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)

MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR PERMISSION TO FILE SUPPLEMENTAL OBJECTION TO PLAN CONFIRMATION

The Official Committee of Equity Security Holders (the "Equity Committee"), by and through its undersigned counsel, hereby submits this motion (the "Motion") seeking permission to file a Supplemental Objection to Plan Confirmation. In support thereof, the Equity Committee respectfully represents as follows:

1. On October 6, 2010, the Debtors filed their Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Code (the "Plan") [Docket No. 5548].

2. On October 29, 2010, the Debtors filed their Modification to the Plan (the "Modification") [Docket No. 5714]. Among other things, the Modification amended the Debtors' Release contained in Section 43.5 of the Plan to exclude certain Related Persons.

3. Pursuant to the Order (I) Approving the Proposed Disclosure Statement and the Form and Manner of Notice of the Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice

[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 Corp. (5396). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

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and Objection Procedures for Confirmation of the Debtors' Sixth Amended Joint Plan, the deadline for parties to object to the Plan was November 19, 2010 [Docket No. 5659].

4. The Equity Committee timely filed its objection to the Plan on November 19, 2010 (the "Initial Objection") [Docket No. 6012]. Therein, the Equity Committee argued, among other things, that the Plan releases – including the third-party releases in Section 43.6 – were overbroad and improper under Third Circuit law.

5. After the Equity Committee filed its Initial Objection, on November 24, 2010, the Debtors filed their Second Modification to the Plan (the "Second Modification") [Docket No. 6081]. Notably, the Second Modification deleted the Third-Party Releases contained in Section 43.6 of the Plan in its entirety, and inserted a new proviso entitled Releases by Holders of Claims. Although loosely based on the previous version, new Section 43.6 is substantially different. For instance, it releases claims that were not released under the prior version. The Second Modification also amended the Debtors' Release (Section 43.5) as well as certain of the injunction provisions (Sections 43.7, 43.9 and 43.12).

6. The confirmation hearing is scheduled to begin on December 2, 2010.

7. By this Motion, the Equity Committee seeks permission to file a supplemental objection to the Plan ("Supplemental Objection"). A Supplemental Objection is necessary because the Equity Committee's Initial Objection focused on the prior (and now outdated) versions of the Debtors' Release and Third-Party Releases. Thus, certain arguments in the Initial Objection with regard to the releases may no longer be applicable. More importantly, the Equity Committee was not given an opportunity to respond to the new releases since the Second Modification was filed five days after the Plan objection deadline. The Second Modification raises many issues with respect to the releases set forth therein that require a response from the

Equity Committee. Accordingly, the Equity Committee should be permitted to respond and object to the newly amended releases. The Equity Committee believes that a supplemental objection addressing the newly amended releases will shorten the length of oral argument at the confirmation hearing and assist the Court in evaluating the releases for purposes of plan confirmation. A copy of the Supplemental Objection is attached hereto as Exhibit A

WHEREFORE, for the reasons set forth above, the Equity Committee respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit B, granting the relief requested herein and awarding such other and further relief that the Court deems just and proper.

Dated: November 30, 2010
Wilmington, Delaware

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EXHIBIT A

[Supplemental Objection]

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)
	Hearing Date: December 2, 2010 at 9:30 a.m. (ET)

SUPPLEMENTAL OBJECTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO PLAN CONFIRMATION

The Official Committee of Equity Security Holders of Washington Mutual Inc. (the "Equity Committee"), by and through its undersigned counsel, submits this Supplemental Objection to confirmation of the Debtors' proposed Sixth Amended Joint Plan of Affiliated Debtors pursuant to chapter 11 of the United States Bankruptcy Code, as supplemented and/or amended (the "Plan").[2] In support of its Supplemental Objection, the Equity Committee respectfully states as follows:

ARGUMENT

I. JPMC MAKES NO MEANINGFUL CONTRIBUTION TO THE WMI ESTATE UNDER THE TERMS OF THE GSA.

JPMC opens its self-serving brief in support of confirmation with the unwarranted statement that it is contributing "over $7 billion in value" to the estate [Dkt. No. 6008]. (JPMC Br. at 1). In truth, JPMC's contribution is much closer to zero. The "$7 billion in value" consists principally of two elements – a payment of just under $4 billion for deposits that WMI

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[2] To the extent a capitalized term used herein is not otherwise defined, it shall have the meaning given to such term in the Plan.

had with WMB and an allocation of just under $2.5 billion from the nearly $6 billion in tax credits due to Washington Mutual.

