May 12, 2011

Hon. Mary F. Walrath

United States Bankruptcy Court

District of Delaware

824 Market Street, 5th Floor

Wilmington, DE 19801

Re: *In re* Washington Mutual. Inc. *et al.* Case Number 08-12229 (MFW) (Jointly Administered)

Objection to the Plan of Reorganization

Dear Judge Walrath:

I am writing on behalf of myself as a shareholder of various Washington Mutual Securities. I have been tracking the progress of Washington Mutual since the summer of 2008. I hold PIERS units, Preferred Equity of WMI, and Common Equity of WMI.

I have attempted to bring some of these matters to the attention of the PIERS trustee, however, at present I am uncertain as to whether or not they intend to address these issues. Out of an overabundance of caution and a desire to express further concerns, I hereby submit this objection to the current incarnation of the Amended Plan of Reorganization ("the Plan").

I move the court to deny confirmation of the Plan on the grounds that the proposed receipt or retention of estate property by classes junior to Class 16 ("the PIERS units") violates the absolute priority rule pursuant to 11 U.S.C. § 1129(b)(2)(B). Furthermore, the conduct of the debtors beginning shortly before the final expiration of exclusivity until present, especially subsequent to this Court's denial of the previous iteration of the Plan, suggests the current Plan was not proposed in good faith, in violation of 11 U.S.C § 1129(a)(3).

Additionally, in light of recent developments surrounding the applicability of the Federal Judgment Rate ("FJR") and the potential effects on the PIERS' recovery, along with statements by certain parties in court filings and recent hearings, I move the court to consider fully enforcing the conclusions reached in its Dec. 2, 2009 Opinion on the Motion of JPMorgan Chase Bank, National Association ("JPM") to Compel the Washington Mutual, Inc., Noteholders Group (the "WMI Noteholders Group") to Comply with Rule 2019 of the Federal Rules of Bankruptcy Procedure [D.I. 1952], and further expand this to include all *Ad Hoc* committees in these proceedings and any parties represented thereof, compelling them (a) to fully comply with Federal Rule of Bankruptcy Procedure 2019 ("Fed. R. Bankr. 2019"), (b) prohibiting the further

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participation in these proceedings by any *Ad Hoc* group pending full compliance with F.R. 2019, and (c) directing the debtors to withhold further payments to or on behalf of such groups and any parties represented pending full compliance with F.R. 2019. In support of this Objection, I respectfully state as follows:

I.
Preliminary Statement

Over a year has passed since the expiration of the debtors' exclusivity period. During this time, the debtors have submitted a Plan of Reorganization, which has undergone six major revisions and two separate votes. Assuming the contract rate applies with respect to the indebtedness of the estate, interest alone costs the estate approximately $30 million per month. Additionally, roughly $10 million in professionals' fees accrue monthly. In light of this, the continued attempts by the debtor to push through a Plan that suffers fatal flaws further harms the estate with no perceptible corresponding benefit. Furthermore, the continued and willful failure of the debtors to endeavor to maximize the value of the estate does further gross harm to the recoveries available for distribution by and the credibility of the debtor. The sole class of creditors that suffers as a result of this is Class 16, the PIERS units.

Additionally, it has become apparent that the potential interaction between the Court's application (if the Court deems fit) of the Federal Judgement Rate and certain contractual provisions of the indebtedness of WMI might further impair the PIERS' recoveries to the benefit of more senior creditors. These contractual provisions may effectively negate any determination by the court that the FJR is appropriate, yielding recoveries to senior creditors equivalent to those received under a contract rate of interest. The suggestion has been made that the difference between the recoveries under the FJR and contract rate would be extracted from the amount available to the PIERS units as a result of their prepetition claims.

While I am admittedly unclear as to the ultimate validity or likelihood of such a scenario to occur, to the extent that this possibility exists, some of the parties which would stand to benefit, at the PIERS expense, are the same parties that may be responsible for the imposition of the FJR in the first place. Under such a scenario, any penalty imposed upon those parties by the application of the FJR would be mitigated by virtue of their significant positions in tranches of WMI indebtedness senior to the PIERS units. Furthermore, recent statements in court by some of these parties suggests that the conduct under scrutiny with respect to this matter was not isolated solely to these parties but also extended to other parties in interest. While these statements lacked specificity, in the interests of fairness, transparency, and thoroughness the Court should verify their accuracy and discern to what extent conduct by any other parties (especially those in receipt of nonpublic, material information, and with respect to continued trading in the debtors' securities) should be reviewed.

To those ends, I respectfully request the relief sought herein in order to finally and truly maximize the value of the estate and provide a fair and equitable distribution to all parties in interest as a result.

