IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	:	**Chapter 11 Cases**
In re :	:	
	:	**Case No. 08-12229 (MFW)**
WASHINGTON MUTUAL, INC., et. al.,	:	
	:	**Jointly Administered**
DEBTORS	:	
	:	**Re: D.I. 5548**

THE WMB NOTEHOLDERS' OBJECTION TO THE SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

The WMB Noteholders[1] hereby object to the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Plan"). The Plan cannot be approved, as it violates the Bankruptcy Code and improperly purports to deprive the WMB Noteholders of the opportunity to pursue legitimate and valuable fraud claims against the Debtor relating to the WMB Noteholders' purchases of in excess of $600 million in aggregate principal amount outstanding of Senior Notes and Subordinated Notes issued by non-debtor Washington Mutual Bank ("WMB" or the "Bank").

The Plan suffers from various fatal defects as set forth below including: (i) it improperly disallows the WMB Noteholders' claims through their treatment in the Plan;

[1] The WMB Noteholders include Thrivent Financial for Lutherans, AEGON USA Investment Management, LLC (AEGON Life Insurance (Taiwan) and Transamerica Financial Life Insurance Company), PPM America, Inc. (The Prudential Assurance Company, Ltd., JNL VA High Yield Bond Fund, Jackson National Life Insurance Company of New York, and Jackson National Life Insurance Company), New York Life Investment Management LLC, Legal & General Investment Management (Legal & General Investment Management America), The Northwestern Mutual Life Insurance Co. (Northwestern Mutual Life Insurance Co., Northwestern Long Term Care Insurance Company, Northwestern Mutual Series Fund, Inc. and its Select Bond Portfolio, and Northwestern Mutual Series Fund, Inc. and its Balanced Portfolio), ING Direct NV, Sucursal en España, and their affiliates, who are the legal or beneficial holders of, or have control or discretionary investment authority with respect to, in excess of $600 million in aggregate principal amount outstanding of Senior Notes and Subordinated Notes issued by Washington Mutual Bank.

(ii) it improperly classifies the WMB Noteholders' claims; and (iii) it results in the WMB Noteholders receiving less than they would have received under a Chapter 7 liquidation. The net result of the Plan is to extinguish the WMB Noteholders' valid and valuable misrepresentation claims. The Plan cannot be confirmed under these circumstances.

BACKGROUND

A. OVERVIEW OF THE WMB NOTEHOLDERS

1. The WMB Noteholders are a group of institutional investors, comprised chiefly of insurance companies, who collectively purchased, at or near par, *in excess of $600 million* in WMB Senior Notes and WMB Subordinated Notes. These institutional investors hold and manage the funds of insurance companies that millions of average American rely upon to pay claims upon the occurrence of catastrophic life events.

2. The WMB Noteholders – unlike many purchasers of WMB securities who acquired their positions for a fraction of their value after the Debtors' fraud was disclosed and who stand to receive a windfall under the Plan – bought their notes at or near par, well in advance of the disclosure of any malfeasance at the Bank, and have suffered substantial monetary losses. *See* Verified Statement of Grant & Eisenhofer P.A. Pursuant To Rule 2019 Of The Federal Rules Of Bankruptcy Procedure (Docket No. 3754). The WMB Noteholders – and the millions of American who turn to them in their darkest hours – are true victims of the Debtors' fraud.

B. OVERVIEW OF THE WMB NOTEHOLDERS' CLAIMS

3. The WMB Noteholder Group filed a proof of claim (the "Proof of Claim")[2] against debtor Washington Mutual, Inc. ("WMI" or "WaMu") alleging, *inter*

[2] The WMB Noteholder Group is defined in the Proof of Claim and includes each of the WMB Noteholders.

alia, that they were induced to purchase or retain bonds issued by former WMI subsidiary WMB based on false representations made by WMI that caused the prices of their WMB bonds to be artificially inflated. Among the claims asserted in the Proof of Claim was a claim for misrepresentation (the "Misrepresentation Claim").[3]

4. A very real and damaging fraud undergirds the WMB Noteholders' Misrepresentation Claim – in fact, a securities fraud class action challenging the very misrepresentations of which the WMB Noteholders complain is currently pending against WaMu in the United States District Court for the Western District of Washington, having survived defendants' motions to dismiss. *See In re Washington Mut., Inc. Sec., Derivative & ERISA Litig.*, No. 2:08-md-1919 MJP (W.D. Wash.). The WMB Noteholders, unlike many other late-in-the-game investors, were fully unaware of the risks they were undertaking when they chose – from the thousands of investment options at their disposal – to invest their capital with the Bank.

