authorized the parties to execute the "Liquidating Trust Agreement," which established and governed the Trust. Confirmation Order ¶ 25 (A289).

The Trust's purpose is to liquidate and distribute all remaining assets. Liquidating Trust Agreement § 1.2 (A167). To accomplish this, the liquidating trustee is empowered to settle claims consistent with his "reasonable business judgment." *See* Liquidating Trust Agreement § 6.2(b)(iii) (A186) (providing for authority "in the Liquidating Trustee's reasonable business judgment, to investigate, prosecute, settle and/or abandon rights, Causes of Action, Claims or litigation of the Liquidating Trust…."); *id.* § 6.2(b)(vi) (A186) (providing for authority "in the Liquidating Trustee's reasonable business judgment, to object to Claims, and manage, control, prosecute, and/or settle on behalf of the Liquidating Trust…."); *see also* Plan § 27.6 (A122–23) (providing similar authority).

The liquidating trustee operates under the oversight of a "Trust Advisory Board" that consisted of nine members at the time of the settlement that Griffin challenges, three of whom were selected by the creditors' committee, another three by the equity committee, one by the creditors' committee and approved by the equity committee, and two by certain parties-in-interest. Liquidating Trust Agreement § 6.4 (A189–90); 2012 10-K at 25–27 (A413–17) (listing members as of April 1, 2013).

Under the court-approved terms of the Liquidating Trust Agreement, the Trust was not required to seek Bankruptcy Court approval of any settlement. *See* Liquidating Trust Agreement § 6.2(d) (A187) ("Except as otherwise provided in this Trust Agreement, the Liquidating Trustee will not be required to obtain the order or approval of the Bankruptcy Court, or any other court …, or account to the Bankruptcy Court or any other court … for, the exercise of any right, power or privilege conferred hereunder.").

E. Class 18 may receive further distributions under the Plan, but Class 19 likely will not

Upon becoming effective, the Plan provided for "initial distributions" of approximately $6.5 billion to holders of allowed claims, and for reserves to be established for holders of disputed claims. *See* Trust Form 10-K for the period ending December 31, 2018 ("2018 10-K") at 3–4 (A764–65) (specifying amount of distributions and reserves); Plan § 31 (A131–38) (governing initial distributions).

As their initial distribution, Classes 19 and 22 (preferred and common equity) received the stock of reorganized WMI, 75% of which was allocated to Class 19 and 25% of which was allocated to Class 22. *See* Plan §§ 23.1, 25.1 (A115, 117) (70% and 30%); Bankr. D.I. 9691, Ex. A §§ 3, 5 (modifying percentages to 75% and 25%). The only further distribution that Class 19 may receive under the Plan is a share of whatever remains following payment in full of all senior classes (including post-petition interest). Plan § 23.1 (A115).

Since the Plan's effective date, the Trust has distributed approximately $925 million in additional distributions. 2018 10-K at 4 (A765).

Depending on the outcome of certain disputes in higher-priority classes, the Trust may commence making distributions to Class 18. 2018 10-K at 7 (A768). But, as of March 31, 2019, the Trust had remaining net assets of approximately $34.9 million. *See* 3/31/2019 Quarterly Summary Report at 5 (A928); *see also* 2018 10-K at 4 (A765). This is less than the amount of *allowed* claims in Class 18 ($38.2 million plus $8.4 million in post-petition interest), let alone disputed claims in that class. 2018 10-K at 7 (A768).

As a result, the Trust does not expect to satisfy Class 18 in full, and does not expect to make any further distribution to Class 19. *See*, *e.g.*, 2018 10-K at 7 (A768) ("management currently believes it is unlikely that the Trust will make any cash distributions to holders of Equity Interests").

F. The Trust objects to allowance of the Underwriters' claims

In 2012, the Trust objected to the Underwriters' claims on the ground that the indemnification rights they asserted were not allowable as claims under governing law. (A340). The Trust then engaged the Underwriters in settlement negotiations and ultimately settled the objection through a stipulation dated March 28, 2013 (the "Allowance Stipulation") (A365).

The Allowance Stipulation disallowed the Underwriters' $24M Claim that was classified in Class 18. Allowance Stipulation § 3(a) (A369). It also allowed the $72M Claim that was classified in Class 19.[3] *Id.* As Griffin acknowledges, the allowed $72M Claim constituted only a 1% expansion to Class 19 allowed claims. Griffin Brief at 3–4.

Because the $72M Claim was now allowed in a fixed amount, it was entitled to receive its share of Class 19's "initial distribution." On May 1, 2013, the Trust distributed approximately 1.4 million shares of reorganized WMI to the Underwriters on account of their claim, as calculated in accordance with the Plan. 2012 10-K at 14 and F-11 (A396, 443). The distribution came from the "disputed equity escrow" that the Trust had established on the Plan's effective date to hold potential distributions owed to equity interests whose claims were not yet allowed. *Id.*

Reorganized WMI's shares traded on NASDAQ under the symbol "WMIH," and closed at $0.70 on the date the Allowance Stipulation was executed.[4] Thus,

---

[3] The Allowance Stipulation noted that, because "Class 20" in the sixth amended plan had become "Class 19" in the final Plan, "[c]laims and interests that had been classified in Class 20 of the Sixth Amended Plan were re-classified into Class 19 of the [final] Plan…." *Id.* at Recital H (A367–68).

[4] This Court may take judicial notice of publicly traded stock prices. *See Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000) (concluding that an appellate court may take judicial notice, and taking notice of stock prices). *See*

the distribution of 1.4 million shares was worth approximately $1 million at the time of settlement.

