

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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<i>In re</i>	:	<b>Chapter 11</b>
WASHINGTON MUTUAL, INC., <u>et al.</u> , <sup>1</sup>	:	<b>Case No. 08-12229 (MFW)</b>
Debtors.	:	<b>(Jointly Administered)</b>
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**OBJECTION OF THE PENSION BENEFIT GUARANTY CORPORATION  
TO DEBTORS' PROPOSED DISCLOSURE STATEMENT**

**INTRODUCTION**

The Court cannot approve the proposed disclosure statement because the disclosure statement describes certain releases in the Debtors' proposed plan that could be interpreted to release claims against non-debtors for fiduciary breach arising under ERISA. No extraordinary circumstances exist that warrant the granting of non-debtors a release of their fiduciary obligations to the Debtors' defined benefit pension plans. Moreover, the non-debtor releases violate public policy, and are prohibited under Section 524(e) of the Bankruptcy Code and Section 410(a) of the Employee Retirement Income Security Act of 1974 ("ERISA").<sup>2</sup>

**BACKGROUND**

1. The Pension Benefit Guaranty Corporation ("PBGC") is a wholly-owned United States government corporation, and an agency of the United States, that administers the defined-benefit pension plan termination insurance program under Title IV of ERISA. PBGC guarantees

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<sup>1</sup> The 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 1301 Second Avenue, Seattle, Washington 98101.

<sup>2</sup> 29 U.S.C. §§ 1301-1461 (2006).



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the payment of certain pension benefits upon the termination of a single-employer pension plan covered by Title IV of ERISA. When an underfunded plan terminates, PBGC generally becomes trustee of the plan and, subject to certain statutory limitations, pays the plan's unfunded benefits with its insurance funds.<sup>3</sup>

2. Washington Mutual, Inc. and WMI Investment Corp. (the "Debtors") sponsor two defined-benefit plans covered by Title IV of ERISA: (a) the Retirement Income Plan for Salaried Employees of Lakeview Saving Bank (the "Lakeview Plan"); and (b) the WaMu Pension Plan (the "WaMu Plan," and together with the Lakeview Plan, the "Pension Plans."). The Pension Plans cover an estimated 56,000 participants and have an estimated underfunding of \$35.7 million.

3. If the Pension Plans are terminated, the Debtors and any other members of the Pension Plans' controlled group would become liable to PBGC for unfunded benefit liabilities of the Pension Plans, for any unpaid minimum funding contributions, as well as unpaid premiums and termination premiums.<sup>4</sup>

4. Any party who is a fiduciary of a covered pension plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by Titles I and IV of ERISA shall be liable to pay for losses to the plan or perhaps to the plan's participants resulting from such breach.<sup>5</sup> Provisions in an agreement or instrument that purport to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under ERISA are void as against public policy.<sup>6</sup>

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<sup>3</sup> See 29 U.S.C. §§ 1321-1322, 1343, 1361.

<sup>4</sup> See 29 U.S.C. §§ 1301(a)(18), 1306(a)(7), 1362(a)-(b).

<sup>5</sup> See 29 U.S.C. §§ 1109(a), 1342(d).

<sup>6</sup> See 29 U.S.C. § 1110.

5. On September 26, 2008, the Debtors filed petitions under chapter 11 of the Bankruptcy Code. This Court consolidated the Debtors' cases for procedural purposes only, and the cases are being jointly administered under case number 08-12229 (MFW).

6. On March 19, 2009, PBGC filed the following claims against the Debtors concerning the WaMu Plan:

- (i) unfunded benefit liabilities contingent on termination of the WaMu Plan in the estimated amount of \$35.6 million.
- (ii) contributions owed to the WaMu Plan in an unliquidated amount.
- (iii) premiums that may be owed under the WaMu Plan in an unliquidated amount.

7. PBGC also filed the following claims against the Debtors concerning the Lakeview Plan:

- (i) unfunded benefit liabilities contingent on termination of the Lakeview Plan in the estimated amount of \$136,799.
- (ii) contributions owed to the Lakeview Plan in an unliquidated amount.
- (iii) premiums that may be owed under the Lakeview Plan in an unliquidated amount.