C. PROCEDURAL BACKGROUND

5. The Debtors objected to the Misrepresentation Claim in their Corrected Twentieth (20th) Omnibus (Substantive) Objection to Claims (the "First Objection"), claiming that the WMB Noteholders lacked standing to assert a direct misrepresentation claim and that the WMB Noteholders failed to state a claim in conformity with the pleading requirements applicable to a complaint, an adversary proceeding, or the federal securities laws. The Court roundly rejected these arguments during oral argument on April 6, 2010, finding that the WMB Noteholders had standing to assert their properly-

[3] The WMB Noteholders have retained the undersigned counsel to represent them solely with respect to the Misrepresentation Claim. As to claims other than the Misrepresentation Claim, the WMB Noteholders will continue to be represented by Bracewell & Giuliani LLP. Accordingly, the Misrepresentation Claim alone will be addressed herein.

pled Misrepresentation Claim and authorized discovery to proceed.[4] The Court entered an order on April 21, 2010 denying that there was a lack of standing or that the claims were not properly pled . *See* Docket No. 3549.

D. TREATMENT OF THE WMB NOTEHOLDERS' MISREPRESENTATION CLAIM UNDER THE PLAN

6. Under the Plan, the WMB Noteholders' claims, so long as those claims are not subordinated pursuant to Section 510(b) of the Bankruptcy Code, fall under Class 17.[5] Class 17, in turn, has been split into two subclasses: Class 17(a) for the WMB Senior Notes claims and Class 17(b) for the WMB Subordinated Notes claims. *See* Plan at 21.1(a), 21.1(c).

7. Holders of WMB Senior Notes – upon granting a release of all of their claims against the Debtors, *both direct and derivative* – will receive a pro rata distribution of $335 million stemming from certain tax refunds inuring to the BB Liquidating Trust and certain other cash distributions, up to $10 million.[6] *See* Plan at 21.1(a), 43.6. Those holders of WMB Senior Notes who refuse to grant the release *and who* are able to convince the Bankruptcy Court to allow their direct, misrepresentation

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[4]Undeterred by the Court's clear rejection of their arguments, the Debtors have filed a second objection to the Misrepresentation Claim, asserting the exact same arguments that the Court previously rejected. *See* Debtors' Fifty Fifth (55th) Omnibus (Substantive) Objection To Claims (the "Second Objection") (Docket No. 5616). The WMB Noteholders have opposed the Second Objection. *See* The WMB Noteholders' Response And Opposition To The Debtors' Fifty-Fifth (55th) Omnibus (Substantive) Objection to Claims (Docket No. 5766).

[5]In the Second Objection (Docket 5616), Debtors have, for the WMB subordinated notes held by members of the WMB Noteholders, moved to subordinate the WMB Noteholders' direct misrepresentation claims under Section 510(b) of the Code. The WMB Noteholders have opposed this improper attempt to subordinate their misrepresentation claims. (Docket No. 5766). In addition, the Debtors have filed an adversary proceeding (Adv. Proc. No. 10-53420) (the "Adversary Proceeding"), seeking to subordinate the WMB Noteholders' direct misrepresentation claims under Section 510(b). No answer has been filed in that proceeding as yet.