G. The Trust discloses the settlement's terms in 10-Ks and in its quarterly summary report, all posted on the Trust's website

Four days after the Allowance Stipulation was executed, on April 1, 2013, the Trust filed its 2012 10-K with the SEC. *See* 2012 10-K (A372, A424).

The 2012 10-K disclosed the settlement and its terms in the "Legal Claims" section of the report, under the bolded heading "Underwriters' Claim":

> ***Underwriters' Claim***
>
> On March 28, 2013, the Trust entered into a stipulation (the "Underwriter Stipulation") with certain underwriters (including Morgan Stanley, Credit Suisse, and Goldman Sachs, and collectively referred to herein as the "Underwriters") who had filed indemnification claims totaling $96.0 million against the Debtors for legal fees and settlement costs incurred in defending securities fraud action claims brought against the Underwriters in connection with their role underwriting various security issuances by the Debtors. During the course of the Debtors' chapter 11 cases, the Debtors objected to the indemnification claims and the claims were subordinated to Class 18 and Class 19 (as defined in the Plan). Pursuant to the terms of the Underwriter Stipulation, the parties have agreed that (a) the Underwriters' $24.0 million Class 18 claim will be disallowed in full, and (b) the Underwriters' $72.0 million Class 19 [claim] will be allowed in full. Accordingly, pursuant to the Plan, the Underwriters, as the holders of Allowed Claims in Class 19, will receive a distribution of approximately 1.4 million shares of common stock of Reorganized WMI from the Disputed Equity Escrow, such amount having been calculated in accordance with the Plan. The Underwriters have also reserved any rights they may have to defend

---

https://www.historicalstockprice.com/history/?a=historical&ticker=WMIH&month=03&day=28&year=2013&x=12&y=7 for historical WMIH stock prices.

> against claims brought against them by the Trust and have released the Trust from any possible affirmative claims.

2012 10-K at 14 (A396).

The Trust repeated this disclosure in the notes to the 2012 10-K's financial statements. *Id.* at F-11 (A443). The Trust also made similar disclosures in its Form 10-K filings for the following three years. *See* 2013 10-K (A1020); 2014 10-K (A552); 2015 10-K (A649).

In addition, the Trust disclosed the settlement's terms in its quarterly summary report for Q1 2013, which it publicly filed with the Bankruptcy Court on April 30, 2013. *See* 4/30/13 Post-Confirmation Quarterly Summary Report [Bankr. D.I. 11228] at Note 9 (A456).

The purpose of a quarterly summary report is to disclose the financial condition of the Trust, including recent and upcoming disbursements. In Note 9 of the Q1 2013 report, entitled "Disputed Equity Escrow," the Trust discussed disbursements from that reserve. *Id.* In that section, the Trust disclosed the Allowance Stipulation and its terms using language substantially similar to the 10-K language quoted above. *Id.*

The Trust posts links to all of its SEC filings and quarterly reports on its website, www.wmitrust.com, under clearly marked tabs called "SEC Filings by WMI Liquidating Trust" and "Quarterly Summary Reports."

H. In 2019, Griffin objects to the Allowance Stipulation as a breach of fiduciary duty

In March 2019, Griffin filed a pleading styled as an objection to certain of the Underwriters' claims. [Bankr. D.I. 12595]. In that objection, she argued that the Trust breached its fiduciary duty by reaching a settlement allowing the $72M Claim in Class 19. *Id.* ¶¶ 12–17 (A748–50) (arguing that allowing claim in Class 19 was breach of fiduciary duty); *Id.* ¶¶ 18–19 (A750–51) (arguing that classifying claim in Class 19 also was breach of fiduciary duty).

Griffin further argued that she was not time-barred from objecting. *Id.* ¶¶ 20–21 (A751–52). For the first time on reply, she also argued that the Allowance Stipulation was invalid and that the Trust's disclosures were misleading. [Bankr. D.I. 12609, ¶¶ 2–15] (A833–37).

The Trust responded that the objection was "Untimely, Factually and Legally Inaccurate and Fail[ed] to Understand the Economic Impact of the [Allowance] Stipulation." [Bankr. D.I. 12604, p. 15] (A823).

I. The Bankruptcy Court denies the objection as untimely and baseless

The Bankruptcy Court overruled Griffin's objection on two grounds.

First, the objection was untimely. *See* Tr. at 41:23–42:17 (A904–05). The Bankruptcy Court found that "classification was settled in February of 2011 over eight years ago." *Id.* at 42:4–42:5 (A905). Likewise, allowance "was stipulated to

by the liquidating trustee over six years ago in March of 2013." *Id.* at 42:5–42:7 (A905).

The Bankruptcy Court then found that Griffin received adequate notice of the Allowance Stipulation because the Trust publicly disclosed the settlement terms in SEC and Bankruptcy Court filings. *Id.* at 42:8–42:10 (A905) ("And although Ms. Griffin complains … the shareholders and other parties did not get notice of [the Allowance Stipulation], the facts do not support that assertion."). In particular, the Bankruptcy Court found that the Trust's disclosures "ma[d]e it clear what the terms of the settlement were and the treatment of the underlying claims." *Id.* at 42:8–42:15 (A905). Because the settlement terms were publicly available in 2013, the Bankruptcy Court held that Griffin's objection was untimely under the doctrine of laches. *Id.* at 42:16–18 (A905).

Second, the Bankruptcy Court determined that "th[e] settlement was not in bad faith, was not a breach of fiduciary duty, but really was a proper exercise of the liquidating trust['s] obligation under the trust agreement." *Id.* at 44:19–44:23 (A907). Applying the Third Circuit's *Martin* factors,[5] the Bankruptcy Court found that (1) prosecuting the claims objection would have been a complex, expensive, and lengthy endeavor because the parties would have had to retry the underlying securities litigation, (2) prosecuting the claims objection carried risk for the Trust,

[5] *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996).

and (3) the settlement was in the best interests of stakeholders, including Class 19, because a 1% expansion to the size of Class 19 was better than standing behind a $24 million senior claim. *Id.* at 42:18–45:6 (A905–08).

SUMMARY OF ARGUMENT

1. Griffin's objection is untimely. The Trust argued untimeliness below under the statute of limitations, which is three years for the breach of fiduciary duty claim on which Griffin premises her objection. The Bankruptcy Court determined that Griffin's objection was untimely, and referred to the doctrine of laches when doing so. Although the Bankruptcy Court did not discuss the statute of limitations in its bench ruling, this Court may affirm on any ground supported by the record, and the record supports a finding of untimeliness under ***both*** the statute of limitations and laches.

a. *Statute of limitations*. The Bankruptcy Court found that Griffin was on notice of the Allowance Stipulation in 2013, and therefore the record supports a finding that the three-year statute of limitations expired in 2016.

b. *Laches*. The record also supports a finding that Griffin's delay was unreasonable and prejudicial. First, because the analogous statute of limitations has expired, Griffin's six-year delay gives rise to a ***presumption*** of laches that she cannot overcome. Second, even if the burden were on the Trust, the record shows that Griffin was on notice of the settlement in 2013 and had no

reasonable excuse for delaying until 2019. This delay prejudices the Trust by attempting to re-open what the Bankruptcy Court found would have been lengthy and complex litigation now, at the tail-end of the Trust's existence.

2. The Bankruptcy Court did not abuse its discretion in determining that the settlement was a reasonable exercise of the Trust's business judgment. Litigating the claims objection would have been expensive, complex, and lengthy, and re-opening the litigation now would mean spending "real" dollars to determine claims in classes that are receiving a partial distribution (Class 18) or no further distribution (Class 19). The Bankruptcy Court's weighing of the factors to find that the settlement was reasonable was not an abuse of discretion.

3. Because Griffin makes a request for substantial contribution for the first time on appeal, this Court should not entertain that request. Even if it did, Griffin cannot show that her efforts benefitted the estate or that she acted altruistically.

ARGUMENT

I. The Bankruptcy Court correctly ruled that objecting to a settlement six years after its consummation is too late

These facts are firmly established in the record:

1. The Trust disclosed the Allowance Stipulation on April 1, 2013 in its 2012 10-K, on April 30, 2013 in its quarterly summary report, and numerous times thereafter. *Supra* at 14–15.

2. The disclosures explained the terms of the Allowance Stipulation. They stated that the $24M Claim would be disallowed in Class 18, the $72M Claim would be allowed in Class 19, and the Underwriters would receive a distribution of 1.4 million shares of reorganized WMI's common stock on account of their allowed Class 19 claim. *Id.*

3. Griffin did not object until March 22, 2019, six years later. (A745).

Although the Trust argued statute of limitations in its response below, the Bankruptcy Court used the term "laches" when finding untimeliness. This Court may affirm on any basis supported by the record, and the record here supports untimeliness under both doctrines. *See Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999) (court may affirm on any ground supported by record); *In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 237 n. 6 (3d Cir. 1995) ("[T]he appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it.") (quotation omitted).

A. Because Griffin's objection is premised on a breach of fiduciary duty, it is time-barred under the three-year statute of limitations

Griffin asserts that the Trust breached its fiduciary duty by entering into the Allowance Stipulation. *See* Griffin Objection p. 4, Header "A" (A748) ("The Settlement Amount Claim Was Worthless and the WMILT Breached its Fiduciary

Duty by Allowing It into Class 19"); *id.* ¶ 16 (A749) (alleging that settlement was "a breach of fiduciary duty against preferred"); *id.* ¶ 17 (A750) ("One cannot expect the Trustee as a rational person to bring a stipulation that encases a breach of fiduciary duty before the Court for approval."); *id.* ¶ 18 (A750–51) (alleging that the settlement "is incomprehensible, and seems to be a 'paradigm case of inequitable conduct by a fiduciary.'"); *see also id.* ¶¶ 19, 21, 22 (A751–53) (more allegations of breach of fiduciary duty). Her objection thus is premised on a breach of fiduciary duty.

Under Delaware law,[6] a three-year statute of limitations applies to breach of fiduciary duty claims. 10 *Del. C.* § 8106; *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) ("It is well-settled under Delaware law that a three-year statute of limitations applies to claims for breach of fiduciary duty."), *aff'd*, 725 A.2d 441 (Del. 1999) (TABLE).

Because Griffin's objection is premised on breach of fiduciary duty, then absent tolling, the statute of limitations expired in April 2016, three years after the

[6] The Trust's fiduciary obligations are governed by Delaware law. *See* Liquidating Trust Agreement § 9.1 (A207) ("[T]he rights, duties, and obligations arising under this Trust Agreement shall be governed by, and construed and enforced in accordance with, the Bankruptcy Code and, to the extent not inconsistent therewith, the laws of the State of Delaware."); Griffin Objection ¶ 21 (A752) ("The WMILT is organized in Delaware and Delaware has a three-year statute of limitations for a breach of fiduciary duty cause of action.").

Trust disclosed the terms of the Allowance Stipulation that Griffin says was a breach of duty.

This Court need not consider tolling because Griffin did not argue tolling below. Even had she done so, the Bankruptcy Court's finding that she received adequate notice in 2013 would preclude tolling. A statute is tolled only until a person is on "inquiry notice" of the alleged wrongdoing. *See, e.g.*, *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *17 (Del. Ch. Dec. 1, 2009) ("[T]he statute begins to run 'upon the discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts.'") (citation omitted; emphasis in original).

A person is on "inquiry notice" when the facts underlying her claim are "readily available." *Kennedy v. Skadden, Arps, Slate, Meagher & Flom LLP (In re Radnor Holdings Corp.)*, 564 B.R. 467, 481 (D. Del. 2017) ("A 'plaintiff is on inquiry notice when the information underlying plaintiff's claim is readily available.'") (citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *8).

Where the facts underlying a claim are published in public documents, they are "readily available" such that inquiry notice exists. *See Seidel v. Lee*, 954 F. Supp. 810, 817 (D. Del. 1996) (tolling did not apply because "the public documents, which form the basis of many of Plaintiff's claims, could have

provided Plaintiff with adequate notice of any alleged misconduct by Defendants”); *In re Radnor Holdings Corp.*, 564 B.R. at 482 (no tolling because “the information from which [plaintiff] discovered his alleged claims was publicly available….”).

Here, the facts underlying Griffin’s objection to the Allowance Stipulation were publicly and timely available starting on April 1, 2013. *See supra* at 14–15. As the Bankruptcy Court found, the Trust’s disclosures clearly articulated the Allowance Stipulation’s terms. Tr. at 42:8–42:15 (A905). Not only were these documents available through the usual avenues (*i.e.*, the SEC website and the Bankruptcy Court’s docket), but the Trust posted them to its own website under links labelled “SEC Filings by WMI Liquidating Trust” and “Quarterly Summary Reports.” *See* www.wmitrust.com.[7]

Because the Bankruptcy Court found that the Trust appropriately disclosed the Allowance Stipulation in 2013, the record demonstrates that the statute of limitations expired in 2016, and therefore supports a finding of untimeliness under the statute of limitations.

---

[7] To the extent that Griffin attempts to object to the Classification Stipulation as opposed to the Allowance Stipulation, she was on notice even earlier, in 2012 when the Bankruptcy Court entered an order on the docket approving the Classification Stipulation. (A35). Moreover, because the Bankruptcy Court approved that settlement by final court order, Griffin cannot challenge it now.

Griffin argues that the Bankruptcy Code contains no statute of limitations for objecting to a claim under Bankruptcy Code § 502(b), which she interprets to mean that she can object at any time before the case is closed. But, the Bankruptcy Court correctly found that Griffin's objection was not actually a § 502(b) objection to a claim, but rather was an objection to the Trust's settlement of a claim. *See* Tr. 42:2-42:3 ("What [Ms. Griffin] really … is pressing is an objection to the settlement of that claim. The claims were settled.") (A905). And, Griffin cannot dispute that the basis of her objection to the settlement is breach of fiduciary duty, a claim with a three-year statute of limitations. Because the wrongdoing upon which her objection is premised is time-barred, the objection itself cannot stand because it rests on no legally cognizable claim. It is likewise time-barred.[8]

This Court therefore may affirm on the basis that the statute of limitations bars Griffin's objection, a conclusion that is firmly supported by the record.

[8] For the first time on appeal, Griffin also suggests that 10-Ks are "inadmissible hearsay." Griffin Brief at 33. Griffin never raised this objection below, and therefore has waived it. Even had she raised it below, the Trust would have shown that 10-Ks are routinely admitted as business records. *S.E.C. v. Jasper*, 678 F.3d 1116, 1122–23 (9th Cir. 2012) ("virtually all" 10-Ks are admissible as business records if authenticated). In addition, to establish that Griffin was on notice, the Trust does not need to offer the 2012 10-K for the truth of the matters asserted, but merely to show that the statements were made. The statements therefore do not fall within the definition of hearsay.

B. **The record also supports a finding of laches**

Laches applies where "the plaintiff delayed in filing suit for an unreasonable and inexcusable length of time after the plaintiff knew or reasonably should have known of its claim against the defendant; and (2) the defendant suffered material prejudice or injury as a result of the plaintiff's delay." *McKesson Inf. Solutions LLC v. Trizetto Group, Inc.*, 426 F. Supp. 2d 203, 208 (D. Del. 2006); *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 949 (3d Cir. 1971). How to apply the doctrine "is committed to the sound discretion of the district court." *McKesson*, 426 F. Supp. 2d at 209 (quoting *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1032 (Fed. Cir. 1992) (*en banc*)).

Laches is the equitable analogue of the statute of limitations, and if the analogous statute of limitations has expired, then a ***presumption*** of laches arises. *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 138 (3d Cir. 2005) ("Once the statute of limitations has expired, the defendant 'enjoys the benefit of a presumption of inexcusable delay and prejudice.'") (citing *EEOC v. Great Atl. & Pac. Tea Co.*, 735 F.2d 69, 80 (3d Cir. 1984)). The burden then shifts to the other party to show excusable delay and lack of prejudice. *Id.* ("Santana, therefore, carried the burden of proving that its delay was excusable *and* that it did not prejudice Bobrick.") (emphasis in original). That party must prove both elements to rebut the presumption. *Id.* at 139 ("[W]e have consistently held that a

plaintiff must prove that laches does not exist by showing that its delay was excusable *and* that its delay did not prejudice the defendant") (emphasis in original).