8. On March 26, 2010, Debtors filed their proposed Disclosure Statement for the Joint Plan of Affiliated Debtors (the "Disclosure Statement").

## OBJECTION

### **The Disclosure Statement violates section 524(e) of the Bankruptcy Code and Title IV of ERISA.**

Section 524(e) of the Bankruptcy Code limits the effect of a debtor's discharge. That section states that the "discharge of a debt of the debtor does not affect the liability of any entity on, or the property of any other entity for, such debt."<sup>7</sup>

In the Third Circuit, as set forth in *In re Continental Airlines*, the "hallmarks of permissible non-consensual releases" include "fairness, necessity to the reorganization, and specific factual findings to support these conclusions."<sup>8</sup> Furthermore, as stated by this bankruptcy court, "even if the threshold *Continental* criteria of fairness and necessity for approval of non-consensual third-party releases were marginally satisfied," "the broader context of the *Continental* discussion" provides that such releases should be approved only "in the context of **extraordinary cases**" like mass tort litigation cases.<sup>9</sup>

Sections I.C.9 and V.P.6 of the Disclosure Statement describe releases under the proposed joint plan and global settlement that purport to release claims against non-debtors.<sup>10</sup> If

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<sup>7</sup> See 11 U.S.C. § 524(e).

<sup>8</sup> *In re Continental Airlines*, 203 F.3d 203, 214, 217 (3d Cir. 2000); see also *In re Prussia Ass'n.*, 322 B.R. 572, 598 (Bankr. E.D. Pa. 2005); *In re PWS Holding Corp.*, 228 F.3d 224, 237 (3d Cir. 2000).

<sup>9</sup> *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001), *appeal dismissed by*, 280 B.R. 339 (D. Del. 2002) (emphasis added).

<sup>10</sup> Section I.C.9 of the Disclosure Statement states:

The Releases in the Plan are (i) essential to the success of the Debtors' reorganization, (ii) based on a critical financial contribution of the Released Parties, (iii) necessary to make the Plan feasible, and (iv) fair to creditors. The Releases are integral to obtaining the value provided in the Proposed Global Settlement Agreement, that will be deliverable pursuant to the Plan, and thus constitute an essential component of the compromises reached among the parties to the Proposed Global Settlement Agreement, and an essential component of the Plan. Pursuant to the Plan, and except as otherwise expressly provided therein, the Confirmation Order, or the Proposed Global Settlement Agreement, for good and valuable consideration, the Debtors, the Creditors' Committee and all creditors and equity interest holders of the Debtors, will be deemed to have released the JPMC Entities, the FDIC Receiver, and FDIC Corporate, from any and all claims, in connection with or related to any of the

the Pension Plans terminate in the future, PBGC will have the authority to investigate and pursue claims for fiduciary breach and prohibited transactions under Title I and Title IV of ERISA. The releases in the proposed disclosure statement, however, might be interpreted to extinguish possible claims against non-debtor fiduciaries or parties-in-interest covered in that provision. Debtors have made no showing of fairness or necessity, let alone extraordinary circumstances needed to warrant the release of non-debtors from their fiduciary obligations to Debtors' Pension

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Debtors, the Reorganized Debtors, or claims or interests for which such party is receiving a distribution pursuant to the Plan, all as more fully described in the Plan.

Section V.P.6 of the Disclosure Statement states:

Except as otherwise expressly provided in the Plan, the Confirmation Order, or the Proposed Global Settlement Agreement, on the Effective Date, for good and valuable consideration each Entity that has held, currently holds or may hold a Released Claim or any Equity Interest that is terminated, and each of its respective Related Persons, on their own behalf and on behalf of anyone claiming through them, on their behalf, or for their benefit, shall be deemed to have and hereby does irrevocably and unconditionally, fully, finally and forever waive, release, acquit and discharge each and all of the Released Parties from any and all Released Claims in connection with or related to any of the Debtors, the Reorganized Debtors, the Affiliated Banks, or their respective subsidiaries, assets, liabilities, operations, property or estates, the Chapter 11 Cases or the Plan or the Disclosure Statement, the assets to be received by JPMC pursuant to the Proposed Global Settlement Agreement, the Plan Contribution Assets, the Debtors' Claims, the JPMC Claims, the FDIC Claim, the Purchase and Assumption Agreement, the WMI/WMB Intercompany Claims, any intercompany claims on the books of WMI or WMB related to the WaMu Pension Plan or the Lakeview Plan, claims related in any way to the Trust Preferred Securities (including, without limitation, the creation of the Trust Preferred Securities, the financing associated therewith, the requested assignment of the Trust Preferred Securities by the Office of Thrift Supervision and the transfer and the asserted assignment of the Trust Preferred Securities subsequent thereto), and/or any claim, act, fact, transaction, occurrence, statement, or omission in connection with or alleged in the Actions or in the Texas Litigation, or that could have been alleged in respect of the foregoing or other similar proceeding, including, without limitation, any such claim demand, right, liability, or cause of action for indemnification, contribution or any other basis in law or equity for damages, costs or fees incurred by the releasors in the Plan arising directly or indirectly from or otherwise relating thereto; **provided, however, that each Entity that has submitted a Ballot may elect, by checking the appropriate box on its Ballot, not to grant the releases set forth in the Plan with respect to those Released Parties other than (i) the Debtors, (ii) the Reorganized Debtors, and (iii) the Creditors' Committee and its members in such capacity and for their actions as members, their respective Related Persons, and their respective predecessors, successors and assigns (whether by operation of law or otherwise), in which case, such Entity that so elects to not grant the releases will not receive a distribution hereunder; and provided, further that, because the Plan and the Proposed Global Settlement Agreement, and the financial contributions contained therein, are conditioned upon the aforementioned releases and, as such, these releases are essential for the successful reorganization of the Debtors, pursuant to the Confirmation Order, those Entities that opt out of the releases provided hereunder shall be bound and shall receive the distributions they otherwise would be entitled to receive pursuant to the Plan.** (emphasis in original).

Plans. Furthermore, the Debtors have not demonstrated, nor can they demonstrate, that the release of non-debtors from their fiduciary obligations to the Pension Plans is integral to the Debtors' reorganization. Without such evidence, the releases cannot be allowed, and the Debtors' proposed plan cannot be confirmed.

Moreover, Section 410(a) of ERISA prohibits such releases because they violate public policy:

[A]ny provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.<sup>11</sup>

Accordingly, the Disclosure Statement violates Section 524(e) of the Bankruptcy Code and Title IV of ERISA.

### **CONCLUSION**

The Bankruptcy Court cannot approve the Disclosure Statement because it describes certain releases of non-debtors in the proposed plan that violate public policy, and are prohibited under Section 524(e) of the Bankruptcy Code and Title IV of ERISA.<sup>12</sup>

WHEREFORE, PBGC requests that the Court sustain the Objection of the Pension Benefit Guaranty Corporation to Debtors' Proposed Disclosure Statement, and the Court grant such other and further relief to PBGC as appropriate.

[Signature Page Follows]

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<sup>11</sup> See 29 U.S.C. § 1110(a).

<sup>12</sup> In the attached *Exhibit A*, PBGC has provided language that would cure the proposed Disclosure Statement.

Dated: Washington, DC  
May 13, 2010

Respectfully submitted,

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**EXHIBIT A**



No provision contained herein, the Joint Plan of Reorganization, the Order Confirming the Joint Plan of Reorganization, or section 1141 of the Bankruptcy Code, shall be construed as discharging, releasing or relieving any party, in any capacity, from any liability with respect to the Pension Plans under any law, government policy or regulatory provision. PBGC and the Pension Plans shall not be enjoined or precluded from enforcing such liability against any party as a result of the Joint Plan of Reorganization's provisions for satisfaction, release and discharge of claims.

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: **Case No. 08-12229 (MFW)**  
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<b>Debtors.</b>	:	<b>(Jointly Administered)</b>

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that a true and correct copy of the accompanying Objection Of The Pension Benefit Guaranty Corporation To Debtors' Proposed Disclosure Statement, was served electronically on all parties, this May 13, 2010, through the Court's Electronic Filing System or to those parties listed below by the means specified.

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