[6] These funds are allegedly available to holders of WMB Senior Notes pursuant to a settlement between the Debtors and certain WMB Senior Noteholders. The WMB Noteholders are not parties to this settlement. While there is no authority allowing one creditor to be able to settle the claim of another creditor, that is exactly what the Debtors attempt to do.

claims, still lose their direct claims to the extent they obtain any recovery under the Plan. Section 1.175 of the Plan provides that "for the avoidance of doubt, to the extent the holders of an Allowed WMB Senior Note Claim receives a distribution pursuant to the Plan, such holder shall be deemed to have released any and all Section 510(b) Subordinated Note Claims that they may have"; Section 21.1(a) of the Plan provides that "to the extent a WMB Senior Notes Claim is determined pursuant to Final Order of the Bankruptcy Court to be an Allowed Claim . . . such holder shall be deemed to have consented to the releases provided in Section 43.6 of the Plan . . ." Significantly, those holders of Senior WMB Notes that do not have direct misrepresentation claims against WMI, receive the same pro rata distribution from Class 17A as holders of both direct and derivative claims – yet they are not forced to abandon direct claims as are the entities that have both types of claims.

8. Holders of WMB Subordinated Notes have been placed into Class 17(b) and will receive *no* distribution, regardless of whether they hold direct claims, derivative claims, or both. If the misrepresentation claims of holders of WMB Subordinated Notes are found to be subordinated under Section 510(b), then those claims are in Class 18. If those claims are found not be subordinated, then the claims are disallowed by the Plan. *See* Plan at 21.1(b). Thus, this classification effectively renders the direct claims held by the holders of WMB Subordinated Notes – including the WMB Noteholders – non-existent.

9. Requiring the WMB Noteholders to release their Misrepresentation Claims as a condition of receiving any distribution under the Plan including on the derivative claims they have related to their purchases of WMB Senior Notes – and

effectively disallowing their Misrepresentation Claim as it relates to their purchases of WMB Subordinated Notes – is both inequitable and impermissible under the Bankruptcy Code.

ARGUMENT

10. The Bankruptcy Court should deny confirmation of the Plan because it fails to meet the confirmation requirements set forth in the Bankruptcy Code. Section 1129(a) of the Bankruptcy Code provides that the court shall confirm a plan only if *all* of the requirements of Section 1129(a)(1)-(13) are met. 11 U.S.C. § 1129(a). As a proponent of a Chapter 11 plan, the Debtors bear the burden of establishing that the Plan complies with each of the confirmation requirements of Section 1129(a) by a preponderance of the evidence. *See, e.g., Armstrong World Indus., Inc.*, 348 B.R. 111, 120 n.15 (D. Del 2006) (plan proponent must establish by preponderance of the evidence the satisfaction of requirements of Bankruptcy Code sections 1129(a) and 1129(b)); *In re Exide Techs.*, 303 B.R. 48, 58 (Bankr. D. Del. 2003) (same). Moreover, the Bankruptcy Court has an independent duty to determine whether a plan proponent has met its evidentiary burden under Section 1129(a) prior to entering an order confirming a Chapter 11 plan. *See, e.g., In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 656 (Bankr. D. Del. 2003). To the extent the Debtors rely upon section 1129(b) of the Bankruptcy Code to confirm the Plan, the Plan unfairly discriminates and is not fair and equitable with respect to the misrepresentation claims.

I. THE PLAN CANNOT BE CONFIRMED BECAUSE IT ADJUDICATES THE WMB NOTEHOLDERS' MISREPRESENTATION CLAIMS BY IMPROPERLY DISALLOWING THE CLAIMS

11. The Bankruptcy Code makes clear that claims cannot be adjudicated through their treatment in a plan. Rather, creditors are entitled to a claims process (or an

adversary proceeding) whereby claims are objected to, a contested matter is initiated, and the parties are put on notice that litigation is required to make a final determination as to whether a claim is allowed. *See, e.g., Sun Fin. v. Howard (In re Howard)*, 972 F.2d 639, 641 (5th Cir. 1992); *Simmons v. Savell (In re Simmons)*, 765 F.2d 547, 559 (5th Cir. 1985). Here, the Debtors' First Objection was flat-out denied, while their Second Objection (improper as it may be) remains pending. Yet, Section 21.1(c) of the Plan states that "all WMB Subordinated Notes Claims, to the extent that they are not Section 510(b) Subordinated WMB Notes Claims, shall be deemed disallowed, and holders thereof shall not receive any distribution from the Debtors." As noted above, using a plan to adjudicate treatment of a claim is not permissible under the Bankruptcy Code and requires rejection of the Plan. Since the Debtors cannot simply disallow a claim by stating in a plan that it is disallowed, the Plan fails because it does not account for the treatment of a class of creditors. *See* Section 1123(a)(3). Moreover, the Claim cannot be disallowed pursuant to the Global Settlement Agreement with the FDIC since the claim does not belong to the FDIC .

II. THE PLAN CANNOT BE CONFIRMED BECAUSE IT IMPROPERLY CLASSIFIES WMB NOTEHOLDERS' CLAIMS

A. THE MISREPRESENTATION CLAIMS ARE IMPROPERLY CLASSIFIED AS CLASS 17 RATHER THAN CLASS 12 CLAIMS

12. First, as the Debtors freely admit, "WMB Notes are unsecured obligations of WMB, and the Claims, if successfully asserted and not subject to subordination, would constitute unsecured obligations of the Debtors." Adversary Proceeding at ¶ 48. Notwithstanding the fact that the Debtors have admitted that the WMB Noteholders' Claims should be treated as general unsecured obligations, the Debtors nonetheless seek to put these misrepresentation claims in a separate class so that they do not have to treat

them as general unsecured claims. The claims in Class 12 (General Unsecured Claims) are being paid in full, but the Debtors provide no distribution for the substantially similar unsecured misrepresentation claims of the WMB Noteholders. The convoluted classification scheme the Debtors have created to disenfranchise the holders of the misrepresentation claims is improper on its face. *See In re Combustion Eng'g, Inc*., 391 F.3d 190, 238 (3rd Cir. 2004) (the Bankruptcy Code furthers the policy of equality of distribution among creditors by requiring a plan of reorganization provide similar treatment to similarly situated claims); *In re Quigley*, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) ("[C]lassification is constrained by two straight-forward rules: Dissimilar claims may not be classified together, similar claims may be classified separately only for a legitimate reason.").

13. It is noteworthy that the Debtors have recently recognized that the misrepresentations claims if not subordinated should be treated as general unsecured claims. *See* Adversary Proceeding at ¶ 36 ("If these and all other Senior Noteholders prevail on any claim and the Bondholders' right to payment is not subordinated to the claims of the general unsecured creditors, claimants in the latter group will receive a drastically diminished payment because it is likely that the amounts due to unsecured claimants will exceed the assets available for distribution from the Debtors' estates."). The Debtors have improperly classified the misrepresentation claims in an effort to augment the recoveries available to other creditors at the cost of the WMB Noteholders. The Debtors have offered no justification for treating the misrepresentation claim differently from all other general unsecured claims.

B. PLAN VIOLATES SECTIONS 1122 AND 1123

14. Under the Plan, all purchasers of Senior WMB notes are grouped together in Class 17A – regardless of whether such purchasers have asserted only derivative claims *or* both derivative and direct claims. Under Section 1122(a) of the Bankruptcy Code, "a plan may place a claim or an interest in a particular class *only if* such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a) (emphasis added). The WMB Noteholders' direct Misrepresentation Claims – which are based on the harm *they suffered individually* by virtue of having been induced by the Debtors' fraud into purchasing WMB Notes at artificially inflated prices – are fundamentally different from the derivative claims asserted by other holders of WMB Senior Notes – which are based on harm suffered by Debtors as corporate entities. Grouping these fundamentally different claims in the same class violates Section 1122(a).

15. In grouping these claims together, the Plan also provides for disparate treatment of creditors in the same class in contravention of Section 1123(a)(4). Section 1123(a)(4) mandates that a plan "provide the same treatment for each claim or interest of a particular class." The requirement that claims of the same class be treated equally is absolute and unconditional. The Plan violates Section 1123(a)(4) by treating holders of WMB Senior notes who have asserted misrepresentation claims differently than those who have not asserted misrepresentation claims. Simply put, while all members of Class 17A receive the same pro rata distribution from the funds allocated to the class (based upon the amount of Senior Notes held), the WMB Noteholders (and other purchasers of WMB Senior notes who have asserted direct claims against the Debtors) are being forced to give up a valuable direct claim that other purchasers of WMB Senior notes never even had in the first place. This disparate treatment violates Section 1123(a)(4). Moreover,

the provisions requiring the WMB Noteholders to waive their misrepresentation claims to receive a distribution are improper.

16. The only assets available to creditors who have been placed in Class 17 are the proceeds of the settlement of a derivative action. These proceeds, by definition, cannot have been – and were not – calculated by reference to the direct harm suffered by the WMB Noteholders in purchasing their notes at artificially inflated prices. This disparate treatment has denied the WMB Noteholders the chance to receive full recompense for all damages flowing from their Misrepresentation Claim.

III. THE PLAN CANNOT BE CONFIRMED BECAUSE IT RESULTS IN THE WMB NOTEHOLDERS RECEIVING LESS THAN THEY WOULD IN THE EVENT OF A CHAPTER 7 LIQUIDATION

17. Under the Plan's provisions relating to claims by holders of WMB Notes, those Noteholders who also have misrepresentation claims will receive no value for those claims. Pursuant to Sections 1.175 and 21.1(a) of the Plan, WMB Senior Noteholders with Misrepresentation Claims cannot receive a distribution on their derivative claims unless they waive their Misrepresentation Claims. Even more unfairly, under Plan Section 21.1(b), WMB Subordinated Noteholders with Misrepresentation Claims will receive *no* distribution – even if their Misrepresentation Claims are allowed and found not to be subordinated under Section 510(b). Thus, holders of Misrepresentation Claims will receive no recovery on those claims, even if those claims are determined by the Court to be valid, unsecured, unsubordinated claims against WMI. Since at present, all unsecured creditors of WMI are estimated to receive 100 percent of the value of their claims, it is apparent that under the Plan the WMB Noteholders' misrepresentation claims would receive much less (i.e, zero versus 100 percent) than if there were a liquidation in a Chapter 7 proceeding and they were merely unsecured creditors.

18. Further, in proposing a Plan under which the WMB Noteholders will receive *nothing* for the Misrepresentation Claims that this Court has already ruled can proceed as direct claims, the Debtors have failed to act in good faith as required by Section 1129(a)(3). 11 U.S.C. § 1129(a)(3) (requiring that "[t]he plan has been proposed in good faith and not by any means forbidden by law"). The Debtors have acted in bad faith by effectively extinguishing claims that this Court found could proceed to discovery.

WHEREFORE, for all the above reasons, the WMB Noteholders request that the Court enter an order denying confirmation of the Plan.

Dated: November 19, 2010

Respectfully submitted, _/s/ David P. Primack_____ David P. Primack (DE Bar # 4449) DRINKER BIDDLE & REATH LLP 1100 N. Market Street, Suite 1000 Wilmington, DE 19801-1254 302.467.4200 302.467.4201 (facsimile) david.primack @dbr.com -and- Jeffrey M. Schwartz (Pro Hac Vice) 191 N. Wacker Drive, Suite 3700 Chicago, IL 60606-1698 312.569.1208 312.569.3208 (facsimile) jeffrey.schwartz@dbr.com Counsel for The WMB Noteholders	Jay W. Eisenhofer (DE Bar # 2864) Geoffrey C. Jarvis (DE Bar # 4064) Christine M. Mackintosh (DE Bar # 5585) GRANT & EISENHOFER P.A. 1201 N. Market Street, Suite 2100 Wilmington, DE 19801 302.622.7000 302.622.7100 (facsimile) jeisenhofer@gelaw.com gjarvis@gelaw.com cmackintosh@gelaw.com

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WASHINGTON MUTUAL, INC., et al.,	)	Case No. 08-12229 (MFW)
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Debtors.	)	Jointly Administered

CERTIFICATE OF SERVICE

I, David P. Primack, hereby certify that on the 19th day of November 2010, I caused a true and correct copy of ***The WMB Noteholders' Objection to the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*** to be served upon all parties via CM/ECF and the parties listed below in the manner indicated:

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Dated: November 19, 2010

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