PLEASE CAREFULLY REVIEW THIS REPLY AND THE ATTACHMENTS HERETO TO DETERMINE WHETHER THIS REPLY AFFECTS YOUR CLAIMS

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., *et al.*,[1]	:	(Jointly Administered)
Debtors.	:	**Hearing Date: April 6, 2010 at 2:00 p.m.**

DEBTORS' SUPPLEMENTAL REPLY REGARDING FRAUDULENT TRANSFER CLAIMS TO THE PRELIMINARY RESPONSES TO THE LEGAL ISSUES SET FORTH IN DEBTORS' TWENTIETH OMNIBUS (SUBSTANTIVE) OBJECTION TO CLAIMS

Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment"), as debtors and debtors in possession (collectively, the "Debtors") file this reply to the Marathon Credit Claimants' and WMB Noteholders' (collectively, the "Bank Bondholders") preliminary response ("Opposition") to Debtors' Twentieth Omnibus (Substantive) Objection ("Objection") to proof of claims numbers 3710, 3711 and 2480 (collectively, the "Claims"), with respect to the fraudulent transfer claims asserted therein, and represent as follows:

PRELIMINARY STATEMENT[2]

1. The Bank Bondholders' Actual Fraudulent Transfer Claims should be dismissed for failure to plead with the requisite particularity notwithstanding the Bank Bondholders' efforts to bolster their insufficient pleading in their proof of claim through their Opposition. In fact, the

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

[2] This reply concerns only the fraudulent transfer claims asserted by the Bondholders. The Debtors have filed a separate reply with respect to the other claims referenced in the Opposition. Capitalized terms not defined herein shall have the meanings ascribed them in the Objection.

Bank Bondholders' assertions are so deficient they fail under any pleading standard.

2. With respect to the Insider Preference Claim regarding the withdrawal of the Debtors' Deposits, this claim too should be dismissed because the Bank Bondholders, as general unsecured creditors of WMB, could never have expected to recover from the Debtors' Deposits given FIRREA's statutory "depositor preference." As discussed herein, each of the Bank Bondholders' arguments as to why this statutory priority supposedly would not apply is meritless. Significantly, over the course of complex and long-standing litigation between the Debtors and the FDIC, the FDIC has never asserted the Bank Bondholders' frivolous position that the Debtors would not be entitled to depositor priority. Moreover, even assuming *arguendo* that the federal "depositor preference" were inapplicable, this claim fails because the Bank Bondholders were not prejudiced through any depletion of WMB's assets. Fraudulent transfer law has no application where there is no depletion of assets available to satisfy the aggrieved creditors. The Court may and should consider these facts, notwithstanding the Bank Bondholders' objections, because they are a matter of public record and have been endorsed by the Bank Bondholders themselves.

3. Separately, at this critical point in the Debtors' bankruptcy cases, the Bank Bondholders are attempting to assert "new" fraudulent transfer claims in their Opposition. Like the Actual Fraudulent Transfer Claims asserted in the proof of claim, the "new claims" should be dismissed for insufficiency of pleading, but also because they are asserted nearly one year after the passage of the Bar Date without any possible showing of excusable neglect and without even a motion seeking to amend their proof of claim.

4. For all of the reasons discussed herein, the Bank Bondholders' claims should be dismissed.

BACKGROUND

5. In their proof of claim, the Marathon Credit Claimants asserted fraudulent transfer claims under three theories of fraudulent transfer law with respect to two different categories of transactions: (i) dividends paid by WMB in September 2007 and earlier (the "Dividends"); and (ii) WMI's withdrawal of funds held on deposit with WMB and WMI's re-deposit of those funds into WMBfsb (the "Deposit Transfer").[3]

6. In their Opposition, for the very first time, the Marathon Credit Claimants reference a "new" Actual Fraudulent Transfer Claim in connection with a tax reimbursement payment allegedly made by WMB to WMI for amounts WMI advanced to taxing agencies for WMB's benefit (the "Tax Reimbursement"). The Marathon Credit Claimants also now purport to assert an Actual Fraudulent Transfer Claim in connection with the Deposit Transfer.

7. The Marathon Credit Claimants' fraudulent transfer claims, as now asserted, are summarized in the following chart:

Transaction: / Fraudulent Transfer Theory	Dividends	Deposit Transfer	Tax Reimbursement
Actual Fraudulent Transfer	Proof of Claim	Opposition	Opposition
Insider Preference	--	Proof of Claim	--
Constructive Fraudulent Transfer	Proof of Claim	Proof of Claim	--

[3] As discussed in the Objection at 45, n.28, the WMB Noteholders do not assert fraudulent transfer claims on behalf of themselves, relying instead on claims purported belonging to WMB. *See* Claim 2480 at 8 ("WMB may have claims against WMI for [fraudulent] transfers.") The WMB Noteholders do not have standing to assert a claim on behalf of WMB. *See In re Refco Inc.*, 505 F.3d 109, 117 (2d Cir. 2007) ("To the extent that the rights of a party in interest are asserted, those rights must be asserted by the party in interest, not someone else."). To the extent the WMB Noteholders claim to assert a fraudulent transfer claim, it should be expunged on this basis.

8. For purposes of the April 6, 2010 hearing, the Debtors are seeking to dismiss and disallow the Actual Fraudulent Transfer Claims and the Insider Preference Claims.[4] *See* Feb. 12 Rosen Email, Manzer Decl. Ex. 1 ("The Motion to Dismiss aspect shall, with respect to the Standing Issue, relate to all claims but for the fraudulent transfer claims and, with respect to the Failure to State a Claim Issue, all claims *but for the constructive fraudulent transfer claims*.") (emphasis added).

ARGUMENT

A. The Actual Fraudulent Transfer Claims Are Insufficiently Pled

9. Concerning the Actual Fraudulent Transfer Claims, there is an absolute dearth of facts pled in the Marathon Credit Claimants' proof of claim that evince any fraudulent intent, let alone satisfy the heightened pleading requirement of factual particularity required for allegations of fraud. For this reason, they should be dismissed.

10. As stated in the Objection, with respect to Actual Fraudulent Transfer Claims, it is well-settled that Fed. R. Civ. P. 9(b) ("Rule 9(b)") applies, requiring that such claims be pled with particularity. Objection at ¶ 82; *see also Nisselson v. Ford Motor Co. (In re Monahan Ford Corp.)*, 340 B.R. 1, 38-39 (Bankr. E.D.N.Y. 2006) ("Factual allegations supporting claims of intentional fraudulent transfer are scrutinized pursuant to F.R.C.P. 9(b)"); *OHC Liquidation*

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[4] The Marathon Credit Claimants incorrectly state that the Debtors are only seeking dismissal of the Actual Fraudulent Transfer Claims at this stage. However, both the agreement reached among the parties and the fact that the Marathon Credit Claimants devoted several pages of briefing in the Opposition to the Insider Preference Claim prove otherwise. *See* Opposition at 63-65.

In this pleading, the Debtors do not address the Marathon Credit Claimants Constructive Fraudulent Transfer Claims. *See* Objection ¶¶86-88. However, it bears noting to the Court that even if the Marathon Credit Claimants were successful in proving insolvency for such "upstream" avoidance claims, it would only ensure that the $6.5 billion in "downstream" capital contributions WMI made subsequent to the Dividends would similarly be avoidable vis-à-vis WMB. The Debtors' claims would, at the very least, setoff any Constructive Fraudulent Transfer Claims regarding the Dividends that the Marathon Credit Claimants might prove. Thus, from a practical perspective, the assertion of these claims can never benefit the Bank Bondholders given the equitable remedy provisions of the UFTA.

Trust v. Nucor Corp. (In re Oakwood Homes Corp.), 325 B.R. 696, 698 (Bankr. D. Del. 2005) ("There is no question that Rule 9(b) applies to adversary proceedings in bankruptcy which include a claim for relief under 544 or 548, whether it is based upon actual or constructive fraud."); Pardo v. Gonzaba (In re APF Co.), 308 B.R. 183, 188 (Bankr. D. Del. 2004) (same). "Rule 9(b)'s heightened pleading standard gives defendants notice of the claims against them, provides an increased measure of protection for their reputations, and reduces the number of frivolous suits brought solely to extract settlements." *In re Burlington Coat Factory Sec. Lit.*, 114 F.3d 1410, 1418 (3d Cir.1997).[5]

1. The Actual Fraudulent Transfer Claim Concerning The Dividends Should Be Dismissed

11. With respect to the Dividends, the Marathon Credit Claimants plead little else than their occurrence (ironically through reference to publicly-filed financial statements). *See* Claim 3071 at n. 4-6. In their Opposition, however, the Marathon Credit Claimants argue that "the surrounding circumstances are compelling." Opposition at 62. But all the Marathon Credit Claimants point to is the fact that WMB was placed in receivership "a few years" after the Dividends were paid and that the Dividends were made to "its own parent, an insider." Opposition at 62. That is not pleading fraud (or any other cognizable claim). That is simply reciting the unremarkable fact that the Dividends were issued to WMB's shareholder, a trait

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[5] The Marathon Credit Claimants do not dispute that Rule 9(b) applies, but cite *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 215-16 (3d Cir. 2002) for the proposition that in certain instances, "when the defendant retains control over the flow of information," courts have relaxed "the rigid requirements of Rule 9(b)." Opposition at 63, n.28. Significantly, even assuming *Rockefeller* endorsed such a standard, the court did apply the heightened pleading requirements of Rule 9(b), finding that the plaintiffs "failed to support their claims of fraud with the factual particularity required by Rule 9(b)." *Id.* at 223. Moreover, the Third Circuit was concerned about "certain instances" where "sophisticated defrauders" may "successfully conceal the details of their fraud." *Id.* at 216. Here, there have been no allegations that WMI has concealed anything and, moreover, as this Court is aware, WMI functions with a skeleton staff of employees and most of WMI's books and records were transferred to JPMC pursuant to the sale of WMB's assets.

shared, by definition, with each and every dividend ever paid. Accordingly, this allegation cannot even be deemed to constitute a lone "badge" of fraud. Even if it were, courts agree that the existence of one, or even several, badges of fraud is insufficient circumstantial evidence as a matter of law. *In re Actrade Fin. Techs. Ltd.*, 337 B.R. 791, 809 (Bankr. S.D.N.Y. 2005); *In re Zeigler*, 320 B.R. 362, 378 (Bankr. N.D. Ill. 2005) (finding that despite the presence of six badges of fraud, "an insufficient number of the badges exists to give rise to an inference that the [debtors] actually intended to hinder, delay or defraud their creditors"); *see also Oakwood Homes*, 325 B.R. at 699 (holding that "merely identifying the allegedly fraudulent transfers" fails to establish the fraudulent nature of alleged transfers). Moreover, the fact that WMI was paid the Dividends by its wholly-owned subsidiary, allegedly "involuntarily," is also irrelevant as it only reflects the inherent nature of every parent-subsidiary relationship. *See, e.g., ASARCO LLC v. Americas Mining Corp.*, 396 BR 278, 414 (S.D. Tex. 2008) ("As a general rule, a parent does not owe a fiduciary duty to its wholly owned subsidiary.").