JPMC cannot reasonably be said to have "contributed" either of these assets to the estate because it never had a colorable legal claim to either one. The $4 billion deposit was always an asset of WMI. WMI notified JPMC of the existence of the deposit within days of the filing of the petition. JPMC has never offered any credible basis for a finding that this money does not belong to WMI.

Similarly, the majority of the tax refund JPMC claims it "contributed" to WMI also did not, and could not, have been collected by JPMC. These credits were made available under the 2009 Homeownership Act, which extended the carryback period for tax losses from two years to five years. Under the express terms of that Act, JPMC is prohibited from collecting these credits because it had accepted TARP funds. The GSA "allocates" to JPMC the vast majority of the credits that it could lawfully claim (those generated by a two-year carryback that was not impacted by TARP) and the majority of WMI's "allocation" was generated by ***credits that JPMC could never have collected in the first place*** (those generated by the three to five year carryback established by the 2009 Homeownership Act).

Thus, JPMC's contribution to the settlement consists of $4 billion in deposits over which it has never identified a valid legal claim and $2 billion in tax refunds that it could never have collected. In exchange for these painless sacrifices, JPMC receives billions of dollars in truly disputed assets and releases from possibly billions more in potential liability. As will be demonstrated at the confirmation hearing, preferred equity is only $375 million out of the money even under the terms of the inequitable GSA and the Plan. Given the substantial economic benefit to be conferred upon JPMC in return for suspect consideration, the Equity Committee

submits that the Court should find that the Plan and the GSA on which it is based are grossly inequitable and should not be approved.

II. THE LAST MINUTE MODIFICATIONS TO THE PLAN RELEASE PROVISIONS ARE, AT BEST, AMBIGUOUS AND REMAIN UNREASONABLY BROAD, ARE NOT SUPPORTED BY ADEQUATE CONSIDERATION AND ARE IMPROPER UNDER THIRD CIRCUIT LAW.

A. The First Plan Modification to the Debtors Release—Section 43.5.

The Debtors filed their First Modification to the Plan on October 29, 2010 [Dkt No. 5714] (the "First Modification") – after the October 22, 2010 deadline for service of the Solicitation Packages (*see* Disclosure Statement Order at 12) – which limits the scope of the release of claims owned by the Debtors in Section 43.5 of the Plan (the "Debtors' Release") (which includes derivative claims) by excluding any claims based upon gross negligence or willful misconduct. The First Modification further modified the Debtors' Release to exclude from the definition of "Related Persons" the Debtors' "retained financial advisors, attorneys, accountants, investment bankers, consultants, agents and professionals with respect to Claims and Causes of Action relating to the period prior to the Petition Date." All of these Claims and Causes of Action are now proposed to be assigned to the Liquidating Trust on the effective date of the Plan. This is mere window dressing. Whether or not to pursue these Claims and Causes of Action will be within the discretion of the Liquidating Trustee, who is subject to the control and oversight of the Trust Advisory Board. (Proposed Liquidating Trust Agreement at 19). The Liquidating Trust Advisory Board is to be comprised of three members chosen jointly by the Debtors, the Creditors' Committee and the Settlement Note Holders. Neither the holders of common nor preferred Equity Interests will have any representation on the Advisory Board. Each of the members currently proposed as a member of the Advisory Board is also party to the

GSA and each represents a constituency that will either receive a full (or near full) recovery under the Plan or does not otherwise have a material interest in seeing any of the assigned Claims or Causes of Action prosecuted. And certainly the professionals representing these stake holders have no interest in pursuing such Claims and Causes of Action. The likelihood that these Claims and Causes of Action will ever be brought is remote, at best. Thus the Debtors' initial efforts to release significant claims against its own Officers and Directors (and other culpable parties) have been modified only superficially, by placing those claims in the control of parties who have no incentive to pursue them. At a bare minimum, this problem with the Plan should be rectified by appointing representatives of equity to the Advisory Board and giving the parties with a financial stake in the outcome the power to control the potential litigation claims.[3]

B. The Second Plan Modification to the Third Party Release and the Debtors' Release—Sections 43.5 and 43.6.

On November 24, 2010 – 7 days before the start of the confirmation hearing, after the November 19, 2010 deadline for submission of objections to confirmation of the Plan, and after the November 18, 2010 deadline for parties in interest to submit their ballots electing to accept or reject the Plan (and elect to not grant the Third Party Release therein) – the Debtors filed their Second Modification to the Plan [Dkt. No.6081] (the "Second Modification", and together with the First Modification, the "Modifications"). The Second Modification further materially modified the Debtors' Release contained in Section 43.5 of the Plan by expressly providing for the release by the Debtors of the JPMC Entities from all Claims and Causes of action *including*