II.
Background

The plan violates the absolute priority rule

1. The Plan violates Section 1129(b)(2)(B) of the Bankruptcy Code, which mandates that, with respect to a class of unsecured claims, "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section."
2. The PIERS units (Class 16) rejected the previous Plan and are likely to likewise reject the current Plan, by virtue of the debtors continued failure to endeavor to maximize the recoveries available for distribution by the estate.
3. According to the Updated Liquidation Analysis [D.I. 7430, Exhibit D], the projected best-case scenario for the recovery of Class 16 (under Ch. 11 and after contractual subordination) is currently 34%, rendering Class 16 impaired.
4. Additionally, the expected recovery for Class 16 decreases as a function of time, due to interest and professionals' fees that continue to accrue to the estate.
5. The Plan provides that the WMB Senior Notes Claims (Class 17a, which is subordinate to Class 16) will receive a Pro Rata Share of BB Liquidating Trust Interests (which interests, in the aggregate, represent an undivided interest in WMI's share of the Homeownership Carryback Refund Amount, as defined and set forth in Section 2.4 of the Global Settlement Agreement, in an amount equal to Three Hundred Thirty-Five Million Dollars ($335,000,000.00)), strictly by virtue of the Plan Support Agreement dated as of October 6, 2010, by and among the Debtors and the Settlement WMB Senior Note Holders [D.I. 6697, Exhibit F].
6. The recovery for Class 17a has remained constant since the announcement of the Plan Support Agreement, even in the face of increased costs to the estate due to the denial of the previous Plan.

7. Under section 1129(b)(2)(B), if an impaired class of unsecured claims rejects a chapter 11 plan, the plan is only confirmable if either (i) the rejecting class receives the full value of its claims or (ii) no classes junior to that class receive or retain any property under the plan on account of their junior claims or interests.
8. Since the PIERS are currently impaired, the plan can only be confirmed if Class 17a does "not receive or retain" "any property" "under the plan on account of such junior . . . interest." The ultimate result of the Plan's proposal to distribute BB Liquidating Trust Interests to class 17a effectively results in a gifting of estate assets in exchange for Class 17a's support of the Plan, in violation of 11 U.S.C. § 1129(b)(2)(B). *See In re DBSD North America, Inc.* __ F.3d __ , 2011 WL 350480 (2d Cir. 2011).
9. Such an arrangement also suggests an attempt by the debtors to manufacture a consenting impaired class[1].
10. As a result of the foregoing, it is hereby requested that the Court finds that the Plan violates the absolute priority rule under section 1129(b)(2)(B), was not proposed in good faith in violation of section 1129(a)(3), and is not fair and equitable under section 1129(b)(1) of the Bankruptcy Code.

Other parties in receipt of material, nonpublic information were "in the marketplace"

11. Upon information and belief, the concerns raised with respect to certain parties in receipt of material, nonpublic information regarding this bankruptcy and their subsequent trading activity in the debtors' securities potentially apply to a much wider set of participants than originally suggested.
12. Statements made by Mr. Harris (Schule Roth & Zabel on behalf of Owl Creek) during the Feb. 8, 2011 hearing suggest that the Settlement Noteholders were not the only parties in interest who were in receipt of material, nonpublic information, yet continued to trade in the debtors securities:

> *Your Honor, just a couple other points to make. And that is, the settlement noteholders here were not the only people in this case that had access to material nonpublic information. Various other parties were engaged in negotiations with the debtors during various points in the case in other creditor constituencies represented by other people.*

[1] See, e.g., discussion of gerrymandering in 12/7/2010 Transcript, 249-252

12 They were restricted for some periods of time. They were
14 unrestricted for some periods of time. But we were not the
14 only people who were out in the marketplace. (2/8/11 Tr. 59)

13. A cursory review of Amended Verified Statements Pursuant to F.R. 2019 by a couple of the major parties in interest reveals a notable dearth of granularity with regards to the chronology of individual members' trading activity, instead aggregating first and last purchase dates for the entire group. However, the May 4, 2010 Verified Amended Statement of White & Case LLP Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure states the following in regards to the Washington Mutual, Inc. Noteholders Group ("*WMI Noteholders*"):

> *"Specifically, the WMI Noteholders acquired their respective interests in notes issued by WMI during the time period October 2, 2007 to date and notes issued by WMB during the time period July 23, 2007 to date."* [D.I. 3635]

14. The WMI Noteholders have previously confirmed that they were, in fact, in receipt of material, nonpublic information by virtue of their involvement in the March 2009 settlement negotiations between various creditors, the debtors, JP Morgan Chase, and the FDIC:

> *"12. In March of 2009, certain of the Noteholders participated in negotiations with JPM, the FDIC, the Debtors, the Official Committee of Unsecured Creditors (the "Official Committee") and other noteholders represented by Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank") in hopes of reaching a global settlement of the disputed issues in these chapter 11 cases. As a condition to participation in those negotiations, the participating Noteholders were required to execute limited confidentiality agreements, which in effect precluded them from trading in WMI's securities or required them to establish and observe internal screening procedures during the term of the confidentiality agreement. During these negotiations, JPM commenced an adversary proceeding against the Debtors; no advance notice was provided to the Debtors, the Official Committee or the Noteholders. JPMorgan Chase Bank, N.A. v. Washington Mutual, Inc., Adv. Case No. 09-50551 (Bankr. D. Del.) [Docket No. 807]. The filing of the adversary proceeding effectively ended the negotiations.."* [D.I. 1515]