12. Inspection of the Marathon Credit Claimants' proof of claim reveals that it does not describe any fraudulent actors or any specific decisions made with respect to the Dividends. The proof of claim is in fact void of any details of the alleged fraud. More specifically, the Marathon Credit Claimants do not describe, as they must, any scheme to hinder, delay or defraud WMB's creditors with even minimal particularity. Nowhere in the proof of claim lies the fundamental (and requisite) fraudulent transfer allegation that the Dividends were paid to WMI in order to transfer value and make it unavailable for payment to WMB's creditors or that at the time the Dividends were paid, WMB knew that its creditors would not be paid in full. *See Monahan Ford*, 340 B.R. at 38-39 (dismissing fraudulent transfer claim where "complaint merely lists the date and amount of the transfer and does not assert any factual allegations that

these transfers were made in furtherance of the scheme to defraud"); *Actrade*, 337 B.R. at 809 ("intentional fraudulent conveyance claims should be relegated to their proper sphere, i.e., where there is a knowing intent on the part of the defendant to damage creditors"). This sort of pleading fails to "place the defendants on notice of the precise misconduct with which they are charged. . . ." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984).[6]

13. The Marathon Credit Claimants attempt to bolster their deficient pleading with irrelevant allegations. First, the Marathon Credit Claimants argue that their proof of claim contains "allegations of control and dominance of WMB by WMI, of the appropriation by WMI of billions in tax benefits, and of misrepresentations by WMI with respect to the financial health of WMB." Opposition at 62-63. These allegations about WMI's supposed control are irrelevant to whether payment of the Dividends by WMB were made with fraudulent intent. *See* Objection at ¶ 82 (listing badges of fraud as enumerated by UFTA); *Monahan Ford,* 340 B.R. at 39 (dismissing fraudulent transfer claims where overall fraudulent scheme of control over debtor was adequately alleged, yet claims were dismissed as they did not allege "that the transfers were made in furtherance of this scheme, or how that was the case"); *Actrade*, 337 B.R. at 810 ("it cannot be assumed that a wrongdoer is part of another fraud merely because of his other bad acts"). Moreover, none of these assertions go to the purported fraudulent intent of WMB, as

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[6] Even if Rule 9(b) did not apply – and it clearly does – the Marathon Credit Claimants cannot even satisfy the more lenient requirements of Rule 8. Rule 8(a)(2) "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007). But that is exactly what the Marathon Credit Claimants' proof of claim does. The proof of claim simply recites certain provisions of the Uniform Fraudulent Transfer Act followed by conclusory assertions. *See* Claim 3071 at 5-6. It fails to provide sufficient factual content "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

opposed to WMI, in paying dividends to its parent and sole shareholder. *Monahan Ford,* 340 B.R. at 38-39 ("The intent examined is the intent of the transferor, not of the transferee.").

14. Next, in support of their Actual Fraudulent Transfer Claim, the Marathon Credit Claimants resort to raising a completely unrelated transfer unreferenced in their proof of claim – the Tax Reimbursement.[7] *See* Opposition at 62. As a threshold matter, because the Tax Reimbursement is not asserted in the proof of claim, by definition, it cannot support the inadequate pleading of the Dividends. Moreover, much like the irrelevant assertions discussed in the preceding paragraph, an alleged transfer made in August or September 2008 is not evidence of fraudulent intent for the Dividends, each of which, as the Marathon Credit Claimants' proof of claim references, occurred in 2007 or earlier. *See* Claim 3071 at n. 4-6. Further, even the JPMC-submitted declaration (cited to by the Marathon Credit Claimants) indicates that the Tax Reimbursement was in satisfaction of "a state tax accounts payable [that] existed on the books of Washington Mutual...." *See* Opposition at 48 (citing Declaration of C. Jack Read, dated July 22, 2009, ¶¶11-13, Manzer Decl. Ex. 23 (attached to Opposition)). Whether a payment made in satisfaction of a valid and owing debt may be "fraudulent" under certain circumstances is besides the point, but it is impossible to fathom how such payment can be evidence of actual fraudulent intent with respect to unrelated, prior transfers. What is clear is that the Tax Reimbursement does not in any way support an assertion that the Dividends were made with actual intent to hinder, delay or defraud WMB's creditors.

15. Finally, not only do the Marathon Credit Claimants fail to adequately plead their Actual Fraudulent Transfer Claim, but there are also significant facts – pled and endorsed by the

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[7] As discussed *infra*, the Marathon Credit Claimants cannot now assert the Tax Reimbursement as a fraudulent transfer in light of the passage of the March 31, 2009 bar date (the "Bar Date") nearly one year ago. *See Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995).

Marathon Credit Claimants – that foreclose any plausible inference of fraudulent intent. First, as asserted in the Objection, the Dividends were publicly disclosed in the Debtors' SEC filings. Ex. 6 to Objection at 185.[8] Additionally, the WMB OTS filings, cited several times in the Marathon Credit Claimants' proof of claim, similarly disclose the Dividends. *See* Claim 3071 at n. 4-6, 8; WMB, Annual Report (Form 10-K) (Mar. 21, 2008) at 66 (reporting Dividends in certified financial statements; the pertinent pages have been attached hereto as **Exhibit A**). Second, these same filings – cited in the proof of claim – reflect the fact that billions of dollars of capital was contributed by WMI to WMB *subsequent* to payment of the Dividends. *Id.* (reporting $1 billion in capital contributions); WMB, Quarterly Report (Form 10-Q) (Aug. 14, 2008) at 3 (reporting $3 billion in capital contributions; the pertinent pages have been attached hereto as **Exhibit B**). Third, as the pertinent OTS regulations indicate, the Dividends were disclosed to, reviewed by, and approved by the OTS. Objection at ¶84 (citing 12 CFR Part 563, Subpart E, a copy of which has been attached hereto as **Exhibit C**).[9] Thus, the Dividends were fully disclosed to the public by WMI, reported to OTS filings by WMB, followed by billions of dollars of downstream capital contributions by WMI, and individually approved by OTS. The concept that such a transparent process, one that was subject to regulatory review and was not objected to, was part of some fraudulent scheme by WMB defies reason, and provides further justification for this Court to dismiss these claims. *See Iqbal*, 129 S. Ct. at 1950 (noting that in determining whether

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[8] Judicial notice of SEC filings is appropriate. *See Southmark Prime Plus, L.P. v. Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991); *see also Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (noting that the Court may consider "items subject to judicial notice" and "matters of public record.").

[9] Not only do the Marathon Credit Claimants cite OTS regulations in their proof of claim, *see* Claim 3071 at ¶ 12, but the Court may take judicial notice of federal regulations. *See In re Loranger Mfg. Corp.*, 324 B.R. 575 (Bankr. W.D. Pa. 2005) (taking judicial notice of Title 12 of the Code of Federal Regulations).

complaints state plausible claims, the reviewing court must "draw on its judicial experience and common sense").

16. At bottom, the Marathon Credit Claimants' proof of claim, even fortified with the allegations submitted in the Opposition, fails to plead actual fraud under any standard, but certainly does not do so under Rule 9(b)'s heightened requirements, which the Marathon Credit Claimants do not dispute apply. Moreover, the public facts of record – referenced in the proof of claim – foreclose these claims as a matter of law and require their dismissal.

2. The Actual Fraudulent Transfer Claims Concerning The Deposit Transfer And The Tax Reimbursement Should Be Dismissed Because They (i) Are Only Now "Asserted" In Violation Of The Bar Date and (ii) Are Insufficiently Pled

(a) The Claims Are "Asserted" In Violation Of The Bar Date

17. The Marathon Credit Claimants' proof of claim did not assert Actual Fraudulent Transfer Claims concerning the Deposit Transfer or the Tax Reimbursement. *See* Claim 3071 at 6-7 (discussing "Stripping Billions of Dollars in Purported Deposits" with respect to an Insider Preference Claim and a Constructive Fraudulent Transfer Claim, but not as an Actual Fraudulent Transfer Claim); Claim 3071 *in toto* (providing no mention or reference to the Tax Reimbursement). In their Opposition, however, the Marathon Credit Claimants argue, disingenuously, that "[p]erhaps recognizing ... the indicia of fraudulent intent, the Debtors do not argue that Bank Bondholder [sic] have failed, adequately, to allege such [fraudulent] intent" Opposition at 63. In reality, the reason that the Objection did not contain such argument is that neither claim was asserted. Because these claims have not been pled, they should be discarded.

