IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11 Cases
	)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., et al.,[1]	)	Jointly Administered
	)	
Debtors.	)	

REPLY OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF WASHINGTON MUTUAL, INC., ET AL. IN FURTHER SUPPORT OF THE DEBTORS' TWENTIETH (20TH) OMNIBUS (SUBSTANTIVE) OBJECTION TO CLAIMS

The Official Committee of Unsecured Creditors (the "Creditors' Committee") of Washington Mutual, Inc., et al. (collectively, the "Debtors"), by and through its undersigned co-counsel, submits this reply brief in further support of the Debtors' Twentieth (20th) Omnibus (Substantive) Objection to Claims (the "Objection") [Docket No. 2205]. The Creditors' Committee previously had joined in the Objection, and submits this brief in reply to the responses filed by the WMB Bondholders.[2] In this reply, the Creditors' Committee addresses only limited issues raised in the WMB Bondholders' Responses, and respectfully refers the Court to (1) the Debtors' Reply To The Various Preliminary Responses To The Legal Issues Set Forth In Debtors' Twentieth Omnibus (Substantive) Objection To Claims [Docket No. 2620], and (2) the Debtors' Supplemental Reply Regarding Fraudulent Transfer Claims To The Legal Issues Set

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

[2] The "WMB Bondholders" refers collectively to the Bank Bondholders, the WMB Noteholders, the WMB Noteholder Group Participants, and Paulson & Co., each of which submitted a Response to the Objection (Docket Nos. 2469, 2466, 2470, and 2467, respectively)(each a "Response" and collectively, the "Responses").

Forth In Debtors' Twentieth Omnibus (Substantive) Objection To Claims [Docket No. 2621], with respect to the remaining issues.

THE WMB BONDHOLDERS' SECURITIES FRAUD CLAIMS FAIL TO STATE A PLAUSIBLE CLAIM UPON WHICH RELIEF MAY BE GRANTED

1. The WMB Bondholders' proofs of claim included, among other things, claims against the Debtors for alleged fraud and misrepresentation in connection with the purchase of WMB securities. In the Objection, the Debtors explained that the allegations supporting the WMB Bondholders' securities fraud claims demonstrate that those claims are common to all creditors, and as such are derivative and the WMB Bondholders lack standing to bring them. In their Responses, the WMB Bondholders argue their securities fraud claims are direct and the WMB Bondholders have standing to pursue them. See Bank Bondholder Opp. at 19 (citing Hayes v. Gross, 982 F.2d 104, 108 (3d Cir. 1992)); Noteholder Group Participants Opp. at 39-40 (citing Howard v. Haddad, 916 F.2d 167, 169-70 (4th Cir. 1990)). The WMB Bondholders are incorrect: their securities fraud claims are derivative, and neither Hayes nor Howard holds otherwise. Moreover, even if their claims were direct, the WMB Bondholders vastly overstate the value of their potential recovery.

A. The WMB Bondholders' Securities Fraud Claims Are Derivative

2. The WMB Bondholders rely on Hayes v. Gross and Howard v. Haddad to support the position that securities fraud claims against third parties are individualized, and therefore direct, as opposed to being common to all creditors and derivative. In Hayes, the Third Circuit held that an equity shareholder could maintain a direct claim against the officers and directors of a failed bank under the federal securities laws where the claim (1) was based on specific misrepresentations that affected prospective purchasers similarly situated to plaintiff differently than other stockholders and (2) plaintiff was seeking to recover the difference

between the allegedly inflated price he paid for his stock and the amount he would have paid for the stock had defendants not misrepresented the financial status of the corporation. See Hayes, 982 F.2d at 108. In Howard, the Fourth Circuit held similarly, finding that a plaintiff shareholder's claims based on misrepresentations were direct and the measure of damages would be the difference between "what [the plaintiff] paid and what the stock was worth on the day [the plaintiff] paid for it." Howard, 916 F.2d at 170.