15. Upon information and belief, the salient terms of the March 2009 negotiations did not change materially between then and the resumption of negotiations after the passage of the Worker, Homeownership and Business Assistance Act of 2009.
16. The Bank Bondholders similarly represent, in the Second Amended Verified Statement of Wilmer Cutler Pickering Hale and Dorr LLP Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure:

    "The Bank Bondholders acquired interests in WMB Senior Notes beginning on February 28,2006 and continuing through April 30, 2010." [D.I. 3763]

17. Admittedly, I am unclear as to what material, nonpublic information the Bank Bondholders (or any other party in interest outside of the WMI Noteholders or Settlement Noteholders, for that matter) may or may not have been in receipt of during these proceedings. I note, however, that there appears to have been continuing activity in the debtors securities by multiple, major parties in interest. To the extent that the Court or other parties are aware of any other specific instances of a party in interest being in receipt of material, nonpublic information, I rely on the Court and those parties to suggest what scrutiny, if any, would be appropriate of those parties.
18. However, given the proposed amount of distributions to these major parties in interest by the estate, full compliance with F.R. 2019 should not be overly burdensome or expensive. As a precautionary measure, it would protect various members who have not actively traded the securities of the debtors from further costly, wasteful inquiries in the future. This would likewise allow for appropriate transparency with regard to those parties which have actively traded the securities of the debtors during these proceedings.
19. Additionally, further information regarding positions in credit default swaps of Washington Mutual has recently come to my attention. To the extent that the Court finds this relevant, I would request the court to compel any parties who have been paid on account of any interest in the debtor outside of the debtors securities divulge the nature and amount of such interest, as well as any payment received.
20. As a result of the foregoing, it is hereby requested that the court compel all major *Ad Hoc* committees in these proceedings, and any parties represented thereof (especially those who indicated possessing material, nonpublic information regarding the debtor or settlement negotiations): (a) to fully comply with Federal Rule of Bankruptcy Procedure 2019 ("Fed. R. Bankr. 2019"), (b) prohibiting the further participation in these

proceedings by any *Ad Hoc* group pending full compliance with F.R. 2019, and (c) directing the debtors to withhold further payments to or on behalf of such groups and any parties represented pending full compliance with F.R. 2019.

Other matters

Retention of Services by the Estate

21. In the interests of transparency, I hereby request that the debtors detail what value was received by the estate for their retention of and payment of $150,000 to Kadesh & Associates, LLC.

WMB stock abandonment

22. The debtors currently appear to be attempting to abandon the stock of WMB. The debtors suggest this is necessary in order to utilize associated tax benefits. However, an alternative characterization *without* abandonment of the WMB stock would allow for full retention of the same tax benefits, with the added benefit of allowing use of all historical business activities associated with the WMB stock, thus expanding the likelihood of the reorganized debtor to more fully access and utilize these forward looking tax benefits. I move the Court to deny any motion by the debtors to take any course of action regarding same until this matter can be properly adjudicated.

"Usability" of the forward looking tax benefits

23. The debtor grossly mischaracterizes and understates the value of the forward looking tax benefits, and has engaged in a determined effort to minimize these, and thus, the estate. I will present more on this topic at the confirmation hearings.

III.
Conclusion

In order to ensure a fair equitable administration of the Debtors' reorganization, it is respectfully requested that the court find that:

1) the Plan violates the absolute priority rule under the applicable standards of Section 1129(b)(2)(B) of the bankruptcy code, and thus, the Plan cannot be confirmed.

2) the Plan has been proposed in bad faith under the applicable standards of Section 1129(a)(3) of the Bankruptcy Code, and thus, the Plan cannot be confirmed;
3) the Debtors, by and through Debtors' counsel and Debtors' agents, have effectively and impermissibly gerrymandered the Plan vote by constructing a Plan and GSA with prior knowledge of the class structure and assenting classes;
4) as a result of Debtors' transparent efforts to impermissibly gerrymander a plan-accepting impaired class , under Section 1126(e) of the Bankruptcy Code, a) Class 17(a)'s acceptance of the Plan is not in good faith, b) was not solicited or procured in good faith, c) was not solicited or procured in accordance with the provisions of Bankruptcy Code and applicable case law and, and as a result,
5) Class 17(a)'s acceptance of the plan should be designated according to Section 1126 of the Bankruptcy Code and applicable case law, and thus, the Plan cannot be confirmed;
6) the disclosures heretofore submitted by the major *Ad Hoc* committees in respect of Rule 2019 fail to comply with the Rule 2019(a), inasmuch as a) any supplemental statements were not filed promptly, b) any of said disclosures fail to adequately disclose the nature and amount of the claim or interest and the time of acquisition thereof insofar as any credit default swaps, derivatives or other hedge instruments or insurance contracts bearing on the value of the respective claims or interests that represent material changes in the facts are outside the court record;
7) the motion by the debtors for the Abandonment of the WMB stock be denied as an inferior strategy to maximize the potential value of the estate.
8) the Court determine and administer any further just and equitable relief as is appropriate.

Either myself or a representative can appear in court to be heard at a hearing regarding this matter. A copy of this objection and request has been sent to all major parties as well as the US Trustee's Office.

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