[3] And even if the Liquidating Trustee determines to prosecute such claims and obtains a recovery sufficient to provide a distribution to WMI equity holders, the Liquidating Trust Agreement expressly precludes current equity holders from receiving such value. (*See* Liquidating Trust Agreement at § 1.6) (precluding reversion of such assets to the Debtor or Reorganized Debtor and authorizing the Liquidating Trustee to contribute those assets to a charitable organization approved by the Court). Any value remaining after all senior claims are paid in full should be distributed to WMI equity holders.

claims arising from JPMC's gross negligence or willful misconduct. (Second Modification at 3). The Debtors are seeking to release JPMC from claims of intentional misconduct, most of which the Debtors have failed to fully investigate or evaluate, as the Equity Committee has explained in its Objection to Plan Confirmation. Unbelievably, the Debtors also appear to seek to release JPMC from claims of intentional misconduct *that belong to third parties.* Such claims, if proven, could provide the only potential recovery for shareholders and other parties injured by JPMC's misconduct. Releases from intentional misconduct or gross negligence are disfavored in the law. *See, e.g.*, 8 *Del. C.* § 145 (empowers corporation to indemnify directors, officers and other employees if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation); *In re Coram Healthcare Corp.*, 315 B.R. 321, 337 (Bankr. D. Del. 2004) (plan provision purporting to release third-party claims against the Trustee, the Equity Committee and their respective agents and professionals not permissible except to the extent it is limited to post-petition activity that does not constitute gross negligence or willful misconduct). JPMC should not be released from liability for intentional misconduct simply for the convenience of confirming the Plan.

The Second Modification also wholly replaced, and materially modified, the Third Party Release contained in Section 43.6 of the Plan. (Second Modification at 3). New Section 43.6 provides that "to the fullest extent Permissible under applicable law, each Entity that has held, currently holds or may hold a Released Claim *and that may be entitled to receive, directly or indirectly, a distribution pursuant to the Plan*, and each of its respective Related Persons, on their own behalf and on behalf of anyone claiming through them" is deemed to grant the Third Party Release of the "Released Claims" to the "Released Parties", provided that:

> that each Entity that has submitted a Ballot may elect, by checking or not checking ... the appropriate box on the Ballot, not to grant the releases set forth in

> this Section 43.6, *in which case, such non-granting Entity shall not receive a distribution pursuant to the Plan*; and provided, further, that, notwithstanding anything contained in this Section 43.6(a) to the contrary, the foregoing release shall not extend to acts of gross negligence or willful misconduct of any released Persons *(other than with respect to the JPMC Entities and their respective related Persons).*

(Second Modification at 4 (emphasis added)). Additionally, new Section 43.6 excludes "Related Persons" from the scope of the Third Party Release, **except for Related Persons of the JPM Entities, the officers and directors of the Debtors during the period from the petition date to the effective date of the Plan, and the Debtors' "present affiliates."** *Id.* (emphasis added).

In the Declaration of Charles Edward Smith in Support of Confirmation [Dkt. No. 6092] (the "Smith Declaration"), the Debtors claim that Third Party Release now complies with applicable law and satisfies Section 1123(b)(6) of the Bankruptcy Code because "the releases to be granted to non-Debtor third parties are now limited to being granted by Claim and Equity Interest holders on a consensual basis only." (Smith Declaration at ¶ 27). The Debtors also state that: "In addition, the Debtors have carved out, in most instances, the release of acts of gross negligence or willful misconduct, and the Debtors have cut out substantially all Related Persons from receiving such releases." *Id.* Respectfully, the Third Party Release to be given by the holders of Equity Interests is not consensual in these circumstances, and the "carve-outs" are insufficient.[4]

The "original" Section 43.6 (as contained in the version of the Plan served as part of the Solicitation Packages) provided that notwithstanding a party in interest's election to not grant the Third Party Release, that party would receive the distribution to which it was entitled. (Sixth Amended Plan dated October 6, 2010 at 86-87). According to the Declaration of David M.

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[4] The holders of the Debtors' common Equity Interests, which are to receive no distribution under the Plan and GSA, are deemed to reject and received a Notice of Non-Voting Status and accordingly did not consent to any release.