18. To the extent the Court is willing to treat the Opposition as purporting to assert these claims, given the passage of the Bar Date nearly one year ago, these claims should be dismissed as untimely. *In re Pigott*, 684 F.2d 239, 242 (3d Cir. 1982) (Deadlines for filing

proofs of claim are to be "strictly construed" to ensure the efficient administration of bankruptcy cases and to provide all parties with finality.). This is particularly true where during this entire period, and even to this date, the Marathon Credit Claimants have not sought to amend their proof of claim[10] nor moved the Court to establish excusable neglect. *See* Fed. R. Bankr. P. 9006(b)(1). Moreover, the Marathon Credit Claimants' tardiness was entirely avoidable and within their control. No new facts were recently discovered. Rather, the Tax Reimbursement was raised by JPMC and the FDIC in four briefs worth of opposition to the Debtors' Motion for Summary Judgment with respect to the Debtors' Deposits more than six months ago.[11] The Marathon Credit Claimants themselves opposed the Debtors' motion for summary judgment and participated in the hearing before this Court when the Tax Reimbursement was again raised by the FDIC. *See* 10/22/09 Tr. at 62:18-23, attached hereto as **Exhibit D**. And with respect to the Deposit Transfer, the fact that the Marathon Credit Claimants have asserted an Insider Preference Claim and a Constructive Fraudulent Transfer Claim in connection with the very same transaction evinces no recent fact discovery.

19. Yet, only now, on the eve of the filing of the Debtors' chapter 11 plan incorporating a significant, global trilateral understanding, the Marathon Credit Claimants seek to assert these new claims. Such conduct is a far cry from excusable neglect and should not be countenanced by this Court. *See Hefta v. Official Comm. of Unsecured Creditors (In re Am. Classic Voyages Co.)*, 405 F.3d 127, 134 (3d Cir. 2005) (finding no excusable neglect where

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[10] With the exception of an initial amendment regarding group membership.

[11] *See* Memorandum of Law of FDIC in Opposition to Plaintiffs' Motion for Summary Judgment dated July 24, 2009, at 4 [Turnover Action D.I. 97]; Opposition of JPMC to Plaintiffs' Motion for Summary Judgment dated July 24, 2009, at 35 [Turnover Action D.I. 102]; JPMC Supplemental Opposition dated September 11, 2009, at 5 [Turnover Action D.I. 156]; FDIC Supplemental Opposition dated September 11, 2009, at 2-3 [Turnover Action D.I. 152].

delay was entirely avoidable and within claimant's control and claim was asserted two days after filing of chapter 11 plan).[12]

(b) The Actual Fraudulent Transfer Claim Regarding The Deposit Transfer Is Insufficiently Pled

20. Even assuming the Court were to permit the Opposition to assert an Actual Fraudulent Transfer Claim regarding the Deposit Transfer nearly twelve months after the passage of the Bar Date, the claim still fails. As discussed *above* regarding the Dividends, the Marathon Credit Claimants fail to plead this claim as an actual fraudulent transfer with Rule 9(b) particularity. Nowhere is it alleged in the Opposition (given that the claim is not asserted in the proof of claim) that the Deposit Transfer was made to hinder, delay or defraud WMB creditors. Nowhere do the Marathon Credit Claimants allege any decision makers or any specific determinations with respect to WMB's payment of the Debtors' Deposits in spite of WMB's creditors.

21. Moreover, in view of the fact that the Deposit Transfer was made with the contemplation that funds in an equal amount were to be immediately loaned back to WMB under the Master Note, it is not plausible that the Deposit Transfer was made with the actual intent to hinder, delay or defraud creditors of WMB, because the transaction could not and did not accomplish any of those ends. As discussed more fully in the Objection and below, the Deposit Transfer did not deplete the WMB estate (and in fact had the opposite effect vis-à-vis WMB's general unsecured creditors).[13]

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[12] The Marathon Credit Claimants' "boiler plate" reservation of rights, *see* Claim 3071 at ¶20, cannot save their tardiness. *See In re Enron Corp.*, 419 F.3d 115, 120, 134 (2d Cir. 2005) (rejecting claimant's late filed claim, notwithstanding reservation of rights provision in timely filed proof of claim where claimant purported to "reserve[] the right to amend, supplement, or otherwise modify . . . at any time").

[13] *See* Objection ¶93, n.37. Notwithstanding JPMC's previous efforts to cast a negative light upon this transaction, there is absolutely nothing nefarious about a parent company moving a deposit liability

22. The Marathon Credit Claimants incorrectly assert that the Debtors offer the Court "their own, disputed version of the facts." Opposition at 64. That is not true. The Marathon Credit Claimants themselves incorporated JPMC's assertions that no cash was actually transferred. *See* Marathon Credit Claimants' Statement in Opposition to the Debtors' Summary Judgment Motion at 2 n.6, 3, [Turnover Action D.I. 115] ("Given the substantial factual issues clearly laid out by JPMC and the FDIC in their oppositions, the Bank Bondholders would not anticipate the need to file any additional papers opposing the Debtors' summary judgment motion..."; "the supposed transfer of the deposits from WMB to WMBfsb may well never have occurred . . . "); *see also* JPMC Opposition to Debtors' Motion for Summary Judgment at 17, [Turnover Action D.I. 102] ("No actual funds were transferred to WMB fsb"); Declaration of Paul Stephen, dated July 22, 2009, ¶5 (filed as part of Appendix in Support of JPMC's Opposition to Debtors' Motion for Summary Judgment) ("No actual cash moved from WMB to WMB fsb and the net effect of these general ledger entries made WMB fsb a lender to WMB in precisely the same amount as the deposit liabilities that were transferred from WMB to WMB fsb."). Even had the Marathon Credit Claimants not incorporated JPMC's opposition, the Court may take judicial notice of these public filings. *Buck*, 452 F.3d at 260.

23. Thus, even if the Court were inclined to (i) treat the Actual Fraudulent Transfer Claim regarding the Deposit Transfer as being asserted by the Opposition, and (ii) forgive that the claim was not asserted prior to the Bar Date, *and* (iii) forgive that it is not pled with the requisite particularity, the Actual Fraudulent Transfer Claim regarding the Deposit Transfer

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from one subsidiary to another, indisputably solvent, subsidiary and having that second subsidiary loan the related cash assets back to the original subsidiary. As discussed in the Objection, this protected the WMB estate and did not damage WMB fsb. Of course, the fact that WMB fsb did not receive bags full of cash from the back of an armored WMB truck "means nothing." *See FDIC v. Fedders Air Conditioning, USA, Inc.*, 35 F.3d 18, 21 (1st Cir. 1994).

should *still* be dismissed because it is simply impossible to draw the reasonable inference that the Debtors are liable for the misconduct alleged. *Iqbal,* 129 S. Ct. at 1949.

(c) The Actual Fraudulent Transfer Claim Regarding The Tax Reimbursement Is Insufficiently Pled

24. Similarly, assuming the Court were to treat the Opposition as asserting an Actual Fraudulent Transfer Claim regarding the Tax Reimbursement nearly twelve months after the passage of the Bar Date, the claim still fails because the Marathon Credit Claimants fail to plead with Rule 9(b) particularity. The Marathon Credit Claimants allege that "it is suspicious" that the Tax Reimbursement was made to WMB's parent. *See* Opposition at 48. But suspicion is not sufficient under Rule 9(b). Similarly, the Marathon Credit Claimants offer the Court academic questions rather than factual assertions. *Id.* (stating that "the Bank Bondholders are not aware of any promissory note or other documentation evidencing the supposed debt" and wondering whether a "limitations period for WMI to seek to collect any such debt had expired"). The Marathon Credit Claimants assert that "these issues require discovery." *Id.* But the Marathon Credit Claimants have it backwards; if they cannot sufficiently plead their claims, they are not entitled to fishing expedition discovery.[14] At bottom, the Marathon Credit Claimants do not assert that the Tax Reimbursement was made with the requisite intent to hinder, delay or defraud WMB's creditors with even minimal particularity.

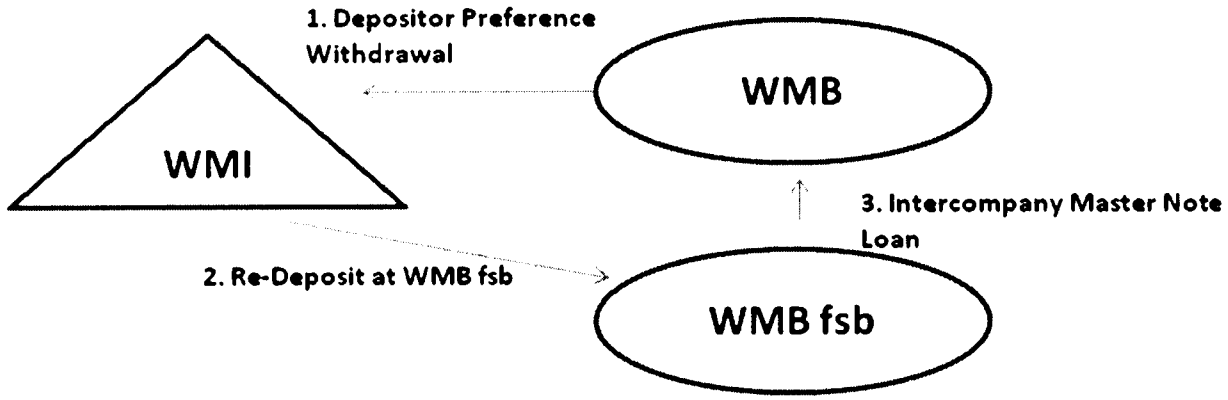
25. Thus, even if the Court were to first treat the Actual Fraudulent Transfer Claim regarding the Tax Reimbursement as being asserted by the Opposition, and second forgive that

[14] Courts have noted how "[t]he purpose of Rule 9(b) is to protect the defending party's reputation, to discourage meritless accusations, and to provide detailed notice of fraud claims to defending parties." *Actrade*, 337 B.R. at 801 (citation and quotation marks omitted). Put differently, Rule 9(b) is intended to "ensure that 'a complaint alleging fraud' is filed 'only after a wrong is reasonably believed to have occurred,' and 'not to find one.'" *See, e.g., Abercrombie v. Andrew College*, 438 F. Supp. 2d 243, 272 (S.D.N.Y. 2006) (quoting *Segal v. Gordon*, 467 F.2d 602, 607-08 (2d Cir. 1972)).

the claim was not asserted prior to the Bar Date, it should still be dismissed for being insufficiently pled with requisite particularity.[15]

B. The Insider Preference Claim Concerning The Deposit Transfer Should Be Dismissed Because It Fails As A Matter Of Law

26. The Insider Preference Claim regarding the Deposit Transfer fails as a matter of law. The Debtors stated in their Objection that the claim must fail because unsecured creditors of WMB, including the Marathon Credit Claimants, were not harmed for two independent reasons. First, because the funds were subject to FIRREA's depositor preference and thus were never assets to which WMB's general unsecured creditors could look to for recovery. 12 U.S.C. § 1821(d)(11). Second, because, in any event, the funds were immediately returned to WMB via the Master Note. See Objection ¶¶92-6. The following chart illustrates the Deposit Transfer and the Master Note intercompany loan:



27. The Marathon Credit Claimants advance three flawed responses to the Debtors' first point of objection: 1) elsewhere in their proof of claim, it is alleged that the Deposits may not in fact be deposit liabilities; 2) the Debtors are not entitled to any depositor preference under

[15] In the Response, the Marathon Credit Claimants do not assert the Tax Reimbursement Claim as an Insider Preference Claim. However, in an abundance of caution, given that the Tax Reimbursement was made by WMB to WMI in satisfaction of an antecedent debt, the Debtors note that the Marathon Credit Claimants fail to allege, *inter alia*, that WMI "had reasonable cause to believe that [WMB] was insolvent" as of the time of the Tax Reimbursement as required under WASH REV. CODE § 19.40.051(b). *See* Response at 47-48, 63-65. Of course, all of the Debtors' assertions regarding the passage of the Bar Date would also apply with equal force to any such claim.

the terms of 12 U.S.C. § 1821(d)(11); and 3) WMB could have setoff purported claims against the Debtors thus realizing the value of the Deposits to the benefit of the Marathon Credit Claimants. Opposition at 64. Each argument fails for several reasons.

28. First, to the extent the Marathon Credit Claimants allege that the Deposits are something other than the Debtors' Deposits, they allege that the Deposits may be "instead properly treated as capital" for the purpose of separate claims under a different legal theory – Constructive Fraudulent Transfer Claims. Claims 3710, 3711 ¶10. The Marathon Credit Claimants' argument is self-defeating. If the Deposits are "properly treated as capital," then the Insider Preference Claim fails to state a claim given that the transfer at issue was not made on account of an antecedent debt. *See* Wash. Rev. Code § 19.40.051(b).

29. Second, the Marathon Credit Claimants assert that the Debtors apply 12 U.S.C. § 1821(d)(11) incorrectly. Rather, the Marathon Credit Claimants assert, the Debtors' claims to their Deposits would have been subordinated – not entitled to priority – and therefore payment of the Debtors' Deposits did remove assets that the Marathon Credit Claimants could have recovered from. This argument is frivolous. Under 12 U.S.C. § 1821(d)(11), "[a]ny deposit liability of the institution" receives priority over general unsecured claims. 12 U.S.C. § 1821(d)(11)(A)(ii) (emphasis added)[16]. The section's subordination provision states that "[a]ny obligation to shareholders or members arising *as a result of their status as shareholders or members* (including any depository institution holding company or any shareholder or creditor of such company)" shall be paid only after general unsecured claims are satisfied. 12 U.S.C. § 1821(d)(11)(A)(v) (emphasis added). The plain language of the statute is clear that *all* deposit liabilities enjoy priority, even deposits of a shareholder. The Debtors' deposit claim would have

[16] A copy of 12 U.S.C. § 1821(d)(11) is attached hereto as **Exhibit E**.

arisen as a result of a the Debtors' status as a depositor and not "as a result of their status as shareholders." This plain statutory text ends the argument. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Marathon Credit Claimants unsurprisingly cite no case law that contravenes this plain language interpretation, or any legislative history suggesting that Congress intended to treat shareholder deposits differently than non-shareholder deposits. There is simply no question that if JPMC had not assumed the Debtors' Deposits, the Debtors would have qualified for "depositor preference" under Title 12 and would have been paid in full before the Marathon Creditor Claimants.[17]

30. Third, the Marathon Credit Claimants' setoff argument ignores reality. JPMC assumed all of WMB's deposit liabilities. The Bank Bondholders have repeatedly conceded this fact in filings with this Court. *See* Answer of Bank Bondholders, dated September 21, 2009 at 1 [Turnover Action D.I. 167] ("the Bank Bondholders admit ... subject to the terms of the [P&A Agreement, JPMC] acquired substantially all of the assets of [WMB] in exchange for $1.88 billion in cash and *the assumption of WMB's deposit liabilities*."); Statement of Bank Bondholders in Opposition to (1) Motion of the Federal Deposit Insurance Corporation for an Order Modifying the Automatic Stay and (2) the Debtors' Objection to the Motion, [D.I. 1896] ("the [FDIC] seeks to modify the automatic stay...so that the FDIC may exercise its contractual rights...*to direct JPMC to return to the FDIC [the Deposits]*") (emphasis added). The Marathon Credit Claimants have acknowledged numerous times that JPMC assumed those Deposits. Thus,

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[17] It is notable that the FDIC has never alleged otherwise. Rather, the FDIC has pointed to setoff as a putative basis to recover the value of the Debtors' Deposits in the event it were allowed to exercise section 9.5 of the Purchase Agreement. *See* Motion of FDIC for an Order Modifying the Automatic Stay [D.I. 1834]. If 12 U.S.C. § 1821(d)(11)(A)(v) truly operated the way the Marathon Credit Claimants propose, setoff would be superfluous to the FDIC's cause and given the Bankruptcy Code's prohibition on establishing mutuality post-petition, the FDIC would not have articulated setoff as the basis for its stay-relief request. Despite the FDIC's long-pending litigation with the Debtors, it has never been driven to adopt the facially absurd reading of section 1821(d)(11) that is pushed by the Marathon Credit Claimants.

any putative right of setoff that FDIC may possess is irrelevant given the actual lack of mutuality vis-à-vis the Debtors.[18]

31. Next, in response to the Debtors' assertion that the Insider Preference Claim regarding the Deposit Transfer must fail because funds were immediately transferred to WMB via the Master Note, *see* Objection ¶¶92-6, the Marathon Credit Claimants accuse the Debtors of improperly "provid[ing] their story" for purposes of a motion to dismiss. Opposition at 64. But as discussed above, the Court may take judicial notice of assertions advanced or incorporated by the Marathon Credit Claimants in their pleadings that the estate was not depleted.

32. Thus, for two reasons the Deposit Transfer did not harm WMB's general unsecured creditors: (i) Title 12's depositor preference provides that such assets were *never* available to WMB's general unsecured creditors and (ii) any transferred value was counterbalanced by an immediate transfer of equal value to WMB through the Master Note. These facts, which have been acknowledged by the Marathon Credit Claimants, require dismissal of the Insider Preference Claim. *See, e.g., Melamed v. Lake Cty. Nat'l Bank*, 727 F.2d 1399, 1402 (6th Cir. 1984) (dismissing fraudulent transfer claim because plaintiff failed to establish "diminution of the debtor's assets available to creditors"); *Bear, Stearns Sec. Corp. v. Gredd*, 275 B.R. 190, 196-99 (S.D.N.Y. 2002) (dismissing fraudulent transfer complaint when "by operation of federal law, [the transferred] funds were never available to satisfy" general creditor claims); *see also Freitag v. McGhie*, 133 Wn. 2d 816, 821 (1997) (adopting an approach of

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[18] *See In re SemCrude, L.P.*, 399 B.R. 388, 393 (Bankr. D. Del. 2009). Each of the cases cited by the Marathon Credit Claimants in their Opposition confirm this unremarkable point even absent bankruptcy. *Sterling Savings Bank v. Air Wisconsin Airlines Corp.*, 492 F. Supp. 2d 1256, 1261 (E.D. Wash. 2007) ("In such instances, the depositor and the bank are *mutually* indebted."); *Conner v. First Natl. Bank of Sedro-Woolley*, 113 Wash. 662, 194 P. 562 (1921) ("as a general rule that when a depositor is indebted to a bank, and the *debts are mutual – that is, between the same parties*...."); *Allied Sheet Metal Fabricators, Inc. v. Peoples Natl. Bank*, 10 Wn. App. 530, (Ct. App. 1974) (reciting same general rule) (emphasis added).

"[c]ommon sense and the statutory purpose" with respect to interpreting UFTA and noting that prejudice to creditors is the driving trait of fraudulent transfer claims); *Davis v. Nielson*, 9 Wn. App. 864, 871 (Wash. Ct. App. 1973) ("prejudice to a plaintiff is essential to relief under the act. The creditor must show injury from the conveyance before a complaint is appropriate.") (internal citation omitted).[19]

33. Moreover, as discussed in the Objection, this fundamental point of fraudulent transfer law applies *a fortiori* here where the effect of the Deposit Transfer was more than asset-neutral and actually benefitted the Marathon Credit Claimants. It replaced a liability subject to a depositor preference that had priority over general unsecured creditors with an intercompany payable to WMB fsb that general unsecured creditors could expect to share *pari passu*. *See* Objection at 55, n.37. Thus, even if this Court were somehow inclined to recognize the Deposit Transfer as an Insider Preference Claim, the UFTA provides for equitable adjustments "as the equities may require." See WASH REV. CODE § 19.40.081(c);[20] *see also Bakst v. Wetzel (In re Kingsley)*, 2007 Bankr. LEXIS 1755, *17-19 (Bankr. S.D. Fla. May 17, 2007), *aff'd*, 518 F.3d 874 (11th Cir. 2008) (finding that under both section 550 of the Bankruptcy Code and the UFTA, the trustee "may not recover sums that were repaid to the Debtors"). Bankruptcy courts have also utilized their equitable powers to ensure plaintiffs asserting fraudulent transfer claims do not receive a windfall. *See e.g.*, Dobin v. Presidential Fin. Corp. (In re Cybridge Corp.), 304 B.R. 681, 692 (Bankr. D.N.J. 2004) (awarding equitable credit in an avoidance action due to the lack

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[19] Moreover, the UFTA's "new value" defense precludes the Marathon Credit Claimants' claim. Specifically, a "transfer is not voidable under [RCW 19.40.051(b)] . . . [t]o the extent the insider gave new value to or for the benefit of the debtor after the transfer was made...." WASH REV. CODE § 19.40.081 (f)(1). *See* Objection at 54, n.37.

[20] WASH REV. CODE § 19.40.081(c) provides: "If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment *as the equities may require*." (emphasis added).

of harm to the estate, with the result of a "net recovery of zero"), *aff'd*, 312 B.R. 262 (D.N.J. 2004); *Bakst v. Sawran (In re Sawran)*, 359 B.R. 348, 354 (Bankr. S.D. Fla. 2007) (exercising section 105(a) equitable powers to issue "equitable credit ... to prevent [plaintiff] from receiving a windfall" where transferee had subsequently "disbursed the money to the Debtor"). Such an equitable adjustment would be especially appropriate here given the anomalous posture of the Marathon Credit Claimants who assert their windfall-seeking claim to redress a transaction that actually improved their position.

34. In conclusion, whether this Court views the Deposit Transfer as the Debtors do (*i.e.*, either as a payment to a priority depositor from funds that were never available to general unsecured creditors *or* as a payment to WMI and re-deposit at WMB fsb, immediately followed by a loan to WMB for an equal amount via the Master Note), or as the Marathon Credit Claimants have asserted to this Court previously (*i.e.*, as the absence of any transfer at all), it is clear that the Deposit Transfer does not constitute a fraudulent transfer and the Insider Preference Claim should be dismissed.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order disallowing the Claims, and granting Debtors such other and further relief as is just and proper.

Dated: March 26, 2010
Wilmington, Delaware

ELLIOTT GREENLEAF

Rafael X. Zahralddin-Aravena (DE Bar No. 4166)
Neil R. Lapinski (DE Bar No. 3645)
Shelley A. Kinsella (DE Bar No. 4023)
1105 North Market Street, Suite 1700
Wilmington, Delaware 19801
Telephone: (302) 384-9400
Facsimile: (302) 384-9399

Email: rxza@elliottgreenleaf.com
Email: nrl@elliottgreenleaf.com
Email: sak@elliottgreenleaf.com

- and -

Peter E. Calamari, Esq.
Michael B. Carlinsky, Esq.
Susheel Kirpalani, Esq.
David Elsberg, Esq.
Benjamin I. Finestone, Esq.
QUINN EMANUEL URQUHART &SULLIVAN, LLP
51 Madison Avenue
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 8489-7100

- and -

Marcia L. Goldstein, Esq.
Brian S. Rosen, Esq.
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

- and -

Thomas C. Frongillo, Esq.
Patrick J. O'Toole, Jr., Esq.
WEIL, GOTSHAL & MANGES LLP
100 Federal Street, Floor 34
Boston, Massachusetts 02110
Telephone: (617) 772-8300
Facsimile: (617) 772-8333

Attorneys for Washington Mutual, Inc. and WMI Investment Corp.

Exhibit A

OFFICE OF THRIFT SUPERVISION
Washington, D.C. 20552

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR FISCAL YEAR ENDED DECEMBER 31, 2007

OTS Docket Number 08551

WASHINGTON MUTUAL BANK

(Exact name of registrant as specified in its charter)

Federal Charter	68-0172274
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification Number)
1301 Second Avenue, Seattle, WA	98101
(Address of principal executive offices)	(Zip Code)

Registrant's telephone number, including area code: (206) 461-2000

Securities registered pursuant to Section 12(b) of the Act:
None

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark if the registrant is a well-known seasoned issuer as defined in Rule 405 of the Securities Act. Yes ☐ No ☒.

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act. Yes ☐ No ☒.

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐.

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☒.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☐	Accelerated filer ☐	Non-accelerated filer ☒ (Do not check if a smaller reporting company)	Smaller reporting company ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒.

The aggregate market value of voting stock held by nonaffiliates of the registrant as of June 30, 2007:
None

The number of shares outstanding of the issuer's classes of common stock as of February 29, 2008:
Common Stock — 331,386

Documents Incorporated by Reference:
None

Note: Registrant meets the conditions set forth in General Instruction I(1)(a) and (b) of Form 10-K and is therefore filing this Form with the reduced disclosure format.

WASHINGTON MUTUAL BANK AND SUBSIDIARIES

CONSOLIDATED STATEMENTS OF STOCKHOLDER'S EQUITY AND COMPREHENSIVE INCOME

	Number of Common Shares	Capital Surplus	Accumulated Other Comprehensive Income (Loss)	Retained Earnings	Total
	(dollars in millions, shares in thousands)				
BALANCE, December 31, 2004	331	$ 16,184	$ (71)	$ 9,490	$ 25,603
Comprehensive income:					
Net income – 2005	–	–	–	3,723	3,723
Other comprehensive income (loss), net of tax:					
Net unrealized loss from securities arising during the year, net of reclassification adjustments	–	–	(188)	–	(188)
Net unrealized gain from cash flow hedging instruments	–	–	40	–	40
Total comprehensive income					3,575
Cash dividends declared on common stock	–	–	–	(925)	(925)
Contributions from parent company	–	87		–	87
Contributions (adjustments) related to subsidiary reorganization	–	928	–	(928)	–
Contributions (adjustments) related to Providian acquisition	–	5,640	–	(7)	5,633
BALANCE, December 31, 2005	331	22,839	(219)	11,353	33,973
Cumulative effect from the adoption of Statement No. 156, net of income taxes	–	–	6	29	35
Adjusted balance	331	22,839	(213)	11,382	34,008
Comprehensive income:					
Net income – 2006	–	–		3,995	3,995
Other comprehensive income, net of tax:					
Net unrealized gain from securities arising during the year, net of reclassification adjustments	–	–	18	–	18
Net unrealized gain from cash flow hedging instruments	–	–	83	–	83
Total comprehensive income					4,096
Cash dividends declared on common stock	–	–	–	(7,200)	(7,200)
Contributions from parent company	–	5	–	–	5
Adjustments related to Providian acquisition	–	7	–	–	7
Contributions (adjustments) related to subsidiary reorganization	–	734	–	(734)	–
BALANCE, December 31, 2006	331	23,585	(112)	7,443	30,916
Comprehensive income:					
Net income – 2007	–	–	–	286	286
Other comprehensive income (loss), net of tax:					
Net unrealized loss from securities arising during the year, net of reclassification adjustments	–	–	(95)	–	(95)
Net unrealized gain from cash flow hedging instruments	–	–	42	–	42
Total comprehensive income					233
Dividends declared on common stock	–	–	–	(5,758)	(5,758)
Contributions from parent company	–	1,002	–	–	1,002
Contributions (adjustments) related to subsidiary reorganization	–	650	–	(650)	–
BALANCE, December 31, 2007	331	$ 25,237	$ (165)	$ 1,321	$ 26,393

See Notes to Consolidated Financial Statements.

Exhibit B

OFFICE OF THRIFT SUPERVISION
WASHINGTON, D.C. 20552

FORM 10-Q

QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE QUARTERLY PERIOD ENDED JUNE 30, 2008

OTS Docket Number 08551

WASHINGTON MUTUAL BANK
(Exact name of registrant as specified in its charter)

Federal Charter	**68-0172274**
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification Number)
1301 Second Avenue, Seattle, WA	**98101**
(Address of principal executive offices)	(Zip Code)

(206) 461-2000
(Registrant's telephone number, including area code)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):
Large accelerated filer ☐ Accelerated filer ☐ Non-accelerated filer ☒ (Do not check if a smaller reporting company) Smaller reporting company ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

The number of shares outstanding of the issuer's classes of common stock as of July 31, 2008:

Common Stock – 331,386

Note: Registrant meets the conditions set forth in General Instructions (H)(1)(a) and (b) of Form 10-Q and is therefore filing this form with reduced disclosure format.

WASHINGTON MUTUAL BANK AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY AND COMPREHENSIVE INCOME
(UNAUDITED)

	Number of Common Shares	Capital Surplus	Accumulated Other Comprehensive Income (Loss)	Retained Earnings	Total
	(dollars in millions, shares in thousands)				
BALANCE, December 31, 2006	331	$ 23,585	$ (112)	$ 7,443	$ 30,916
Comprehensive income:					
Net income	–	–		1,846	1,846
Other comprehensive income, net of tax:					
Net unrealized loss from securities arising during the period, net of reclassification adjustments	–	–	(302)	–	(302)
Net unrealized gain from cash flow hedging instruments	–	–	22	–	22
Total comprehensive income					1,566
Cash dividends paid to parent company	–	–	–	(3,400)	(3,400)
Contributions from parent company	–	2	–	–	2
BALANCE, June 30, 2007	331	$ 23,587	$ (392)	$ 5,889	$ 29,084
BALANCE, December 31, 2007	331	$ 25,237	$ (165)	$ 1,321	$ 26,393
Cumulative effect from the adoption of accounting pronouncements, net of income taxes	–	–	–	(32)	(32)
Adjusted balance	331	25,237	(165)	1,289	26,361
Comprehensive loss:					
Net loss	–	–		(4,273)	(4,273)
Other comprehensive loss, net of tax:					
Net unrealized loss from securities arising during the period, net of reclassification adjustments	–	–	(689)	–	(689)
Net unrealized loss from cash flow hedging instruments	–	–	(18)	–	(18)
Total comprehensive loss					(4,980)
Contributions from parent company	–	2,999	–	–	2,999
BALANCE, June 30, 2008	331	$ 28,236	$ (872)	$(2,984)	$ 24,380

See Notes to Consolidated Financial Statements.

Exhibit C

LEXSEE 64 FR 2809

FEDERAL REGISTER

Vol. 64, No. 11

Rules and Regulations

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision (OTS)

12 CFR Parts 563, 563b

[No. 99-1]

RIN 1550-AA72

Capital Distributions

64 FR 2805

DATE: Tuesday, January 19, 1999

ACTION: Final rule.

12 CFR Part 563

Accounting, Advertising, Crime, Currency, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Security bonds.

12 CFR Part 563b

Reporting and recordkeeping requirements, Savings associations, Securities.

Accordingly, the Office of Thrift Supervision amends chapter V, title 12 of the Code of Federal Regulations as set forth below.

PART 563--OPERATIONS

1. The authority citation for part 563 is revised to read as follows: [*2809]

Authority: *12 U.S.C. 375b,* 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1820, 1828, 1831o, 3806; *42 U.S.C. 4106.*

§ 563.134 -- [Removed]

2. Section 563.134 is removed.

3. Subpart E is revised to read as follows:

Subpart E--Capital Distributions

Sec.

Subpart E--Capital Distributions

§ 563.140 -- What does this subpart cover?

This subpart applies to all capital distributions by a savings association ("you").

§ 563.141 -- What is a capital distribution?

A capital distribution is:

(a) A distribution of cash or other property to your owners made on account of their ownership, but excludes:

(1) Any dividend consisting only of your shares or rights to purchase your shares; or

(2) If you are a mutual savings association, any payment that you are required to make under the terms of a deposit instrument and any other amount paid on deposits that the OTS determines is not a distribution for the purposes of this section;

(b) Your payment to repurchase, redeem, retire or otherwise acquire any of your shares or other ownership interests, any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in your total capital under § 567.5 of this chapter, and any extension of credit to finance an affiliate's acquisition of your shares or interests;

(c) Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring. This includes your payment of cash or property to shareholders of another association or to shareholders of its holding company to acquire ownership in that association, other than by a distribution of shares;

(d) Any other distribution charged against your capital accounts if you would not be well capitalized, as set forth in § 565.4(b)(1) of this chapter, following the distribution; and

(e) Any transaction that the OTS or the Corporation determines, by order or regulation, to be in substance a distribution of capital.

§ 563.142 -- What other definitions apply to this subpart?

The following definitions apply to this subpart:

Affiliate means an affiliate, as defined under § 563.41(b) of this part.

Capital means total capital, as defined under § 567.5(c) of this chapter.

Net income means your net income computed in accordance with generally accepted accounting principles.

Retained net income means your net income for a specified period less total capital distributions declared in that period.

Shares means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term "share" also includes convertible securities upon their conversion into common or preferred stock. The term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not equity securities at the time of a capital distribution.

§ 563.143 -- Must I file with the OTS?

Whether and what you must file with the OTS depends on whether you and your proposed capital distribution fall within certain criteria.

(a) *Application required.*

If:	Then you:
(1) You are not eligible for expedited treatment under § 516.3(a) of this chapter	Must file an application with the OTS.
(2) The total amount of all of your capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds your net income for that year to date plus your retained net income for the preceding two years	Must file an application with the OTS.
(3) You would not be at least adequately capitalized, as set forth in § 565.4(b)(2) of this chapter, following the distribution	Must file an application with the OTS.
(4) Your proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between you and the OTS (or the Corporation), or violate a condition imposed on you in an OTS-approved application or notice	Must file an application with the OTS.

(b) *Notice required.*

If you are not required to file an application under paragraph (a) of this section, but:	Then you:
(1) You would not be well capitalized, as set forth under § 565.4(b)(1), following the distribution	Must file a notice with the OTS.
(2) Your proposed capital distribution would reduce the amount of or retire any part of your common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under part 567 of this chapter (other than regular payments required under a debt instrument approved under § 563.81)	Must file a notice with the OTS.
(3) You are a subsidiary of a savings and loan holding company	Must file a notice with the OTS.

[*2810]

(c) *No prior notice required.*

If neither you nor your proposed capital distribution meet any of the criteria listed in paragraphs (a) and (b) of this section	Then you do not need to file a notice or an application with the OTS before making a capital distribution.

§ 563.144 -- How do I file with the OTS?

(a) *Contents.* Your notice or application must:

(1) Be in narrative form.

(2) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution.

(3) Demonstrate compliance with § 563.146.

(b) *Schedules.* Your notice or application may include a schedule proposing capital distributions over a specified period, not to exceed 12 months.

(c) *Timing.* You must file your notice or application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by your board of directors.

§ 563.145 -- May I combine my notice or application with other notices or applications?

You may combine the notice or application required under § 563.143 with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under this chapter. If you submit a combined filing, you must:

(a) State that the related notice or application is intended to serve as a notice or application under this subpart; and

(b) Submit the notice or application in a timely manner.

§ 563.146 -- Will the OTS permit my capital distribution?

The OTS will review your notice or application under the review procedures in 12 CFR part 516, subpart A. The OTS may disapprove your notice or deny your application filed under § 563.143, in whole or in part, if the OTS makes any of the following determinations.

(a) You will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in § 565.4(b) of this chapter, following the capital distribution. If so, the OTS will determine if your capital distribution is permitted under *12 U.S.C. 1831o*(d)(1)(B).

(b) Your proposed capital distribution raises safety or soundness concerns.

(c) Your proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between you and the OTS (or the Corporation), or a condition imposed on you in an OTS-approved application or notice. If so, the OTS will determine whether it may permit your capital distribution notwithstanding the prohibition or condition.

PART 563b--CONVERSIONS FROM MUTUAL TO STOCK FORM

4. The authority citation for part 563b continues to read as follows:

Authority: *12 U.S.C. 1462,* 1462a, 1463, 1464, 1467a, 2901; *15 U.S.C. 78c,* 78l, 78m, 78n, 78w.

§ 563b.3 -- [Amended]

5. Section 563b.3(g)(2) is amended by removing the phrase "§ 563.134", and by adding in lieu thereof the phrase "§§ 563.140-563.146".

Dated: January 8, 1999.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 99-1040 Filed 1-15-99; 8:45 am]

BILLING CODE 6720-01-P

Exhibit D

accounts back and we'll litigate about the setoff at that point. There should not be -- the Debtors are not unique among depositors, if these are, in fact, depositors in the United States, in being able to evade setoff rights of their financial institution.

If, therefore, the Court concludes that JPMorgan setoff rights somehow do not preclude turnover here, then the FDIC Receiver is prepared promptly to exercise its Section 9.5 rights and to direct JPMorgan to return the account balances to the FDIC Receiver. The Debtors assert that a Lift Stay Motion would be necessary for us to do that. We don't necessarily agree, but if that's what is required, we're prepared to bring that Motion on promptly.

There's two points that the Debtors raised in their reply that I'd like to address at this point. First, it is not true, as the Debtors assert, that the FDIC Receiver's claims in the DC action against them and in the Proof of Claim here merely duplicate the JP -- JPMorgan's claims. For example, the FDIC has a claim for fraudulent conveyance against the Debtors for the $922 million that was transmogrified from a general unsecured -- general ledger entry into purported deposit balances on the literal eve of the receivership for Washington Mutual Bank. The Debtors argue in their reply brief, oh, but your fraudulent conveyance statute says it doesn't apply to payments on an antecedent debt in good faith.

Exhibit E

LEXSTAT 12 U.S.C. § 1821(D)(11)

*** CURRENT THROUGH PL 111-145, APPROVED 3/4/2010 ***

TITLE 12. BANKS AND BANKING
CHAPTER 16. FEDERAL DEPOSIT INSURANCE CORPORATION

Go to the United States Code Service Archive Directory

12 USCS § 1821

§ 1821. Insurance Funds

(11) Depositor preference.

(A) In general. Subject to section 5(e)(2)(C) [*12 USCS § 1815(e)(2)(C)*], amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

(B) Effect on State law.

(i) In general. The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

(ii) Procedure for determination of inconsistency. Upon the Corporation's own motion or upon the request of any person with a claim described in subparagraph (A) or any State which is submitted to the Corporation in accordance with procedures which the Corporation shall prescribe, the Corporation shall determine whether any provision of the law of any State is inconsistent with any provision of subparagraph (A) and the extent of any such inconsistency.

(iii) Judicial review. The final determination of the Corporation under clause (ii) shall be subject to judicial review under chapter 7 of title 5, United States Code [*5 USCS §§ 701* et seq.].

(C) Accounting report. Any distribution by the Corporation in connection with any claim described in subparagraph (A)(v) shall be accompanied by the accounting report required under paragraph (15)(B).

inserted new para. (11), and added para. (17).

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)
Debtors.	:	(Jointly Administered)

CERTIFICATE OF SERVICE REGARDING DEBTORS' SUPPLEMENTAL REPLY REGARDING FRAUDULENT TRANSFER CLAIMS TO THE PRELIMINARY RESPONSES TO THE LEGAL ISSUES SET FORTH IN DEBTORS' TWENTIETH OMNIBUS (SUBSTANTIVE) OBJECTION TO CLAIMS

I, Neil R. Lapinski, Delaware counsel to Washington Mutual, Inc. and WMI Investment Corp., hereby certify that I caused copies of the *Debtors' Supplemental Reply Regarding Fraudulent Transfer Claims to the Preliminary Responses to the Legal Issues Set Forth in Debtors' Twentieth Omnibus (Substantive) Objection to Claims* to be served on March 26, 2010 via hand delivery on all local parties; and via U.S. First Class Mail and Foreign First Class Mail upon the remaining parties.

Dated: March 26, 2010
Wilmington, Delaware

ELLIOTT GREENLEAF

Neil R. Lapinski (DE Bar No. 3645)
1105 North Market Street, Suite 1700
Wilmington, Delaware 19801
Telephone: (302) 384-9400
Facsimile: (302) 384-9399
Email: nrl@elliottgreenleaf.com

Special Litigation and Conflicts Counsel to Washington Mutual, Inc. and WMI Investment Corp.

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

Hand Delivery
Archer & Greiner PC
Charles J Brown III
300 Delaware Avenue, Suite 1370
Wilmington, DE 19801

Hand Delivery
Ashby & Geddes PA
Don A Beskrone
Amanda M Winfree
William P Bowden
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899

Hand Delivery
Attorney Generals Office
Joseph R Biden III
Carvel State Office Building
820 N. French Street, 8th Floor
Wilmington, DE 19801

Hand Delivery
Bayard PA
Jeffrey M Schlerf
P.O. Box 25130
Wilmington, DE 19899

Hand Delivery
Connolly Bove Lodge & Hutz LLP
Marc J Phillips
Jeffrey C Wisler
1007 N. Orange Street
P.O. Box 2207
Wilmington, DE 19899

Hand Delivery
Blank Rome LLP
Michael DeBaecke
1201 Market Street, Suite 800
Wilmington, DE 19801

Hand Delivery
Cross & Simon LLC
Christopher P Simon
913 N. Market Street, 11th Floor
Wilmington, DE 19801

Hand Delivery
Delaware Dept of Justice
Attn: Bankruptcy Department
Division of Securities
820 N. French Street, 5th Floor
Wilmington, DE 19801

Hand Delivery
Department of Labor
Division of Unemployment Insurance
4425 N. Market Street
Wilmington, DE 19802

Hand Delivery
Eckert Seamans Cherin & Mellot LLC
Ronald S Gellert
Tara L Lattomus
300 Delaware Avenue, Suite 1210
Wilmington, DE 19801

Hand Delivery
Edwards Angell Palmer & Dodge LLP
Craig R Martin
Stuart M Brown
919 N. Market Street, 15th Floor
Wilmington, DE 19801

Hand Delivery
Fox Rothschild LLP
Jeffrey M Schlerf
919 N. Market Street
Citizens Bank Center, Suite 1600
Wilmington, DE 19801

Hand Delivery
Landis Rath & Cobb LLP
Adam G Landis
Matthew B McGuire
919 Market Street, Suite 600
Wilmington, DE 19801

Hand Delivery
Morris James LLP
Brett D Fallon
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899-2306

Hand Delivery
Office of the United States Trustee Delaware
Joseph McMahon
844 King Street, Suite 2207
Lockbox 35
Wilmington, DE 19899-0035

Hand Delivery
Pepper Hamilton LLP
David B Stratton
David M Fournier
Evelyn J Meltzer
Hercules Plaza, Suite 5100
1313 N. Market Street
Wilmington, DE 19801

Hand Delivery
Young Conaway Stargatt & Taylor LLP
M Blake Cleary
Robert S Brady
1000 West Street, 17th Floor
Wilmington, DE 19801

Hand Delivery
Reed Smith LLP
J Cory Falgowski
Kurt F Gwynne
1201 Market Street, Suite 1500
Wilmington, DE 19801

Hand Delivery
Richards Layton & Finger PA
Chun I Jang
Mark D Collins
One Rodney Square
920 N. King Street
Wilmington, DE 19899

Hand Delivery
Saul Ewing LLP
Mark Minuti
222 Delaware Avenue, Suite 1200
P.O. Box 1266
Wilmington, DE 19899

Hand Delivery
State of Delaware Division of Revenue
Randy R Weller MS No 25
820 N. French Street, 8th Floor
Wilmington, DE 19801-0820

Hand Delivery
US Attorneys Office
Ellen W Slights
1007 N. Orange Street, Suite 700
P.O. Box 2046
Wilmington, DE 19899-2046

Hand Delivery
Werb & Sullivan
Duane D Werb
Matthew P Austria
300 Delaware Avenue, Suite 1300
P.O. Box 25046
Wilmington, DE 19899

First Class Mail
Akin Gump Strauss Hauer & Feld LLP
David P Simonds
Peter J Gurfein
2029 Century Park E, Suite 2400
Los Angeles, CA 90067-3012

First Class Mail
Acxiom Corporation
CB Blackard III
301 E Dave Ward Drive
PO Box 2000
Conway, AR 72033-2000

First Class Mail
Akin Gump Strauss Hauer & Feld LLP
Scott L Alberino
1333 New Hampshire Avenue, NW
Washington, DC 20036

First Class Mail
Arent Fox LLP
Andrew Silfen
1675 Broadway
New York, NY 10019

First Class Mail
Arapahoe County Attorneys Office
George Rosenberg
5334 S Prince Street
Littleton, CO 80166

First Class Mail
Angelo Gordon & Co
Edward W Kressler
245 Park Avenue, 26th Floor
New York, NY 10167

First Class Mail
Arent Fox LLP
Jeffrey N Rothleder
1050 Connecticut Ave NW
Washington, DC 20036

First Class Mail
Akin Gump Strauss Hauer & Feld LLP
Fred S Hodara
One Bryant Park
New York, NY 10036

First Class Mail
Alston & Brid LLP
J William Boone
1201 W Peachtree St
Atlanta, GA 30309-3424

First Class Mail
Arnall Golden Gregory LLP
Darryl S Laddin
Michael F Holbein
171 17th St NW Ste 2100
Atlanta, GA 30363-1031

First Class Mail
Bank of New York Mellon
Attn Gary S Bush
Global Corporate Trust
101 Barclay St
New York, NY 10286

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Bartlett Hackett Feinberg PC
Frank F McGinn
155 Federal St 9th Fl
Boston, MA 02110

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Hannah Ross
Jerald Bien Willner
1285 Avenue of the Americas 38th Fl
New York, NY 10019

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767 Third Ave
New York, NY 10017

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Bronwen Price
Gail B Price
2600 Mission St Ste 206
San Marion, CA 91108

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Brown & Connery LLP
Donald K Ludman
6 N Broad St Ste 100
Woodbury, NJ 08096

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Buchalter Nemer PC
Shawn M Christianson
333 Market St 25th Fl
San Francisco, CA 94105-2126

First Class Mail
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Ethan Ostrow
Baker & McKenzie LLP
One Prudential Plaza
Suite 3600
Chicago, IL 60601

First Class Mail
Capehart & Scatchard PA
William G Wright
8000 Midlantic Dr Ste 300S
Mt Laurel, NJ 08054

First Class Mail
Centerbridge Capital Partners LP
Vivek Melwani
375 Park Ave 12th Fl
New York, NY 10152-0002

First Class Mail
City and County of Denver
Eugene J Kottenstette
Municipal Operations
201 W Colfax Ave Dept 1207
Denver, CO 80202-5332

First Class Mail
City of Fort Worth
Christopher B Mosley
1000 Throckmorton St
Fort Worth, TX 76102

First Class Mail
Cox Smith Matthew Inc
Patrick L Huffstickler
112 E Pecan Ste 1800
San Antonio, TX 78205

First Class Mail
County Attorneys Office
Erica S Zaron Asst County Attorney
2810 Stephen P Clark Center
111 NW First St
Miami, FL 33128-1993

First Class Mail
David D Lennon
Asst Attorney General
Revenue Section
PO Box 629
Raleigh, NC 27602-0629

First Class Mail
Curtis Mallet Prevost Colt & Mosle LLP
Steven J Reisman
101 Park Ave
New York, NY 10178-0061

First Class Mail
Delaware Secretary of the Treasury
PO Box 7040
Dover, DE 19903

First Class Mail
Delaware Secretary of the State
Division of Corporations
PO Box 898
Franchise Tax Division
Dover, DE 19903

First Class Mail
Dewey & LeBoeuf LLP
Andrew Z Lebwohl
Peter A Ivanick
1301 Avenue of the Americas
New York, NY 10019

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Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue, 13th Floor
New York, NY 10022

First Class Mail
DLA Piper LLP
Jeremy R Johnson
Thomas R Califano
1251 Avenue of the Americas
New York, NY 10020-1104

First Class Mail
E Gaston Riou
110 SW Robin Rd
Lees Summit, MO 64063

First Class Mail
Friedlander Misler
Robert E Greenberg
1101 17th St NW Ste 700
Washington, DC 20036-4704

First Class Mail
Electronic Data Systems LLC
Ayala A Hassell
5400 Legacy Dr
MS H3 3A 05
Plano, TX 75024

First Class Mail
Entwistle & Cappucci LLP
Andrew J Entwistle
Johnston de F Whitman Jr
Joshua K Porter
280 Park Ave 26th Fl
New York, NY 10017

First Class Mail
Federal Deposit Insuance Corp
Donald McKinley
Stephen J Pruss
1601 Bryan St
PAC 04024
Dallas, TX 75201

First Class Mail
First Pacific Bank of California
Jame Burgess
9333 Genesee Ave Ste 300
San Diego, CA 92121

First Class Mail
Fox Hefter Swibel Levin & Carroll LLP
Margaret Peg M Anderson
200 W Madison St Ste 3000
Chicago, IL 60606

Foreign First Class Mail
Freshfields Bruckhaus Deringer LLP
Will Higgs
65 Fleet St
London, EC4Y 1HS UK

First Class Mail
Freshfields Bruckhaus Deringer US LLP
Harvey Dychiao
520 Madison Ave
New York, NY 10022

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Fried Frank Harris Shriver & Jacobson LLP
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Matthew M Roose
One New York Plaza
New York, NY 10004-1980

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18305 Biscayne Blvd Ste 400
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Hagens Berman Sobol Shapiro LLP
Andrew M Volk
1301 Fifth Ave Ste 2900
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Ashley M Chan
One Logan Square 27th Fl
Philadelphia, PA 19103

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Hennigan Bennet Dorman LLP
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865 S Figueroa St Ste 2900
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Vicky Namken
13800 Diplomat Dr
Dallas, TX 75234

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Hewlett Packard Company
Ken Higman
2125 E Katella Ave Ste 400
Anaheim, CA 92806

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Hodges and Associates
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4 E Holly St Ste 202
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First Class Mail
IBM Credit LLC
Bill Dimos
North Castle Dr
MD 320
Armonk, NY 10504

First Class Mail
Internal Revenue Service
Insolvency Section
31 Hopkins Plz Rm 1150
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Johnson Pope Bokor Ruppel & Burns LLP
Angelina E Lim
PO Box 1368
Clearwater, FL 33757

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Trevor J Welch
1633 Broadway
New York, NY 10019

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1201 Third Ave Ste 3200
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101 Park Ave
New York, NY 10178

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Law Debenture Trust Company of New York
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400 Madison Ave 4th Fl
New York, NY 10017

First Class Mail
Law Offices of Lippe & Associates
Emil Lippe Jr
600 N Pearl St Ste S2460
Plaza of the Americas South Tower
Dallas, TX 75201

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Andrea Sheehan
4411 N Central Expressway
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711 Van Nuys St
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2323 Bryan St Ste 1600
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345 Park Ave
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Michael S Etkin
Vincent A Dagostino
65 Livingston Ave
Roseland, NJ 07068

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Manatee County Tax Collector
Ken Burton
Michelle Leeson
PO Box 25300
Bradenton, FL 34206-5300

First Class Mail
Manatee County Tax Collector
Ken Burton
Michelle Leeson
819 US 301 Blvd W
Bradenton, FL 34205

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McCreary Veselka Bragg & Allen
Michael Reed
PO Box 1269
Round Rock, TX 78680

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McDermott Will & Emery LLP
Gary O Ravert
Nava Hazan
340 Madison Ave
New York, NY 10173-1922

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Miami Dade Bankruptcy Unit
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140 W Flagler St Ste 1403
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Pittsburgh, PA 15222

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2 Stamford Plaza Ste 1501
281 Tresser Blvd
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Jason Alderson
Time Square Tower
7 Times Square
New York, NY 10036

First Class Mail
Office of Thrift Supervision
Christopher A Sterbenz
Trial Counsel Litigation Div
1700 G St NW
Washington, DC 20552

First Class Mail
Office of Thrift Supervision
Darrell W Dochow
Pacific Plaza
2001 Junipero Serra Blvd Ste 650
Daly City, CA 94014-1976

First Class Mail
Oregon Dept of Justice
Carolyn G Wade
Senior Asst Attorney General
1162 Court St NE
Salem, OR 97301-4096

First Class Mail
Patterson Belknap Webb & Tyler
Brian P Guiney
Daniel A Lowenthal
1133 Avenue of the Americas
New York, NY 10036-6710

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Pension Benefit Guaranty Corp
Joel W Ruderman
Office of the Chief Counsel
1200 K St NW
Washington, DC 20005-4026

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Perdue Brandon Fielder Collins & Mott LLP
Elizabeth Banda
PO Box 13430
Arlington, TX 76094-0430

First Class Mail
Perkins Coie LLP
Alan D Smith
Brian A Jennings
Ronald L Berenstain
1201 Third Ave 48th Fl
Seattle, WA 98101

First Class Mail
San Diego Treasurer Tax Collector of California
Bankruptcy Desk
Dan McAllister
1600 Pacific Hwy Rm 162
San Diego, CA 92101

First Class Mail
Phillips Goldman & Spence PA
Stephen W Spence
1200 N Broom St
Wilmington, DE 19806

First Class Mail
San Joaquin County Treasurer & Tax Collector
Christine M Babb
500 E Mail St 1st Fl
PO Box 2169
Stockton, CA 95201

First Class Mail
Pillsbury Winthrop Shaw Pittman LLP
Rick B Antonoff
Erica Carrig
1540 Broadway
New York, NY 10036-4039

First Class Mail
Plains Capital Bank Building
Michael S Mitchell
18111 N Preston Rd Ste 810
Dallas, TX 75252

First Class Mail
Platzer Sergold Karlin Levine Goldberg Jaslow LLP
Sydney G Platzer
1065 Avenue of the Americas 18th Fl
New York, NY 10018

First Class Mail
Reed Smith LLP
J Andrew Rahl
James C McCarroll
599 Lexington Ave, 30th Floor
New York, NY 10022

First Class Mail
Riddell Williams PS
Joseph E Shickich Jr
1001 4th Ave Ste 4500
Seattle, WA 98154-1192

First Class Mail
Robert M Menar
700 S Lake Ave Ste 325
Pasadena, CA 91106

First Class Mail
Satterlee Stephens Burke & Burke LLP
Pamela A Bosswick
Christopher R Belmonte
230 Park Ave
New York, NY 10169

First Class Mail
Securities & Exchange Commission
Allen Maiza
Northeast Regional Office
3 World Financial Center Rm 4300
New York, NY 10281

First Class Mail
Securities & Exchange Commission
Daniel M Hawke
The Mellon Independence Ctr
701 Market St
Philadelphia, PA 19106-1532

First Class Mail
Kevin Dean Solonsky
Senior Counsel
Securities & Exchange Commission
100 F Street NE
Washington, DC 20549

First Class Mail
Securities & Exchange Commission
15th & Pennsylvania Ave NW
Washington, DC 20020

First Class Mail
State of Washington Dept of Revenue
Zachary Mosner Asst Attorney General
800 Fifth Ave Ste 2000
Seattle, WA 98104-3188

First Class Mail
Gary A. Gotto
Keller Rohrback PLC
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012

First Class Mail
Shipman & Goodwin LLP
Julie A Manning
One Constitution Plaza
Hartford, CT 06103-1919

First Class Mail
Singer & Levick PC
Michelle E Shriro
16200 Addison Rd Ste 140
Addison, TX 75001

First Class Mail
Sullivan & Cromwell LLP
Hydee R Feldstein
Robert R Urband
1888 Century Park E
Los Angeles, CA 90067-1725

First Class Mail
Steckbauer Weinhart Jaffe LLP
Barry S Glaser
333 S Hope St Ste 3600
Los Angeles, CA 90071

First Class Mail
Tennessee Dept of Revenue
TN Attorney Generals Office Bankruptcy Div
PO Box 20207
Nashville, TN 37202-0207

First Class Mail
Sullivan & Cromwell LLP
Robinson B Lacy
125 Broad St
New York, NY 10004-2498

First Class Mail
Tax Collector for Polk County
Office of Joe G Tedder
Bonnie Holly Delinquency & Enforcement
PO Box 2016
Bartow, FL 33831-2016

First Class Mail
Treasurer Tax Collector
Dan McAllister Bankruptcy Desk
1600 Pacific Hwy Room 162
San Diego, CA 92101

Hand Delivery
Carmella P. Keener
Rosenthal, Monhait & Goddess, P.A.
919 N. Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899

First Class Mail
Unisys Corporation
Janet Fitzpatrick Legal Asst
Unisys Way
PO Box 500 MS E8 108
Blue Bell, PA 19424

First Class Mail
US Attorney General US Department of Justice
Michael Mukasey
950 Pennsylvania Ave NW
Washington, DC 20530-0001

First Class Mail
US Department of Justice
Jan M Geht Trial Attorney Tax Division
PO Box 227
Washington, DC 20044

First Class Mail
Vedder Price PC
Douglas J Lipke
222 N LaSalle St Ste 2600
Chicago, IL 60601

First Class Mail
Verizon Services Corp
William M Vermette
22001 Loudon County Parkway
Room E1 3 113
Ashburn, VA 20147

First Class Mail
Walter R Holly Jr
10853 Garland Ave
Culver City, CA 90232

First Class Mail
Washington Mutual Claims Processing
c/o Kurtzman Carson Consultants
2335 Alaska Ave
El Segundo, CA 90245

First Class Mail
Weil Gotshal & Manges LLP
Brian S Rosen
Marcia L Goldstein
Michael F Walsh
767 Fifth Ave
New York, NY 10153

First Class Mail
Weiss Serota Helfman
Douglas R Gonzales
200 E Broward Blvd Ste 1900
Fort Lauderdale, FL 33301

First Class Mail
Wells Fargo Bank NA
Thomas M Korsman
625 Marquette Ave
Minneapolis, MN 55479

First Class Mail
White & Case LLP
Thomas E Lauria
Wachovia Financial Center
200 S Biscayne Blvd Ste 4900
Miami, FL 33131

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Willkie Farr & Gallagher LLP
Shaunna D Jones
Shelley Chapman
Thomas H Golden
787 Seventh Ave
New York, NY 10019-6099

First Class Mail
Wilmington Trust Company
Jame McGinley
520 Madison Ave 33rd Fl
New York, NY 10022

First Class Mail
Michael J. Bennett
Kathleen R. Dahlgren
Lichtsinn & Haensel, s.c.
111 East Wisconsin Avenue, Suite 1800
Milwaukee, WI 53202

Hand Delivery
Ian Connor Bifferato
Thomas F. Driscoll III
Kevin G. Collins
Bifferato LLC
800 N. King Street, Plaza Level
Wilmington, DE 19801

First Class Mail
Jeffrey Isaacs
Procopio, Cory, Hargreaves & Savitch LLP
530 B Street, Suite 2100
San Diego, CA 92101

First Class Mail
Washington Mutual, Inc.
1301 Second Avenue
Seattle, WA 98101

First Class Mail
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

First Class Mail
Saverio M. Rocca, Esquire
Assistant General Counsel
ACE USA
436 Walnut Street, 4th Floor
WA04J
Philadelphia, PA 19106

First Class Mail
Gregory A. Cross, Esquire
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202

First Class Mail
Jorian L. Rose, Esquire
Venable LLP
Rockefeller Center
2170 Avenue of the Americas, 25th Floor
New York, NY 10020

First Class Mail
Severson & Werson, P.C.
Duane M. Geck, Esquire
One Embarcadero Center, 26th Floor
San Francisco, CA 9411

Hand Delivery
Michael P. Morton, Esquire
1203 North Orange Street
Wilmington, DE 19801

Hand Delivery
Donna L. Culver
Morris Nichols Arsht & Tunnell LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899

First Class Mail
Scott A. Meyers
Ulmer & Berne LLP
One North Franklin Street, Suite 1205
Chicago, IL 60606