Here, because Griffin delayed six years in bringing her objection—twice as long as the applicable statute of limitations—the Trust enjoys a presumption of laches. It was Griffin's burden to provide an excuse for her delay and to show the lack of prejudice. She did not carry that burden, and the Bankruptcy Court's ruling can be affirmed on this basis alone.

The Bankruptcy Court's findings on the record also support findings of inexcusable delay and prejudice. With respect to delay, the Bankruptcy Court found that Griffin was on notice of the settlement in 2013 but slept on her rights for six years. Tr. 42:8–42:18 (A905).

Although Griffin offers two excuses for her delay, neither is justifiable. First, she argues that she does not usually read 10-Ks, and the Trust should have disclosed the settlement in a Form 8-K, "which heralds an extraordinary event." Griffin Brief at 9, 18. But, as the "inquiry notice" law discussed above holds, information must merely be "readily available" to the public, not published in an individual's preferred format. *Supra* at 22–23. The Trust indisputably published the Allowance Stipulation's terms in its 2012 10-K, its quarterly summary report to the Bankruptcy Court, and through links to those documents on the Trust's

website. Moreover, the Trust routinely objects to and settles claims, and Griffin failed to present evidence to support her bare allegation that the Allowance Stipulation was an "extraordinary" event warranting a further disclosure in an 8-K filing. Even assuming it was, disclosure in a Form 10-K four days after the settlement would have obviated any need to further disclose through a Form 8-K.

Second, Griffin argues that her delay is excusable because the Trust's disclosure was misleading and would not have put a reasonable person on notice. But, the disclosure was clear: it stated that "the parties have agreed that (a) the Underwriters' $24.0 million Class 18 claim will be disallowed in full, and (b) the Underwriters' $72.0 million Class 19 [claim] will be allowed in full." 2012 10-K at 14 & F-11 (A396, 443); *supra* at 14. The disclosure then stated that the Underwriters would receive an initial distribution of 1.4 million shares of reorganized WMI stock. *Id.* These disclosures are accurate and would put a reasonable person on notice. Tr. at 42:14–42:15 (A905) (finding that the disclosures "make it clear what the terms of the settlement were and the treatment of the underlying claims."). Griffin contends that the disclosures are inconsistent with various provisions of the Plan, but if Griffin thought so, she was on notice of that fact when the disclosures were made in 2013.

In addition to delay, the record also demonstrates prejudice. The Trust is at the tail-end of its life. As the Bankruptcy Court found (and as Griffin agreed when

asked by the judge at oral argument), any litigation of the Underwriters' claim would be complex and lengthy. *Id.* at 15:5–15:17; 43:25–44:7 (A878, 906–07). Waiting six years until the end of the Trust's life to challenge the settlement and reopen potentially lengthy litigation is prejudicial, as it could cause the Trust to have to unnecessarily extend its term. Tr. 33:6–33:9 (A896) (Trust hopes to complete liquidation this calendar year). Reopening the litigation also would require the Trust to spend "real" dollars to determine claims in a class that will receive no further distribution.

Moreover, the Trust already has distributed 1.4 million shares of reorganized WMI to the Underwriters (fourteen separate entities). *See* Proof of Claim at Attachment (A3) (listing underwriters); 4/30/13 Post-Confirmation Quarterly Summary Report [Bankr. D.I. 11228] at Note 9 (A456) (initial distribution on May 1, 2013). This change in position, and the difficulty of attempting to recollect the stock six years later, would prejudice the Trust.

Furthermore, the Bankruptcy Court found that the settlement was in the paramount interest of stakeholders. Tr. 44:8–44:23 (A907). Undoing a settlement that is in the best interest of stakeholders six years after the fact is prejudicial.[9]

---

[9] Griffin argues that no prejudice can exist because the $72M Claim "should have been placed in Class 22." Griffin Brief p. 19. This is not a challenge to the Allowance Stipulation, but a collateral attack on the Classification Stipulation,

C. <u>Griffin's arguments against laches are unavailing</u>

Griffin first attempts to diminish the Bankruptcy Court's laches ruling by arguing that the Bankruptcy Court raised the issue of timeliness *sua sponte*. But, both parties briefed untimeliness as an issue. Griffin Objection ¶¶ 20–21 (A751–52) (arguing against equitable defenses "such as laches" "because the [Trust] cannot establish that it has clean hands…."); Trust Response ¶ 33 (A825) ("any claims against WMILT … emanating from the [Allowance] Stipulation would need to have been brought at least three years ago before the applicable statute of limitations expired"); Griffin Reply ¶ 15 (A837) (arguing that laches should not apply because Trust's disclosure was purportedly misleading). And, the Bankruptcy Court observed at the hearing that timeliness was a live issue. *Id.* at 41:23–42:1 ("But there is an issue raised [that] even if Ms. Griffin … did have standing to object to the claims, it [is] quite simply just too late to do that."). The Bankruptcy Court did not raise the issue *sua sponte*.

Griffin next argues that the Bankruptcy Court was precluded from ruling on laches because the Trust waived the issue by not raising it as an affirmative defense. But, this argument is premised on Rule 8, which requires a defendant to raise all affirmative defenses in its answer to the complaint. Rule 8 does not apply in bankruptcy contested matters, which do not involve complaints and answers.

---

which was approved by a final order. *See also supra* at 11 (noting differing treatment of Classes 19 and 22).

See Vieira v. AGM II, LLC (In re Worldwide Wholesale Lumber, Inc.), 372 B.R. 796, 809 (Bankr. D. S.C. 2007) ("Fed. R. Bankr. P. 9014 specifically provides that Fed. R. Bankr. P. 7008 and 7013 do not apply to contested matters. By excluding Rules 7008 and 7013 from contested matters, Trustee was not compelled to raise any affirmative defense."); *Davenport v. Djourabchi*, 316 F. Supp. 3d 58, 70 n.11 (D.D.C. 2018) ("Davenport was not required to raise any affirmative defenses or compulsory counterclaims within the contested matter."). Because Rule 8 did not apply, it did not somehow preclude the Bankruptcy Court from resolving Griffin's untimeliness—a live issue—through a finding of laches rather than under the statute of limitations.

Next, Griffin argues that laches cannot be viewed in isolation of the merits, which she believes favor her objection. Yet, the Bankruptcy Court ruled even on the merits, finding that the settlement was an appropriate exercise of business judgment—a ruling that is not an abuse of discretion. Tr. at 44:19–24 (A907). Griffin's appeal to the merits therefore provides no basis for reversing the Bankruptcy Court's laches ruling.

For these reasons, although the Bankruptcy Court did not expressly refer to the elements of laches in its bench ruling, the record supports that ruling. Because Griffin was on notice six years ago—twice the length of the statute of limitations—a presumption of laches arose, which supports the Bankruptcy Court's ruling.

Santana Prods., Inc., 401 F.3d at 138. And, even if the burden were on the Trust, the record affirmatively shows no excuse for the delay, and that proceeding now, at the end of the Trust's life, would be prejudicial.

II. The Bankruptcy Court did not abuse its discretion in finding that the Allowance Stipulation was a reasonable exercise of the Trust's business judgment

Courts in this circuit assess four factors when evaluating a settlement in bankruptcy: (i) the probability of success in the litigation; (ii) difficulties to be encountered in collection; (iii) the complexity of the litigation and related expense, inconvenience, and delay; and (iv) the interests of the creditors. *Myers v. Martin (In re Martin)*, 91 F.3d 389 (3d Cir. 1996). "In analyzing the compromise or settlement agreement under the *Martin* factors, courts should not 'have a "mini-trial" on the merits,' but rather should 'canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness.'" *In re W.R. Grace & Co.*, 475 B.R. 34, 77–78 (D. Del. 2012) (citation omitted); *see also In re Nortel Networks, Inc.*, 522 B.R. 491, 510 (Bankr. D. Del. 2014) (same).

The Bankruptcy Court appropriately exercised its discretion in applying the *Martin* factors. The Allowance Stipulation eliminated the prospect of complex and expensive litigation on $96 million in claims. The only distribution received by the Underwriters (and that the Underwriters will likely receive at all) as a result of

that stipulation was their “initial distribution” of stock in reorganized WMI, worth $1 million at the time of settlement in March 2013. *Supra* at 13.[10]

Prosecuting the claims objection alone could have exceeded this amount. When questioned by the Bankruptcy Court, Griffin conceded that litigating the Underwriters’ claims would have required retrying the underlying securities law claims, which would have been costly and lengthy:

> THE COURT: And clearly if they had litigated this, it would have been costly.
>
> MS. GRIFFIN: Yes.
>
> THE COURT: It would have been lengthy. It would have taken a long time. There would have been discovery and depositions, really they would have to relitigate or litigate the actual underlying securities fraud claims against the underwriters, right?
>
> MS. GRIFFIN: Yes. If they were litigating on -- they would have had to have determined that the underwriters --
>
> THE COURT: Were not grossly negligent or not --
>
> MS GRIFFIN: Exactly, yes, yes.

Id. at 15:5–15:17. When weighed against the cost of prosecuting the claims objection, the settlement is entirely reasonable.

In addition, reopening the claims objection litigation at this late date not only would be expensive, but it would mean incurring those expenses to determine a

---

[10] Separately under the Classification Stipulation that the Bankruptcy Court approved earlier, the Underwriters received a $250,000 allowed unsecured claim. *Supra* at 8.

claim that, with respect to Class 18, will receive only a partial distribution, and with respect to Class 19, likely will not receive a further distribution. These economics further demonstrate the reasonableness of the settlement.

Moreover, the settlement benefitted both Class 18 and 19. Class 18 obviously benefitted from the reduced amount of claims in the class, and from the saved litigation expenses. But, Class 19 also benefitted because the settlement maximized the prospect of a future recovery by eliminating a senior claim that, if allowed, would have had to be paid in full before any distribution could reach Class 19. In any scenario where the Trust does not recover an additional ***$2.4 billion***, Class 19 is better off sharing 1% of any potential future distribution with the Underwriters than it is standing behind a $24 million senior claim.[11] Because the record shows that the Trust has only $34 million in net assets, there is no likely scenario where payment of the Underwriters' claim ahead of Class 19 would be better for Class 19 with respect to any potential future distribution.

---

[11] To demonstrate, assume that the Trust recovers enough to pay Class 18 in full and leave $50 million for Class 19. Class 19 would be better off with the settlement than without: with the settlement it receives $49.5 million ($50 million minus the 1% distributed to the Underwriters); without the settlement it receives $26 million ($50 million minus $24 million to pay the senior claim). If the excess amount is ***$1 billion***, Class 19 is again better off: with the settlement it receives $990 million ($1 billion minus the 1% distributed to the underwriters); without the settlement it receives $976 million ($1 billion minus $24 million). Only if the Trust recovers a staggering ***$2.4 billion*** in additional recoveries would the result start to change.

At argument below, the Bankruptcy Court reviewed these economics with Griffin and she conceded that her view depends on the Trust recovering a massive windfall sufficient to pay all interest holders in full:

> THE COURT: In fact, [the Underwriters] asserted they were entitled to creditor claims, … -- which would have priority over the preferred shareholders, correct?
>
> Ms. GRIFFIN: That's correct. They would have – if anything, they would have had a place in Class 18 or another creditor class, not Class 19 or 22.
>
> THE COURT: But you understand that in bankruptcy, creditors get paid before shares or any equity get paid anything.
>
> MS. GRIFFIN: Yes, I do, yes.
>
> ***
>
> MS. GRIFFIN: I would rather have [the Underwriters], Your Honor, as creditors then have them diluting Class 19 by 1 percent.
>
> THE COURT: Rather than them getting a hundred percent before you got anything.
>
> MS GRIFFIN: Well, if there's a -- it depends on how much comes into the waterfall, Your Honor. If it's enough, because it's capped as a creditor claim. It's capped. Once they're paid, it's over….
>
> THE COURT: Okay. But getting $100 million --
>
> MS GRIFFIN: Yes.
>
> THE COURT: -- versus getting 1 percent of your recovery which could be anything, isn't a hundred percent … worse for you than sharing 1 percent?
>
> MS GRIFFIN: I don't -- not -- depends on what comes in, Your Honor.

Tr. 7:14–7:23 (A870); 16:22–17:13 (A879).

In other words, Griffin speculates that the Trust may recover such a windfall that it would have enough assets to (1) pay creditors in full, (2) pay equity holders in full, and (3) leave a residual for equity. In that scenario, payment of the Underwriters' claim in a creditor class would be better than payment of their claim in an equity class, because as a "creditor" the Underwriters would not share the extra residual left over for equity. But, the record reflects that the Trust does not expect to satisfy Class 18, let alone recover enough to satisfy all equity classes ***and*** leave a residue. *See supra* at 11–12.

Griffin appears to believe that the Trust holds substantial claims against the FDIC that can lead to the massive hypothetical recovery on which her objection is premised. However, the record does not support her belief. The Trust and the FDIC executed a global settlement that is incorporated into the Plan and that contains broad mutual releases. *See* Plan § 1.183 (released claims) (A80). Although Griffin argues that the releases contain carve-outs, she has not identified any viable claim against the FDIC that can fall within a carve-out, and the Trust is aware of none. Tr. 30:1–30:6 (A893) (Trust counsel: "there are no remaining claims that the trust has against the receivership"). Thus, Griffin's contention that the settlement was unfair to Class 19 is based on the wishful thinking that the Trust will receive a massive recovery more than sufficient to satisfy Class 19 in full—

speculation that is not supported by the record. *See supra* at 11–12 (remaining Trust net assets are unlikely to satisfy Class 18).

Ultimately, the Bankruptcy Court had to evaluate whether a distribution worth $1 million, and allowance of a claim in a class that is not expected to receive any further recovery, was a reasonable exchange for disallowance of a senior claim in a class that likely will receive a recovery, and to resolve litigation that likely would have been complicated, costly, and protracted. For the reasons above, it was an eminently reasonable compromise, and the Trust's judgment should not be second-guessed now.

Although Griffin raises several arguments against the Bankruptcy Court's ruling, none of them are sustainable. First, she argues that the Bankruptcy Court's ruling is *dictum*. It is not. "When two independent reasons support a decision, neither can be considered *obiter dictum*; each represents a valid holding of the court." *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 408 n.4 (3d Cir. 1980). The Bankruptcy Court affirmatively ruled that, even if Griffin's objection were timely, "th[e] settlement was not in bad faith, was not a breach of fiduciary duty, but really was a proper exercise of the liquidating trust['s] obligation under the trust agreement." Tr. at 44:19–44:23 (A907). As an independent basis for denying the objection, this ruling was a valid holding of the court.

Second, Griffin contends that the Trust had a 100% chance of success in litigation, rendering its settlement unreasonable. But, all litigation carries risk, and as the Bankruptcy Court observed after canvassing the issues, this litigation was not risk-free. Tr. at 43:7–43:19 (A906). Griffin explained to the Bankruptcy Court that she believed the Underwriters' claims were worthless because of the forcefulness with which the Trust asserted its claims objection. Tr. at 7:5–8:6 (A870–71). As the Bankruptcy Court pointed out, however, there are two sides to every argument, and Griffin had not seen or assessed the Underwriters' argument. *Id.* And more fundamentally, even if the Trust had the stronger argument, it costs money to litigate to victory, and any decision to settle must consider other factors like the expense and complexity of litigation, the benefits that can be obtained from winning, and whether the alternative of settling is in the best interests of stakeholders. *In re Martin*, 91 F.3d at 393. Griffin fails to consider any of these factors.

Third, Griffin argues that the Allowance Stipulation is not valid because it requires Bankruptcy Court approval and the parties did not waive that requirement in writing. But, as the Bankruptcy Court found, this argument was untimely, and even if it were not, whether the parties had to present the Allowance Stipulation to the Court was irrelevant given the Bankruptcy Court's ratification of the settlement. Tr. 44:19–45:3 (A907–08). Moreover, Griffin raised this argument for

the first time on reply. Had the Trust been given an opportunity to brief a response, the Trust would have demonstrated that: (1) only parties to a contract or third-party beneficiaries generally may challenge its validity, and Griffin was neither, *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 434 (Del. Ch. 2007); and (2) the requirement for court approval was a condition precedent to formation that was waived by the parties' full performance of the agreement six years ago. *See Pouls v. Windmill Estates, LLC*, 2010 WL 2348648, at *5 (Del. Super. June 10, 2010) ("A condition precedent may be waived by conduct which evidences such an intention").

Fourth, Griffin argues that Section 1.170 of the Plan, which defines the term "Preferred Equity Interest," prevents the subordination of the $72M Claim into Class 19. Under Griffin's logic, because the term "Preferred Equity Interest" refers to the three types of preferred equity securities that existed as of the bankruptcy filing, the definition precludes anything else from being treated as preferred equity. There are two problems with this logic. First, the Bankruptcy Court already approved classification of the $72M Claim in the "Preferred Equity Interest" class by court order in 2011. *Supra* at 8–9 (A35). Griffin cannot attempt to re-litigate that issue now. Second, the Bankruptcy Code expressly allows for the subordination of senior claims to lower classes. 11 U.S.C. § 510(b). The Plan's

definition of "Preferred Equity Interest" cannot restrict this, and it does not purport to do so here.

Fifth, Griffin argues that the filing of the seventh amended Plan, which moved the preferred equity class from "Class 20" to "Class 19," somehow negated the classification of the $72M Claim as preferred equity. Griffin cites no authority for the proposition that renaming a class can affect the composition of the claims or interests in that class. The $72M Claim was classified as preferred equity, and it remained so when preferred equity was moved to Class 19.

Finally, at various points in her brief, Griffin makes unwarranted attacks upon the Bankruptcy Court. *See* Griffin Brief at 34 (arguing that the Bankruptcy Court "lack[s] judicial disinterestedness"); *id.* at 24 (arguing that the Bankruptcy Court "set aside" any concern for "judicial integrity"). The record is devoid of any evidence supporting these baseless attacks.

For these reasons, on this record, the Bankruptcy Court did not abuse its discretion in finding that the settlement was reasonable.

III. Because Griffin requests "substantial contribution" for the first time on appeal, this Court should not entertain the request

In her brief, Griffin appears to ask for at least $3 million in compensation for having "provided valuable services to the Debtors' Estates…." Griffin Brief at 7; *id.* at 35 (asking for the greater of 33.3% of the $72M Claim or 20% of the $15

million owed to the TPS Group). The Court should deny this request for three reasons.

First, although Griffin does not identify a legal basis for her request, her reference to having provided "valuable services" to the estate appears to be a compensation request for "making a substantial contribution in a case" under Bankruptcy Code § 503(b)(3)(D). Because Griffin never raised this request in the Bankruptcy Court, it should be denied in this Court. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 261-62 (3d Cir. 2009) ("Absent exceptional circumstances, this Court will not consider issues raised for the first time on appeal.") (citation omitted). "Whether a creditor has made a substantial contribution within the meaning of § 503(b)(3)(D) is a question of fact, 'and it is the bankruptcy court that is in the best position to perform the necessary fact finding task.'" *In re Tropicana Entm't LLC*, 498 F. App'x 150, 152 (3d Cir. Aug. 31, 2012) (citing *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 946 (3d Cir. 1994).

Second, Griffin did not substantially contribute to the case. To be entitled to substantial contribution, Griffin must prove that her efforts "resulted in an actual and demonstrable benefit to the debtor's estate and the creditors." *Lebron*, 27 F.3d at 944. In addition, Griffin must show that she would not have prosecuted her objection absent a reasonable expectation of reimbursement from the estate. *Id.* Griffin did not even attempt to meet these burdens here. *Id.* Not only have

Griffin's actions generated ***no*** recovery and brought ***no*** value to the estate, they have affirmatively harmed the estate by creating more fees and expenses.

Finally, Griffin compares herself to the "TPS Group," and attaches a copy of a stipulation that she says serves as precedent for granting her compensation. *See* Griffin Brief at 34–35 and Ex. D. The stipulation is not precedent. The TPS Group settled and released its claims in exchange for a partial payment of its fees, a compromise that was approved by the Bankruptcy Court. By contrast, Griffin unsuccessfully objected to a settlement, has not released any claims, and did not procure any change beneficial to the estate.

Griffin's requests for compensation have no legal basis and therefore should be denied.

CONCLUSION

Because the record demonstrates that Griffin's objection was untimely and that the settlement to which she objected was appropriate, this Court should affirm.

Dated: July 22, 2019
Wilmington, Delaware

/s/ *Marcos A. Ramos*
RICHARDS, LAYTON & FINGER, P.A.
Mark D. Collins (No. 2981)
Marcos A. Ramos (No. 4450)
Amanda R. Steele (No. 5530)
Cory D. Kandestin (No. 5025)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

- and -

PROSKAUER ROSE LLP
Brian S. Rosen
Eleven Times Square
New York, New York 10036
Telephone: (212) 969-3000
Facsimile: (212) 969-2900

Attorneys to the WMI Liquidating Trust

CERTIFICATE OF COMPLIANCE
WITH BANKRUPTCY RULE 8015(a)(7)(C)

This brief complies with the type-volume limitations of Bankruptcy Rule 8015(a)(7)(B) because it contains 10,683 words, as calculated by the word-processing system used to prepare the brief (Microsoft Word 2016). This brief complies with the typeface requirements of Bankruptcy Rule 8015(a)(5), as it is written in proportionally spaced 14-point font.

Date: July 22, 2019
Wilmington, Delaware

/s/ *Cory D. Kandestin*
Cory D. Kandestin (No. 5025)