Sharp of Kurtzman Carson Consults, LLC, the Debtors' claims and balloting agent [Dkt. No. 6089], 180 Class 20 preferred equity holders elected to not grant the third party releases. Presumably, those holders expected to receive their distributions notwithstanding their decision to not grant the releases – because that is what the Plan, as solicited, provided. Now, as a result of the Second Modification, those holders will not receive the distributions to which they are entitled. The Debtors' belated "gotcha" is grossly inequitable at best and should not be allowed to stand.

The Debtors decision to eliminate distributions to those claimants that have elected to not grant the third party releases – *after those parties have exercised their right to vote on the Plan* – should not be condoned by the Court. The Debtors cannot now withhold distributions to the holders of preferred Equity Interests who understood at the time they cast their votes they would receive the distribution to which they were entitled regardless of their election with respect to the releases. New Section 43.6 is a material modification that negatively affects the manner in which preferred Equity Interests are treated under the Plan requiring resolicitation. *See In re New Power Co.*, 438 F.3d 1113, 1118 (11th Cir. 2006) ("After notice and a hearing, the bankruptcy court may deem a claim or interest holder's vote for or against the plan as a corresponding vote in relation to a modified plan unless the modification materially and adversely changes the way that claim or interest holder is treated. If it does, the claim or interest holder is entitled to a new disclosure statement and another vote.") (citations omitted).

Moreover, the ever changing "release landscape" renders the Plan and the GSA susceptible of differing readings and interpretations (which one might posit is the intent), rather than being clear and unambiguous. Under the proviso waterfall contained in new Section 43.5, it is unclear whether the Debtors and the parties to the GSA are seeking to impose a non-

consensual release upon the holders of preferred and common Equity Interests for the benefit of the Debtors' officers and directors and the "Related Persons" of the "JPM Entities". Additionally, revised Section 43.6 also makes the Plan Releases subject to the Global Settlement Agreement stating "the foregoing exclusions are not intended, nor shall they be construed, to limit or otherwise affect the releases granted pursuant to, or any other terms of, the Global Settlement Agreement." (Second Modification at 4). The releases set forth in the Global Settlement Agreement with respect to the Debtors, the JPMC Entities, the FDIC Parties and each of the Settlement Noteholders is lengthy, inconsistent with the Plan Releases and expressly made subject to the Plan. Thus, it is unclear how the Plan Releases interact with the Global Settlement Agreement releases and, in the event of a conflict, which controls.

Another new ingredient added by the Second Modification is new Subsection 43.2(c) of the Plan (Discharge and Release of Claims and Termination of Equity Interests). Subsection 43.2(c) provides in significant part that: "Except as expressly provided in the Plan or the Confirmation Order.....to the extent provided in the Global Settlement Agreement, **none of the JPMC Entities or any of their Related Persons shall have any liability for, and** the Debtors, on behalf of themselves and their respective estates and Related Persons.... hereby release the JPMC Entities and each of their Related Persons from liability for, any and all Claims" that are property of the Debtors' estates or their respective Related Persons, and were or could have been brought in any of the "Related Actions." The sweeping statement in this new subsection that none of the JPMC Entities or any of their Related Persons shall have any liability for Claims that are property of the Debtors (or any of their Related Persons) or could have been brought in the Related Actions can be read to release the JPMC Entities from any third-party claim held by the holder of preferred or common Equity Interests. Indeed, the Global Settlement Agreement

defines "Related Actions" to include "the Actions, the Texas Litigation or any claims objection process with respect to the JPMC Claims or the FDIC Claims or any similar proceeding that could have been brought by the Parties against any Releasees in the Bankruptcy Court or such other court of competent jurisdiction." (GSA at 14).[5] The scope of claims that were or could have been asserted in any of the litany of actions covered by the Plan Releases is exceedingly broad and likely includes claims held by third parties.

The conflicting release provisions of the Plan and Global Settlement Agreement are not the only ambiguities that arise from the newly minted Section 43.6. That section states that those entities "that *may* be entitled to receive, *directly or indirectly*, a distribution pursuant to the Plan" will be deemed to have granted the third party releases. (Second Modification at 3). Adding to the confusion, Section 43.10 of the Plan states that any holder of a Claim or Equity Interest that receives "a distribution under or *any benefit* pursuant to this Plan ... shall be deemed, to the fullest extent permitted by applicable law, to have specifically consented to the releases set forth in Section 43.6 of the Plan." (Emphasis added). What does it mean to receive "indirectly" a distribution, or to receive "any benefit" under the Plan? Undoubtedly different parties will have different views of the import of these provisions. In any event, attempting to impose third party releases upon the holders of Claims and Equity Interests that *may indirectly* receive a distribution or who may receive a "benefit" does not comply with Third Circuit law that requires granting claimants to actually receive fair consideration. *See In re Cont'l Airlines*, 203 F.3d 203, 214 & n.11 (3d Cir. 2000) ("[T]here [may be] circumstances under which [it] might validate a non-consensual release that is both necessary and given in exchange for fair consideration."); *In re*