3. But the WMB Bondholders' reliance on Hayes and Howard is misplaced, as both cases involved holders of equity securities as opposed to holders of corporate debt. In fact, the court in Hayes based its decision upon a distinction previously drawn by the Third Circuit between equity holders and depositors which is not present here. In In re Sunrise Securities Litigation, 916 F.2d 874 (3d Cir. 1990), the Third Circuit had held that depositors of a failed bank could not bring misrepresentation claims against the bank's directors and officers. Though the depositors alleged that various misrepresentations induced them to deposit funds in the bank, the Third Circuit held that their claims were derivative because their injury was caused by the bank's insolvency. Id. This injury was shared by all general unsecured creditors, including the depositors who failed to recover the full amount of their deposits. Id. It was Sunrise's inability to repay its unsecured debt to depositors and other creditors that was the source of their injuries. Hayes distinguished Sunrise because the plaintiffs in Sunrise were depositors who suffered no injury when they made their deposits, whereas the Hayes plaintiff alleged that his harm was due to overpaying at the time of purchase. See Hayes, 982 F.2d at 108. The Howard court reached the same conclusion. Howard, 916 F.2d at 169-70.

4. Here, the WMB Bondholders, as unsecured creditors of WMB, are more analogous to the depositors in Sunrise than they are to the shareholders in Hayes, as they were

ultimately owed a sum certain. The WMB Bondholders purchased WMB debt in exchange for an agreement to be repaid with interest at a later date. Likewise, the Sunrise depositors lent money to the bank in exchange for a promise to be repaid with interest. Regardless of the market value of the WMB Senior and Subordinated Notes, the WMB Bondholders were always promised to recover the same amount of money. The "true value" of the Notes was not impaired, and the WMB Bondholders were not injured, until WMB could not repay the full value of its debts at the time it was placed into receivership. Like the depositors in Sunrise, the WMB Bondholders' injury emanates from the alleged mismanagement of WMB and cannot be separated from the injury to WMB and all of its other creditors. Sunrise, 916 F.2d at 883. Their claim is a derivative claim that can only be asserted by the FDIC, as receiver. Id.

5. Conversely, the value of the stock held by the plaintiffs in Howard and Hayes was based on the market value and not a promise of repayment. They could recover only by selling the stock. Therefore, misrepresentations that caused a stockholder to pay an inflated price for his stock caused an immediate injury and affected that stockholder differently than those who already owned the stock. See Hayes, 982 F.2d at 108. That the WMB Bondholders' proofs of claim are for an amount equal to the face value of their notes and not in an amount based on their purchase prices supports the conclusion that the WMB Bondholders were only injured by WMB's insolvency (affecting all creditors equally) and not by paying a wrongfully inflated purchase price.

B. If The WMB Bondholders' Claims Are Direct, Any Recovery Is Limited To The Amount Of Overpayment

6. Yet even if this Court were to find that the WMB Bondholders do assert direct claims, their damages should be limited to the difference between the price each bondholder actually paid for its note and the price those notes would have been worth absent the

alleged misrepresentations. See id. (holding that a shareholder had established direct claims for misrepresentation only under the federal security laws for the "difference between the allegedly inflated price he paid for stock and the price he would have paid had defendants" not made misrepresentations."); see also Bank Bondholder Opp. at 20 (arguing misrepresentations based on Hayes "[t]o the extent that the misrepresentations caused the holders of Senior Notes to purchase the bonds or pay more for the bonds than they were worth"); WMB Noteholders Opp. at 39 ("First and foremost, the facts giving rise to the Misrepresentation Claim are not alleged to have affected 'all' WaMu creditors; this claim may be asserted only by those WaMu creditors who purchased or continued to hold WaMu Bank securities at prices that were artificially inflated due to WaMu's false statements.") The WMB Bondholders, therefore, cannot assert any direct claims for the full face value of their notes based on the holding in Hayes. And, as explained in the Debtors' Objection and Reply, all other claims are derivative and belong to the FDIC.

7. Importantly, it must also be noted that the WMB Bondholders who purchased their notes after the truth of the alleged misrepresentations was known or after WMB was placed in receivership cannot assert direct misrepresentation claims based on Hayes as they cannot allege that they were misled (after having actual knowledge of the Bank's failure) or that they paid an inflated price for their notes (to the extent that they purchased the notes at a discount which, in all likelihood, reflected the actual market value of the notes at the time of purchase). See Hayes 982 F.2d at 108.

8. **WHEREFORE**, the Committee respectfully requests that the Court grant the relief requested in the Objection.

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Respectfully Submitted,

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