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[5] "Actions" is defined to mean "collectively, the WMI Action, the JPMC action, the Turnover Action, the Record Requests, the Rule 2004 Inquiry and the Bankruptcy Stay motions ... the Rule 2019 Appeal and any proceeding arising from the motions, dated June 23, 2009, to withdraw the reference for the WMI Action and the JPMC Action, respectively." (GSA at 6).

Genesis Health Ventures, Inc., 266 B.R. 591, 607 (Bankr. D. Del. 2001) ("The question of necessity requires demonstration that the success of the debtors' reorganization bears a relationship to the release of the non-consensual parties, and that the releasees have provided a critical financial contribution to the debtors' plan that is necessary to make the plan feasible in exchange for receiving a release of liability."). As the Court is well aware, under the Plan and the GSA the holders of common Equity Interests will receive nothing under the Plan and holders of preferred Equity Interests will receive, at most, a 1% distribution. The Equity Committee submits that a 1% projected recovery to the holders of preferred Equity Interests is not sufficient to support the Third Party Release. *See In re Exide Tech.*, 303 B.R. 48, 73 (Bankr. D. Del. 2003) (finding that a 1.4% recovery to general unsecured creditors "should not be considered a 'substantial contribution' of assets" to support the proposed release). And in any event, WMI preferred equity holders cannot be held to the release unless they actually receive such distribution.[6]

If, as the Debtors appear to now claim, the parties to the GSA do not intend to bind the holders of common Equity Interests to the release provisions of the Plan and the GSA, the Equity Committee submits that a clear and concise statement so stating should be included in the Plan and Confirmation Order:

> Notwithstanding any provision in the Plan, the Global Settlement Agreement, the Confirmation Order, or any document or agreement entered into in connection therewith, any Claim or Cause of Action held by the holder of the Debtors' common Equity Interests against any Entity, other than the Debtors, is not released, discharged or enjoined.

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[6] Application of Section 43.6 is also limited "to the fullest extent Permissible under applicable law." The Equity Committee submits that the applicable law governing the permitted scope of the Plan Releases is the Bankruptcy Code and the caselaw that has developed in relation thereto. Now, when the Court is considering confirmation of the Plan, is the time to determine the appropriate scope and application of the Plan Releases. Thus, there is no need for such additional language, which will only serves to promote future disputes.

CONCLUSION

For the reasons set forth in the Equity Committee's Objection to Confirmation, as supplemented by this Supplemental Objection, the Equity Committee respectfully requests that the Court reject the Debtors' proposed Plan and the Global Settlement Agreement upon which it is based.

Dated: November 30, 2010
Wilmington, Delaware

ASHBY & GEDDES, P.A.

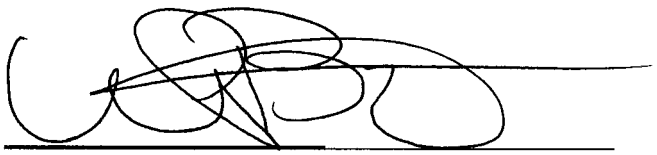

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EXHIBIT B

[Proposed Order]

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)
	Related Docket No. ____

ORDER GRANTING THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS PERMISSION TO FILE SUPPLEMENTAL OBJECTION TO PLAN CONFIRMATION

Upon consideration of the *Motion of the Official Committee of Equity Security Holders for Permission to File Supplemental Objection to Plan Confirmation* (the "Motion")[2] filed by the Official Committee of Equity Security Holders (the "Equity Committee"), the Court finds that it has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334; this is a core proceeding pursuant to 28 U.S.C. § 157(b); venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; the relief requested in the Motion is in the best interests of the Debtors, their estates and creditors; proper and adequate notice has been given and no other or further notice is necessary; after due deliberation and sufficient cause appearing thereof, it is hereby:

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is **GRANTED**.

2. The Equity Committee is authorized to file a Supplemental Objection to Plan Confirmation.

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[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 Corp. (5396). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

[2] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

3. This Court retains jurisdiction with respect to all matters arising from or relating to the implementation of this Order.

Dated: Wilmington, Delaware
_____, 2010

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THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT