

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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In re: : Chapter 11
: :
WASHINGTON MUTUAL, INC., et al., : Case Nos. 08-12229 (MFW)
: (Jointly Administered)
Debtors. :
: :
: :
: **Hearing Date: July 5, 2011 at 9:30 a.m.**
: **Related to Docket No. 7040**
: :
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**LIMITED OBJECTION OF THE WASHINGTON MUTUAL INC. NOTEHOLDERS
GROUP TO THE DEBTORS' MODIFIED SIXTH AMENDED JOINT PLAN OF
REORGANIZATION PURSUANT TO CHAPTER 11 OF THE UNITED STATES
BANKRUPTCY CODE**



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The Washington Mutual, Inc. Noteholders Group (the “WMI Noteholders”), whose members hold in the aggregate approximately \$2 billion in face amount of outstanding debt securities issued by Washington Mutual, Inc. (“WMI,” and collectively with WMI Investment Corp., the “Debtors”), submits this limited objection (the “Limited Objection”) to the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the “Plan”) [Docket No. 5548], as modified by the Modification of the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code [Docket No. 5714] filed by the Debtors.¹ In support of the Limited Objection, the WMI Noteholders respectfully represent as follows:

LIMITED OBJECTION

1. The WMI Noteholders initially hoped that they would receive payment in full, including on the Senior Notes Postpetition Interest Claim, in Cash on the Effective Date. In that case, the subordination issues raised herein would become moot. However, based on the continued delays, it now appears likely that holders of Senior Notes (“Senior Noteholders”) will not be paid in full in Cash on the Effective Date unless their subordination rights are properly incorporated into the Plan. To preserve their rights, the WMI Noteholders submit the following limited objection in accordance with the Plan’s proviso that any disagreement with the priorities or distributions set forth in the Debtors’ proposed “waterfall” distribution scheme shall be raised prior to, and decided at, the Confirmation Hearing. See Plan at §§ 1.189; 33.11.

2. The Debtors’ waterfall distribution scheme fails to properly account for the contractual subordination arrangements among the various creditor constituencies in a

¹ All capitalized terms not defined herein shall have the meaning attributed to them in the Disclosure Statement and Plan.

number of significant ways.² First, under the applicable subordination agreement, holders of Senior Subordinated Notes are not entitled to receive any distribution until holders of Senior Notes are paid in full, including payment of post-petition interest. The Subordinated Indenture (as defined below) plainly states that Senior Subordinated Notes may not receive any distributions of any kind until Senior Notes “have been *paid and satisfied in full*.” See Subordinated Indenture at § 15.2 (emphasis added). While the Debtors may argue that the subordination language does not satisfy the so-called “Rule of Explicitness,” that doctrine has been struck down as a result of the enactment of the Bankruptcy Code. Under the applicable New York principles of contract interpretation, the term “paid and satisfied in full,” when viewed in the full context of the indenture, was plainly intended to include payment of post-petition interest.

3. Second, even if the Senior Notes Postpetition Interest Claims are only on parity with payment of the Senior Subordinated Notes Claims, the Plan improperly allocates, as between Senior Notes and Senior Subordinated Notes, the amounts subject to turnover from subordinated junior stakeholders. The Plan purports to pay the Senior Notes Postpetition Interest Claims pari passu with the Senior Subordinated Notes Claims and Senior Subordinated Notes Postpetition Interest Claims. However, the Senior Notes’ “claim,” for purposes of determining the “pro rata” distribution of amounts paid over from junior stakeholders, is improperly limited to only the amount of the Senior Notes Postpetition Interest Claims, and completely ignores the Senior Notes’ full principal and interest claims. As a consequence, the

² The WMI Noteholders previously raised these issues in connection with the confirmation of the previous plan. See Limited Objection of the Washington Mutual Inc. Noteholders Group to the Debtors’ Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code [Docket No. 6037]. The WMI Noteholders ultimately agreed to defer their objections until it was determined whether Senior Notes would be paid out in full in Cash on the Effective Date. See In re Washington Mutual, Inc., No. 08-12229, 2011 WL 57111 at *35, fn. 41 (Bankr. D. Del. Jan. 7, 2011).

waterfall provides the Senior Subordinated Notes a greater distribution than that to which they are entitled from amounts turned over from junior stakeholders. The Senior Notes represent more than twice the debt of the Senior Subordinated Notes, and thus should receive at least two of every three dollars that junior stakeholders turnover to pay senior debt. By bifurcating the Senior Notes Prepetition Claims from the Senior Notes Postpetition Interest Claims, the waterfall distribution scheme constructed by the Debtors improperly allows the Senior Subordinated Notes Claims to take more than eight of every ten dollars turned over by the junior stakeholders in the second tranche of the waterfall. Thus, the waterfall violates the Senior Notes' right to be paid in full by siphoning value flowing up from junior stakeholders away from the Senior Notes, to the benefit of Senior Subordinated Notes.

4. Significantly, the Senior Notes will likely be paid in full if the distributions in Tranche 2 are properly allocated based on the total amount of the Senior Notes Claims (to include their prepetition claim and post-petition interest). Accordingly, if the Court fixes the Debtors' waterfall to properly allocate the distributions in Tranche 2, it would likely not need to reach the other subordination issues raised herein because the issues would be moot.

5. Third, to the extent the Senior Notes are not paid in full in Cash on the Effective Date (which based on the current waterfall scheme and the Debtors' projections appears likely), the Plan's election mechanism for the distribution of non-cash consideration will violate the Senior Notes' subordination rights. Section 6.2 of the Plan provides that if the Senior Notes Claims are not paid in full in Cash on the Effective Date, the remaining portion of the Senior Notes Claims will be paid in either Reorganized Common Stock or future Cash on account of Liquidating Trust Interests, at the election of the Senior Noteholders. The Plan forces the Senior Noteholders to choose between two forms of consideration with respect to the

unpaid portion of their claims. If a Senior Noteholder chooses Cash, value in the form of Reorganized Common Stock would flow through the waterfall to junior creditors before Senior Notes Claims are paid in full, in violation of the Senior Noteholders' subordination rights. As a consequence of the election, each Senior Noteholder is forced to give up consideration that, in the absence of the election mechanism, would flow to the Senior Notes Indenture Trustee.

6. In the event that the waterfall scheme is not modified and the Senior Notes are not paid out in full in Cash on the Effective Date, the WMI Noteholders respectfully request that the election mechanism for Reorganized Common Stock be modified to ensure that there is no distribution of any kind to subordinated creditors until Senior Noteholders are paid in full in Cash (or via other payments satisfactory to the Senior Noteholders). The Senior Noteholders should be allowed to exercise their contractual subordination rights with respect to any consideration provided to junior stakeholders notwithstanding the election rights set forth in the Plan.

7. In addition to the subordination issues, the Plan also fails to provide for payment of the appropriate post-petition interest for certain floating rate Senior Notes. Unsecured creditors in a solvent debtor case must receive post-petition interest at a rate which is *at least* equal to the federal judgment rate. Here, certain issuances of Senior Notes provided for a floating rate of interest that is lower than the federal judgment rate. To the extent post-petition interest is paid by the Debtors' estates, holders of these Senior Notes are entitled to receive post-petition interest at a rate that is *the greater of* the applicable floating contract rate or the federal judgment rate.³ Failure to pay these Senior Notes' post-petition interest at a rate which is *at*

³ To be clear, the WMI Noteholders believe that to the extent the Court determines that the Debtors should pay post-petition interest it should be at the contract rate, and it is only in those circumstances where the contract rate on certain floating rate Senior Notes is lower than the federal judgment rate that the federal judgment rate should apply as the minimum rate.

least equal to the federal judgment rate would not only violate the best interest of creditors test under § 1129(a)(7)(A), it would also lead to the absurd result of a creditor with no contract rate receiving post-petition interest at a higher interest rate (based on the federal judgment rate) than certain Senior Noteholders holding floating rate notes. Accordingly, to the extent any of the Senior Noteholders' contract rates are lower than the federal judgment rate and post-petition interest is paid by the estate, the WMI Noteholders respectfully request the Court require that such Senior Notes receive payment of post-petition interest at an interest rate that is at least equal to the federal judgment rate.

BACKGROUND

8. The Plan purports to recognize the relative priorities among holders of Senior Notes and Senior Subordinated Notes, among other classes creditors, through the distribution scheme set forth in a chart attached to the Plan at Exhibit "G":

Washington Mutual, Inc.
Waterfall Recovery Matrix

		Senior Notes	Subordinated Notes	CCB Guarantees ⁽¹⁾	PIERs	General Unsecured Creditors
Recovery ^(2,3)	Tranche 1	Prepetition Claim	-	-	-	Pro Rata Share Based on Prepetition Claims ⁽⁴⁾
	Tranche 2	Post-Petition Interest Claim	Prepetition Claim & Post-Petition Interest Claim	-	-	Pro Rata Share Based on Prepetition Claims ⁽⁴⁾
	Tranche 3	-	-	Prepetition Claim & Post-Petition Interest Claim	-	Pro Rata Share Based on Prepetition Claims ⁽⁴⁾
	Tranche 4	-	-	-	Prepetition Claim	Pro Rata Share Based on Prepetition Claims ⁽⁴⁾
	Tranche 5	-	-	-	Post-Petition Interest Claim	Post-Petition Interest Claim ⁽⁵⁾

See Plan at Exhibit G (notes omitted); see also Plan at § 6.1 (describing treatment of Senior Notes Claims). As reflected above, the waterfall provides for distributions to five separate "tranches" of recovery whereby eligible Claims within each tranche receive pro rata

distributions of Creditor Cash and Liquidating Trust Interests based on the size of all Claims within each tranche. The waterfall distribution scheme constructed by the Debtors bifurcates the Senior Notes Claim, placing the Senior Notes Prepetition Claim in Tranche 1 and the Senior Notes Postpetition Interest Claim in Tranche 2, where it is pari passu with the Subordinated Notes' undivided Prepetition Claim and Postpetition Interest Claim.

9. The Plan acknowledges that to the extent the Debtors' waterfall distribution scheme as set forth in Exhibit G conflicts with the contractual subordination provisions in the relevant indentures and guarantee agreements, the subordination provisions in such agreements shall govern. See Plan at § 6.1.

10. All nine issuances of the Senior Notes were issued pursuant to that certain Senior Debt Securities Indenture, dated as of August 10, 1999, as supplemented and amended by that certain First Supplemental Indenture and that certain Second Supplemental Indenture, dated as of August 1, 2002 and November 20, 2002, respectively (the "Senior Indenture"). The relevant portions of the Senior Indenture are attached hereto as Exhibit A.

11. All three issuances of the Senior Subordinated Notes were issued pursuant to that certain Subordinated Debt Securities Indenture, dated as of April 4, 2000, as supplemented and amended by that certain First Supplemental Indenture and that certain Second Supplemental Indenture, dated as of August 1, 2002 and March 16, 2004, respectively (the "Subordinated Indenture"). The relevant portions of the Subordinated Indenture are attached hereto as Exhibit B. The Senior Subordinated Notes are contractually subordinated in right of payment to the prior payment in full of all senior indebtedness, which includes the Senior Notes. See Subordinated Indenture at §15.1; Fifth Amended Disclosure Statement at 34.

12. In accordance with the Amended and Restated Declaration of Trust, dated

as of April 30, 2001, WMI, as sponsor, established WMCT 2001 to issue Trust Preferred Income Equity Redeemable Securities (“PIERS”) to investors. See Fifth Amended Disclosure Statement at 36. The proceeds from such issuance, together with the proceeds of the related issuance of common securities of WMCT 2001, were invested by WMCT 2001 in junior subordinated deferrable interest debentures issued by WMI, pursuant to that certain Indenture, dated as of April 30, 2001, as supplemented by that certain First Supplemental Indenture, dated as of April 30, 2001, each of which is between WMI and The Bank of New York (the “PIERS Indenture”). The relevant portions of the PIERS Indenture are attached hereto as Exhibit C.

13. The PIERS Claims are subordinated in right of payment to the prior payment in full of all senior indebtedness, which is defined in the PIERS Indenture to mean “the principal of, premium, if any, interest (including all interest accruing subsequent to the commencement of any bankruptcy or similar proceeding, whether or not a claim for post-petition interest is allowable as a claim in any such proceeding) on and all fees, costs, expenses and other amounts accrued or due on or in connection with: (1) all indebtedness, obligations and other liabilities (contingent or otherwise) of the Company for borrowed money...or evidenced by bonds, debentures, notes or other instruments for the payment of money....” See PIERS Indenture, § 6.1 and definition of “Senior Indebtedness.”

14. Pursuant to certain Guarantee Agreements, each dated as of November 1, 2007 (the “CCB Guarantees”), WMI guaranteed the payment of the obligations and liabilities under certain agreements and approximately \$68 million principal amount of junior subordinated deferrable interest debentures acquired by HFC Capital Trust I, CCB Capital Trust IV, CCB Capital Trust V, CCB Capital Trust VI, CCB Capital Trust VII, CCB Capital Trust VIII, and CCB Capital Trust IX (collectively, the “CCB Claims”), which obligations were

assumed by WMB when WMB acquired the assets of New American Capital, Inc. in November 2007. See Fifth Disclosure Statement at 35. The CCB Claims are subordinated in right of payment to the prior payment in full of all senior indebtedness, which is defined in the relevant CCB Guarantees to mean the principal and interest on any WMI debt except for WMI debt that is expressly on parity with the CCB Claims or junior to such claims. See, e.g., CCB VI Guarantee §§ 3, 5 & CCB VI Indenture §§ 12.1, 12.2 (reflecting the relevant subordination language for CCB-2 Claims); CCB IV Guarantee at §§ 3, 5, CCB IV Indenture §§ 15.01, 15.03 (reflecting the relevant subordination language for CCB-1 Claims), the relevant portions of which are attached hereto as Exhibit D.

ARGUMENT

I. THE WATERFALL DOES NOT ADEQUATELY REFLECT THE SENIOR NOTEHOLDERS' CONTRACTUAL SUBORDINATION RIGHTS

15. The Debtors' Plan does not adequately reflect the Senior Noteholders' contractual subordination rights with respect to the distribution of Cash and other consideration. Under the applicable subordination agreements, holders of Senior Subordinated Notes are not entitled to receive any distribution until Senior Noteholders are paid in full, including payment of post-petition interest. Junior stakeholders, such as holders of CCB Claims or PIERS Claims, are not entitled to receive any distribution until both Senior Noteholders and Senior Subordinated Noteholders are paid in full.

A. Senior Noteholders Must be Paid in Full Before Any Distributions to Senior Subordinated Noteholders

16. Before Senior Subordinated Noteholders can receive a distribution from the Debtors' estates, Senior Noteholders must be "paid in full," including payment of post-petition interest. The Subordinated Indenture prohibits holders of Senior Subordinated Notes from receiving any distribution of any kind or character, whether in cash, property or securities,

until holders of Senior Notes are “paid and satisfied in full.”⁴ Instead of giving full effect to the plain language of the Subordinated Indenture, the Debtors’ waterfall scheme bifurcates the Senior Notes Postpetition Interest Claim from the Senior Notes Prepetition Claim. This is contrary to the plain meaning and intent of the subordination provisions in the Senior Subordinated Indenture.

(1) The Rule of Explicitness Does Not Apply

17. The Debtors may suggest that their disparate treatment of the Senior Notes Postpetition Interest Claims and the Senior Notes Prepetition Claims is appropriate based on the so-called Rule of Explicitness. See, e.g., Debtors’ Omnibus Responses to Objections to Confirmation of the Debtors’ Sixth Amended Joint Plan of Reorganization [D.I. 6082] at 2. The Debtors’ argument is without merit because the Rule of Explicitness has been supplanted by section 510 of the Bankruptcy Code. Instead of the Rule of Explicitness, the Court should apply general principles of New York contract interpretation to the subordination agreement at issue.

18. The Rule of Explicitness was a judicial doctrine that provided that a senior creditor generally could not collect post-petition interest from distributions otherwise due to a junior creditor unless the applicable subordination agreement unequivocally provided for that result. However, with the enactment of section 510 of the Bankruptcy Code, the Rule of

⁴ The Subordinated Indenture provides that upon the distribution of all or part of WMI’s assets occurring by reason of bankruptcy:

the holders of any and all Senior Debt [including the Senior Notes] shall be preferred in the payment of their claims over the Holders of [Senior Subordinated Notes] . . . and such **Senior Debt shall be first paid and satisfied in full before any payment or distribution of any kind or character, whether in cash, property or securities** (other than securities which are subordinate and junior in right of payment to the payment of all Senior Debt which may at the time be outstanding) shall be made upon the [Senior Subordinated Notes] and in any such event any dividend or distribution of any kind or character . . . shall be paid over to the holders of such Senior Debt, pro rata, for application in payment thereof unless and until such Senior Debt shall have been paid and satisfied in full.

See Subordinated Indenture at § 15.2 (emphasis added).

Explicitness is no longer applicable when enforcing subordination agreements. While the question has not been addressed by the Third Circuit Court of Appeals or any other court in this Circuit, the two circuit courts that have considered the issue have both concluded that the Rule of Explicitness no longer applies as a consequence of the enactment of section 510 of the Code. See HSBC Bank USA v. Branch (In re Bank of New England Corp.), 364 F.3d 355, 359 (1st Cir. 2004); In re Southeast Banking Corp., 156 F.3d 1114, 1123 (11th Cir. 1998). As the First Circuit observed, Congress addressed subordination agreements through enactment of the Bankruptcy Code, and section 510(a) has supplanted the Rule of Explicitness to now provide that a subordination agreement is enforceable in bankruptcy to the same extent as under “applicable nonbankruptcy law.” In re Bank of New England Corp., 364 F.3d at 362; See 11 U.S.C. 510(a).

19. While the First Circuit and the Eleventh Circuit agree that the Rule of Explicitness is a dead letter as a matter of bankruptcy law, they are split on whether it may be enforced through section 510(a) of the Code as applicable “non-bankruptcy,” or state law. In Southeast Banking, after certifying to the New York Court of Appeals the question of what language New York law required in a subordination agreement in order to alert a junior creditor to its assumption of the risk of senior creditor’s post-petition interest, the Eleventh Circuit enforced the Rule as a matter of state law, through section 510(a) of the Code. 156 F.3d at 1125.

20. More recently, the First Circuit disagreed, holding that Congress did not intend for bankruptcy courts to use section 510(a)’s incorporation of “applicable non-bankruptcy law” as a vehicle for importing bankruptcy-specific state law into the Code. In re Bank of New England Corp., 364 F.3d at 364. In the First Circuit’s view, it was improper for

the Eleventh Circuit to request a state court to enunciate a bankruptcy-specific principle under the guise of state law, effectively importing the defunct Rule of Explicitness through section 510(a) of the Code. Id. Accordingly, the First Circuit refused to recognize the Rule of Explicitness as a matter of New York state law and instead held that general principles of New York contract interpretation applied to the subordination agreement at issue. Id. at 366.

21. The Senior Noteholders believe the more recent approach taken by the First Circuit is the correct approach, and that the Rule of Explicitness should not be applied in the current circumstances, either as a now superseded judicial doctrine or as a matter of New York state law. The Court should instead apply general New York rules of contract interpretation as the applicable non-bankruptcy law.

(2) The Subordinated Indenture Provides for Payment of Post-Petition Interest

22. The plain language of the Subordinated Indenture reflects that the Senior Subordinated Notes were intended to be junior and subordinated to the full payment of the Senior Notes, including payment of post-petition interest. Under New York law regarding contract interpretation, the Court must look to the ordinary and plain meaning of the words in the contract.⁵ Tom Doherty Assocs., Inc. v. Saban Entm't Inc., 869 F. Supp. 1130, 1140 (S.D.N.Y. 1994); In re Delta Airlines, Inc., 381 B.R. 57, 64 (Bankr. S.D.N.Y. 2008) (applying New York contract law and stating that “[t]he Court must take the parties’ contract as it is written and construe the words used by the parties in accordance with their common and usual meaning and usage.”). In interpreting what the parties said in their writing, “[t]he words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning.” Brooke Group v. JCH Syndicate 488, 87 N.Y.2d 530, 534 (1996) (citing

⁵ The Subordinated Indenture is governed by the law of the State of New York. See Subordinated Indenture at §1.12.

Levine v. Shell Oil Co., 28 N.Y.2d 205, 211 (1971)). A court's "primary objective is to give effect to the intent of the parties as revealed by the language they chose to use." In re Avon Secs. Litig., No. 91-cv-2287, 2004 WL 3761563, at *5 (S.D.N.Y. Mar. 29, 2004). In interpreting a contract, "the Court is to 'give to each clause its intended purpose in the promotion of the primary and dominant purpose of the contract.'" Id., 2004 WL 3761563, at *5.

23. Here, the Subordinated Indenture states that Senior Subordinated Notes may not receive any distributions of any kind until Senior Notes "have been *paid and satisfied in full.*" See Subordinated Indenture at § 15.2 (emphasis added). In the event that any distribution to Senior Subordinated Noteholders is made before such time, it shall be "paid over to the holders of such Senior Debt, pro rata, for application in payment thereof unless and until such Senior Debt shall have been *paid and satisfied in full.*" Id. (emphasis added).⁶ The phrase "paid and satisfied in full" by its plain meaning includes all amounts, and thus all interest due on the Senior Notes Claims. Payment in "full" is not ambiguous; it means payment of the "maximum or complete size," or payment in the "highest degree." See The Am. Heritage Dictionary 538 (2d ed. 1985); see also Webster's New Universal Unabridged Dictionary 740 (2d ed. 1983) (defining "full" to mean "the greatest measure, extent, state or degree" and "in full" to mean "to, for, or with the full amount, value"). Similarly, to be "satisfied" in full requires payment and discharge of the entire amount of any claim held by the Senior Noteholders,

⁶ There is no dispute that both the Senior Notes Prepetition Claims and Senior Notes Postpetition Interest Claims must be paid in full before any distributions to the PIERS Claims or CCB Claims. The PIERS Indenture explicitly provides that the PIERS Claims are subordinated and junior to the payment of all Senior Indebtedness (which includes the Senior Notes and Senior Subordinated Notes), and such payment includes "any interest thereon accruing after the commencement of any . . . [bankruptcy] proceedings[.]" See PIERS Indenture at §6.1, definition of "Senior Indebtedness." Similarly, the Guarantees for the CCB-2 Claims states that they are junior and subordinated to "the principal of and any premium and interest on (including interest accruing on or after the filing of any petition in bankruptcy or for reorganization...)" on all WMI Debt (which includes the Senior Notes and Senior Subordinated Notes), and the Guarantees for the CCB-1 Claims similarly provide that they are junior and subordinated to "the principal, premium, if any, and interest in respect of" WMI Debt (which includes the Senior Notes and Senior Subordinated Notes). See CCB VI Guarantee at §3 (reflecting CCB-2 subordination provisions); CCB IV Guarantee at §3 (reflecting CCB-1 subordination provisions).

including post-petition interest. See Webster's New Universal Unabridged Dictionary 1610 (2d ed. 1983) (defining “satisfy” to mean “to give what is due” or “to answer or discharge, as a claim, debt, legal demand or the like; to pay; to liquidate.”); Black's Law Dictionary 1460 (9th ed. 2009) (defining “satisfaction” to mean the “fulfillment of an obligation; esp., the payment in full of a debt”). There is certainly no dispute that Senior Noteholders are entitled to receive post-petition interest along with their prepetition claims, and a “full” and “complete” payment of their claims, which satisfies in full such claims, would necessarily include payment of the post-petition interest due upon the Senior Notes.

24. This interpretation is also consistent with common usage and understanding. It is a general principle of law that interest continues to accrue after a bankruptcy. Unsecured creditors are entitled to receive post-petition interest from a solvent debtor, and even with an insolvent debtor post-petition interest continues to accrue and can be payable from another source such as other creditors pursuant to a contract. See, e.g., Kitrosser v. CIT Group/Factoring, Inc., 177 B.R. 458 (Bankr. S.D.N.Y. 1995). As currently projected by the Debtors, the holders of Senior Notes will not receive all of their post-petition interest until some uncertain date after the Effective Date. There can be no real dispute that holders of Senior Notes will not be “paid and satisfied in full” until such time as they are repaid both principal and interest, including post-petition interest.

B. Even if the Rule of Explicitness Applies, the Debtors' Waterfall Does Not Properly Account for the Senior Noteholders' Subordination Rights in Tranche 2

25. Even if the Rule of Explicitness applies or the Senior Notes Postpetition Interest Claims are otherwise on parity with distributions to Senior Subordinated Notes Claims, the Debtors improperly allocate the distributions in Tranche 2 between Senior Notes Postpetition Interest Claims and Senior Subordinated Notes Claims.

26. Under the Debtors' waterfall scheme, distributions in Tranche 2 flow to the Senior Notes Postpetition Interest Claim pari passu with the Senior Subordinated Notes Claims, "based on the size of those claims." See Plan at Exhibit G, note 2. However, in calculating the ratio for distribution, the Debtors inexplicably *exclude* the entire amount of the pre-petition Senior Notes Claim and only account for the smaller amount of the Senior Notes Postpetition Interest Claim in Tranche 2.

27. Because the Senior Notes Postpetition Interest Claims are separated from the Senior Notes Prepetition Claims for purposes of calculating the ratio, the funds paid over to the Senior Notes from junior creditors in Tranche 2 are substantially reduced. The Debtors have engineered a "pro rata" calculus where the Senior Subordinated Notes' Claims in Tranche 2 (consisting of their Prepetition Claim and Postpetition Interest Claim) would outweigh the Senior Notes Claim in Tranche 2 by approximately 5.5 to 1. Consequently, while the Senior Noteholders hold more than twice the dollar amount of total debt that the Senior Subordinated Notes hold, the Senior Subordinated Noteholders would receive more than eight of every ten dollars turned over by the CCB and PIERS Claims in Tranche 2.

28. The Plan's treatment of amounts paid-over from PIERS and CCB Claimholders turns the PIERS Indenture and CCB Guarantees on their head, or at least on their side. The PIERS Indenture explicitly provides that junior stakeholders may not receive a distribution before the Senior Noteholders are paid in full, including post-petition interest. See PIERS Indenture at § 6.1 and definition of "Senior Indebtedness." Similarly, the CCB Indentures provide that junior debt may not receive a distribution before Senior Noteholders are paid in full, including post-petition interest. See, e.g., CCB VI Indenture Art. VII (reflecting relevant subordination language for CCB-2 Claims); CCB IV Indenture Art. XV (reflecting

relevant subordination language for CCB-1 Claims). The indentures do not recognize a distinction in priority between the Senior Notes' claims for repayment of principal and the Senior Notes' claim for payment of post-petition interest, and there is no basis to disregard the prepetition amounts due to Senior Notes for purposes of determining the "pro rata" distribution of amounts subject to pay-over. Rather, it is plain that the holders of Senior Debt (which includes holders of Senior Notes and Senior Subordinated Notes) are entitled to turnover of any amounts distributed to subordinated creditors until Senior Debt is paid in full, including post-petition interest. See, e.g., PIERS Indenture at §6.1(e); CCB IV Indenture §15.03. By dividing the Senior Noteholders' claims into two classes or "tranches" and ignoring the Senior Notes' prepetition claims for purposes of allocating pay-over amounts in Tranche 2, the Plan runs afoul of the Senior Notes' subordination rights.

29. The Debtors' suggestion that their distribution scheme is envisioned by the PIERS Indenture is without merit. See Debtors' Omnibus Responses to Objections to Confirmation of the Debtors' Sixth Amended Joint Plan of Reorganization [D.I. 6082] at 3. The PIERS Indenture provides for pay-over to "the holders of Senior Indebtedness...as their interests may appear." PIERS Indenture at §6.1(e). The Senior Notes "interests" certainly include the entirety of their prepetition and post-petition interest claims. Furthermore, reference in the PIERS Indenture to payment of the Senior Indebtedness that remains unpaid merely recognizes that the pay-over from the PIERS will apply until such time as the Senior Indebtedness is paid in full; it does not suggest that the amount of Senior Notes' prepetition claims should be disregarded when determining how the pay-over amounts are distributed among Senior Indebtedness.

30. The only logical and equitable distribution in Tranche 2 must be based on

the total amount of the Senior Notes and Senior Subordinated Notes Claims. The fact that Senior Notes are also entitled to pay-over from the Senior Subordinated Notes in Tranche 1 is irrelevant for purposes of the pro rata distribution of pay-over amounts in Tranche 2. There is no legitimate basis for the Debtors' convoluted application of a "pro rata" distribution which ignores the Senior Notes prepetition claims.

31. Significantly, if the Court fixes the Debtors' waterfall to properly allocate the distributions in Tranche 2, it likely would not need to consider the other subordination issues regarding the application of the Rule of Explicitness or the election mechanism for Reorganized Common Stock (as discussed below) because those issues would be mooted by the payment in full in Cash of the Senior Notes.

II. IF THE SENIOR NOTEHOLDERS ARE NOT PAID IN FULL IN CASH ON THE EFFECTIVE DATE, THE PLAN'S ELECTION RIGHTS VIOLATE THE SENIOR NOTEHOLDERS' SUBORDINATION RIGHTS

32. To the extent Senior Notes are not paid in full in Cash on the Effective Date, the Plan's election mechanism for the distribution of non-cash consideration will violate the Senior Notes' subordination rights. Section 6.2 of the Plan provides that if the Senior Noteholders are not paid in full in Cash on the Effective Date, the currency in which the remaining portion of the Senior Noteholders' claim will be paid will be determined by each Senior Noteholder, at his individual election, in either Reorganized Common Stock or future Cash on account of Liquidating Trust Interests. See Plan at § 6.2. Thus, to the extent the Senior Notes are not paid in full on day one, the Plan forces the Senior Noteholders to choose between two forms of consideration with respect to the unpaid portion of their claim and forfeit their right to receive value on account of both. The effect of choosing Cash is to release the Senior Noteholders' right to receive Reorganized Common Stock, which flows through the waterfall. See Plan at § 7.2 (providing for Senior Subordinated Noteholders' election rights), §

18.2 (CCB-1 Claims election rights), § 19.2 (CCB-2 Claims election rights) and § 20.2 (PIERS Claims election rights).

33. Whether the Senior Subordinated Noteholders' receipt of Reorganized Common Stock before Senior Notes are paid in full (including post-petition interest) violates the applicable subordination provisions is again a function of whether the Rule of Explicitness applies. But the distribution of Reorganized Common Stock to other subordinated creditors such as the PIERS the CCB Claims certainly violates the relevant subordination agreements which explicitly provide for the priority payment of the Senior Noteholders' claims. See PIERS Indenture at §6.1; CCB IV Indenture at § 15.03. The subordination provisions do not apply to payments made in cash only. Holders of PIERS and CCB Claims may not receive any payment or distribution, whether in cash, securities or other property until Senior Notes and Senior Subordinated Notes are paid in full. See, e.g., PIERS Indenture at §6.1(a); CCB IV Indenture at § 15.03.

34. Furthermore, the distribution of Reorganized Common Stock to the Senior Noteholders would not necessarily satisfy their subordination rights. The Senior Noteholders are entitled to receive payment in full “in cash or other payments satisfactory to the holders of [Senior Notes]” before any distributions to subordinated creditors. See PIERS Indenture at 6.1(a) (emphasis added). Furthermore, to the extent any distributions are made to the PIERS Claims before the Senior Noteholders are paid in full (including post-petition interest), then, unless and until Senior Noteholders are “paid in full in cash,” any such distributions must be paid over to the holders of Senior Notes or their trustee. Id. at 6.1(e)(i) (emphasis added).

35. The current stock election mechanism in the Plan seeks to force Senior Noteholders to give up consideration that, in the absence of the election mechanism, would flow

to the Indenture Trustee for the benefit of all Senior Noteholders. See Subordinated Indenture at § 15.3 (providing that the Indenture Trustee will distribute “ratably . . . for application to the payment of all Senior Debt [amounts turned over to the Trustee from junior stakeholders] for application to the payment of all Senior Debt remaining unpaid until all such Senior Debt shall have been paid in full[.]”).

36. To the extent the parties are unable to resolve the issues with the Plan’s election mechanism in advance of the Confirmation Hearing and the Senior Noteholders are not projected to be paid in full (including post-petition interest) on the Effective Date, the election mechanism for Reorganized Common Stock should be modified to ensure that there is no distributions of any kind to subordinated creditors until Senior Notes are paid in full in Cash (or via other payments satisfactory to the Senior Noteholders). The Senior Noteholders should be allowed to exercise their contractual subordination rights with respect to any consideration provided to junior stakeholders notwithstanding the election rights set forth in the Plan.

III. THE FLOATING RATE SENIOR NOTES ARE ENTITLED TO RECEIVE POST-PETITION INTEREST AT A RATE THAT IS AT LEAST EQUAL TO THE FEDERAL JUDGMENT RATE

37. It is well established that where a debtor is solvent, unsecured creditors are entitled to post-petition interest at the “legal rate.” In re Washington Mutual, Inc., No. 08-12229, 2011 WL 57111, at *37 (Bankr. D. Del. Jan. 7, 2011); Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231, 1234 (9th Cir. 2002). In a chapter 7 liquidation, where the debtor is solvent, a creditor must receive post-petition interest on its claim before shareholders receive any distribution. 11 U.S.C. § 726(a)(5). Therefore, to meet the best interest of creditors test in section 1129(a)(7), impaired creditors must get interest on their claims before shareholders receive any recovery. In re Coram Healthcare Corp., 315 B.R. 321, 344 (Bankr. D. Del. 2004). The best interest of creditors test, by its own terms, establishes a *minimum* requirement. 11

U.S.C. § 1129(a)(7) (a creditor must receive property of a value “not *less than* the amount which would be received under chapter 7”) (emphasis added).

38. In considering what constitutes the “legal rate” of post-petition interest, this Court previously indicated that the federal judgment rate would apply as the minimum interest rate. In re Washington Mutual, Inc., No. 08-12229, 2011 WL 57111, at *37 (Bankr. D. Del. Jan. 7, 2011) (“This Court has considered this issue before and concluded that the federal judgment rate was the *minimum* that must be paid to unsecured creditors in solvent debtor case.”). In In re Coram Healthcare Corp., 315 B.R. 321 (Bankr. D. Del. 2004), this Court adopted the reasoning in In re Dow Corning Corp., 244 B.R. 678, 686 (Bankr. E.D. Mich. 1999) which recognized that “the upshot of the best-interests test is that creditors of a solvent Chapter 11 estate must receive post-petition interest at a rate which is *at least* equal to the federal statutory rate.”

39. Here, certain issuances of Senior Notes (the “Senior Floating Rate Notes”) provided for a floating rate of interest. Some of the floating rates of interest are actually lower than the federal judgment rate.⁷ Accordingly, because creditors of a solvent debtor are entitled to receive post-petition interest at a rate which is *at least* equal to the federal judgment rate, holders of Senior Floating Rate Notes are entitled to receive post-petition interest at a rate that is *the greater of* their applicable floating rate or the federal judgment rate.

40. In practice, the Senior Floating Rate Notes are entitled to receive post-petition interest at the contract rate as part of the pay-over from contractually subordinated

⁷ The Senior Floating Rate Notes issued by WMI are those certain (i) notes due August 24, 2009 with interest accruing at the rate of LIBOR + .14% (ii) notes due January 15, 2010 with interest accruing at LIBOR + .30%, (iii) notes due March 22, 2012 with interest accruing at the rate of LIBOR + .30% and (iv) notes due September 17, 2012 with interest accruing at the rate of LIBOR + .40%. Because the applicable federal judgment rate is and has been for the vast majority of these chapter 11 cases much higher than the above floating rates, the WMI Noteholders estimate as of July 31, 2011 that the use of the lower contract rate in calculating the post-petition interest claims of holders of Senior Floating Rate Notes would result in such holders receiving approximately \$34 million less than if the higher federal judgment rate is properly applied.

creditors (i.e., the PIERS Claims, the CCB Claims and, to the extent the Court finds that the Subordinated Indenture provides for payment of post-petition interest, the Senior Subordinated Claims). However, to the extent post-petition interest is paid by the Debtors' estates and any of the Senior Notes' floating rates are lower than the federal judgment rate, the holders of such Senior Floating Rate Notes should be entitled to receive the difference (up to the federal judgment rate) from the Debtors' estates.

41. Ensuring that the Senior Floating Rate Notes receive the benefit of a rate equal to the federal judgment rate of interest is also fair and equitable. Junior subordinated stakeholders should not receive post-petition interest at a higher rate than senior debt holders. Failure to pay the Senior Floating Rate Notes' post-petition interest at a rate which is *at least* equal to the federal judgment rate would lead to the absurd result of a creditor with no contract receiving post-petition interest at a higher rate based on the federal judgment rate than the Senior Floating Rate Notes.

RESERVATION OF RIGHTS

42. The WMI Noteholders expressly reserve their rights to supplement and amend this Limited Objection and introduce evidence at any hearing relating to this Limited Objection or to consider confirmation of the Plan on any other grounds, without in any way limiting any other rights that the WMI Noteholders may have.

CONCLUSION

43. For the foregoing reasons, the WMI Noteholders respectfully request that, in the event that the Senior Noteholders are not paid in full in Cash on the Effective Date and the parties do not otherwise reach an agreement concerning the Senior Noteholders' subordination rights, the Court enter an order (i) modifying the waterfall to provide for payment

in Tranche 1 of all Senior Noteholders Claims, including Postpetition Interest Claims or (ii) providing for pro rata distribution of pay-over amounts in Tranche 2 that takes into account the total amount of Senior Notes Prepetition Claims and Postpetition Interest Claims. The WMI Noteholders further respectfully request that the election mechanism for Reorganized Common Stock be modified to provide that there will be no distributions of any kind to subordinated creditors until Senior Notes are paid in full in Cash (or via other payments satisfactory to the Senior Noteholders) and that Senior Noteholders are permitted to exercise their contractual subordination rights with respect to any consideration provided to junior stakeholders notwithstanding the election rights set forth in the Plan. Furthermore, to the extent post-petition interest is paid by the Debtors' estates, the WMI Noteholders respectfully request that the Court require that the Senior Floating Rate Notes receive payment of post-petition interest at an interest rate that is at least equal to the federal judgment rate.

Dated: June 17, 2011
Wilmington, Delaware

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EXHIBIT A

WASHINGTON MUTUAL, INC.

and

THE BANK OF NEW YORK, as Trustee

Senior Debt Securities

First Supplemental Indenture

Dated as of August 1, 2002

Register as to principal and any interest (including without limitation any Security in temporary or definitive global registered form).

"Regular Record Date" for the interest payable on any Interest Payment Date on the Registered Securities of any series means the date specified for that purpose as contemplated by Section 3.1, which date shall be, unless otherwise specified pursuant to Section 3.1, the fifteenth day preceding such Interest Payment Date, whether or not such day shall be a Business Day.

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"Responsible Officer", when used with respect to the Trustee means any vice president, any assistant vice president, any assistant treasurer, any trust officer or any other officer of the Trustee customarily performing functions similar to those performed by any of the above designated officers and also means, with respect to a particular corporate trust matter, any other officer to whom such matter is referred because of his knowledge of and familiarity with the particular subject.

"Security" means one of the Securities, or one of any series of Securities (including any Global Securities) issued hereunder.

"Securities" has the meaning stated in the first recital of this Indenture and more particularly means any Securities authenticated and delivered under this Indenture.

"Security Register" and "Security Registrar" have the respective meanings specified in Section 3.5.

"Senior Debt" has the meaning specified in Section 15.12.

"Special Record Date" for the payment of any Defaulted Interest means a date fixed by the Trustee pursuant to Section 3.7.

"Stated Maturity", when used with respect to any Security or any installment of principal thereof or interest thereon, means the date specified in such Security (or Coupon) as the fixed date on which the principal of such Security or such installment of principal or interest is due and payable.

"Subordinated Debt" has the meaning specified in Section 15.12.

"Subsidiary" means any corporation at least a majority of the outstanding voting stock of which shall at the time be owned, directly or indirectly, by the Company or by one or more Subsidiaries of the Company, where voting stock means stock (or such equivalent) of any class or classes, however

ARTICLE XIV

Immunity of Incorporators, Stockholders, Officers and Directors

14.1 Immunity of Incorporators, Stockholders, Officers and Directors. No recourse shall be had for the payment of the principal of (or premium, if any, on) or interest, if any, on, any Security of any series (or any Coupon appertaining thereto), or any part thereof, or for any claim based thereon or otherwise in respect thereof, or of the indebtedness represented thereby, or upon any obligation, covenant or agreement of this Indenture, against any incorporator, direct or indirect stockholder, officer or director, as such, past, present or future, of the Company, or of any successor corporation, either directly or through the Company or any successor corporation, whether by virtue of any constitutional provision, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise; it being expressly agreed and understood that this Indenture and all the Securities of all series (and any Coupons appertaining thereto) are solely corporate obligations, and that no personal liability whatsoever shall attach to, or be incurred by, any incorporator, direct or indirect stockholder, officer or director, as such, past, present or future, of the Company or of any successor corporation, either directly or through the Company or any successor corporation, because of the incurring of the indebtedness hereby authorized or under or by reason of any of the obligations, covenants, promises or agreements contained in this Indenture or in any of the Securities of any series (or any Coupons appertaining thereto) or to

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be implied here from or therefrom, and that all liability, if any, of that character against every such incorporator, stockholder, officer and director is, by the acceptance of the Securities of any series (or any Coupons appertaining thereto), and as a condition of, and as part of the consideration for, the execution of this Indenture and the issue of the Securities (and any Coupons appertaining thereto), expressly waived and released.

ARTICLE XV

Subordination

15.1 Agreement to Subordinate. Anything to the contrary herein notwithstanding, the Company covenants and agrees, and each Holder of Securities of any series designated as Subordinated Debt (as defined below) (or any Coupons appertaining thereto) by acceptance thereof likewise covenants and agrees, that the indebtedness represented by the Securities of such series (and any Coupons appertaining thereto) and the payment of the principal of (and premium, if any,

on) and interest, if any, on each and all of the Securities of such series (and any Coupons appertaining thereto) shall be subordinate and junior in right of payment, to the extent and in the manner hereinafter set forth, to the prior payment in full of all Senior Debt (as defined below), whether outstanding at the date hereof or incurred after the date hereof, but shall in all respects rank pari passu with all other Subordinated Debt other than the Junior Subordinated Notes (as defined below).

15.2 No Payments to Holders of Securities in Certain Circumstances.

(a) In the event of any sale under or in accordance with any judgment or decree rendered in any proceeding by or on behalf of any Holder of Securities (or any Coupons appertaining thereto) or in the event of any distribution, division or application, partial or complete, voluntary or involuntary, by operation of law or otherwise, of all or any part of the assets of the Company, or the proceeds thereof, to creditors of the Company occurring by reason of any liquidation, dissolution or winding up of the Company, or in the event of any receivership, insolvency, bankruptcy, liquidation, readjustment, reorganization or other similar proceeding relative to the Company or its debts or properties, then in any such event the holders of any and all Senior Debt shall be preferred in the payment of their claims over the Holders of Securities (or any Coupons appertaining thereto), and such Senior Debt shall be first paid and satisfied in full before any payment or distribution of any kind or character, whether in cash, property or securities (other than securities which are subordinate and junior in right of payment to the payment of all Senior Debt which may at the time be outstanding), shall be made upon the Securities (or any Coupons appertaining thereto); and in any such event any dividend or distribution of any kind or character, whether in cash, property or securities (other than in securities which are subordinate and junior in right of payment to the payment of all Senior Debt which may at the time be outstanding) which shall be made upon or in respect of the indebtedness evidenced by the Securities (or any Coupons appertaining thereto), or any renewals or extensions thereof, shall be

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paid over to the holders of such Senior Debt, pro rata, for application in payment thereof unless and until such Senior Debt shall have been paid and satisfied in full; and

(b) In the event that pursuant to the provisions hereof any Security is declared or becomes due and payable before its Stated Maturity because of an occurrence of an Event of Default (under circumstances when paragraph (a) of this Section 15.2 shall not be applicable), no amount shall be paid by the

Company in respect of the principal of or interest, if any, on the Securities (or any Coupons appertaining thereto) in excess of current interest payments as provided herein, except at the Stated Maturity thereof or in accordance with any regular mandatory prepayments as contemplated by Section 3.1 for Securities of any series (or any Coupons appertaining thereto) (all subject to paragraph (a) of this Section 15.2), unless and until all Senior Debt outstanding at the time such Security so becomes due and payable because of any such event shall have been paid in full or payment thereof shall have been provided for in a manner satisfactory to the holders of such outstanding Senior Debt; and

(c) without limiting the effect of any of the other provisions of this Article XV, during the continuance of any default with respect to any Senior Debt, no payment of principal, sinking fund, interest or premium shall be made on or with respect to the indebtedness evidenced by the Securities (or any Coupons appertaining thereto) or any renewals or extensions hereof, if either (1) notice of such default in writing or by telegram has been given to the Company by any holder or holders of any Senior Debt, provided that judicial proceedings shall be commenced with respect to such default within 120 days thereafter or (2) judicial proceedings shall be pending in respect of such default.

The Company covenants and agrees, for the benefit of each and every present and future holder of Senior Debt, that in the event that pursuant to the provisions hereof any Security is declared or becomes due and payable because of an occurrence of an Event of Default, then each holder of any Senior Debt then outstanding shall have the right to declare immediately due and payable on demand all or any part of such Senior Debt owing and payable to such holder, regardless of any other maturity or terms of said Senior Debt; and if and when any such default has occurred, or any notice of default under the terms hereof may be served upon the Company, then in each such event the Company shall and hereby agrees that it will immediately notify the holders of the Senior Debt of such default or notice thereof, as the case may be.

15.3 Payments by Trustee or Holders of Securities to Holders of Senior Debt. In the event that any payment by, or distribution of assets of, the Company of any kind or character, whether in cash, property or securities, shall be received by the Trustee or the Holders of Securities (or any Coupons appertaining thereto) before all Senior Debt is paid in full, contrary to the provisions of Section 15.2, such payment or distribution shall be paid over to the holders of such Senior Debt or their representative or representatives or to the trustee or trustees under any indenture under which any instruments evidencing any of such Senior Debt may have been issued, ratably as aforesaid, for application to the payment of all Senior Debt remaining unpaid until all such Senior Debt shall have been paid in full, after giving effect to any concurrent payment or distribution (or provision therefor) to the holders of such Senior Debt.

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15.4 Subrogation. Subject to the payment in full of all Senior Debt, the Holders of Securities (and any Coupons appertaining thereto) shall be subrogated to the rights of the holders of Senior Debt to receive payments or distributions of cash, property or securities of the Company applicable to the Senior Debt until all amounts owing on the Securities (and any Coupons appertaining thereto) shall be paid in full, and, as between the Company, its creditors other than holders of Senior Debt, and the Holders of Securities (and any Coupons appertaining thereto), no such payment or distribution made to the holders of Senior Debt by virtue of this Article XV which otherwise would have been made to the Holders of Securities (and any Coupons appertaining thereto) shall be deemed to be a payment by the Company on account of the Senior Debt, it being understood that the provisions of this Article XV are and are intended solely for the purpose of defining the relative rights of the Holders of Securities (and any Coupons appertaining thereto), on the one hand, and the holders of Senior Debt, on the other hand.

15.5 Obligation of Company Unconditional. Nothing herein shall impair, as between the Company and the Holders of Securities (and any Coupons appertaining thereto), the right of the Holder of any Security or any Coupon, which is absolute and unconditional, to receive payment of the principal (and premium, if any) and interest, if any, thereon in accordance with their terms, or shall prevent the Trustee or any Paying Agent from applying any moneys deposited with it hereunder to the payment of principal of (or premium, if any) or interest, if any, on any of the Securities (or any Coupons appertaining thereto), in each case except as otherwise provided in this Article XV, nor shall anything herein prevent any Holder of Securities (or any Coupons appertaining thereto) from exercising all remedies otherwise permitted by applicable law or hereunder upon default hereunder, subject to the rights, if any, of holders of Senior Debt as herein provided. Each and every holder of Securities (or any Coupons appertaining thereto) by acceptance thereof shall undertake and agree for the benefit of each holder of Senior Debt to execute, verify, deliver and file any proofs of claim, consents, assignments or other instruments which any holder of Senior Debt may at any time require in order to prove and realize upon any rights or claims pertaining to the Securities (or any Coupons appertaining thereto) and to effectuate the full benefit of the subordination contained in this Article XV.

Upon any payment or distribution of assets of the Company referred to in this Article XV, the Trustee and the Holders of Securities (or any Coupons appertaining thereto) shall be entitled to rely upon any order or decree made by any court of competent jurisdiction in which any such dissolution, winding up, liquidation or reorganization proceeding affecting the affairs of the Company is pending or upon a certificate of the liquidating trustee or agent or other

person making any payment or distribution to the Trustee or to the Holders of Securities (or any Coupons appertaining thereto) for the purpose of ascertaining the persons entitled to participate in such payment or distribution, the holders of the Senior Debt and other indebtedness of the Company, the amount thereof or payable thereon, the amount paid or distributed thereon and all other facts pertinent thereto or to this Article XV. In the event that the Trustee determines, in good faith, that further evidence is required with respect to the right of any person as a holder of Senior Debt to participate in any payment or distribution pursuant to this Article XV, the Trustee may request such person to furnish evidence to the reasonable satisfaction of the Trustee as to the amount of Senior Debt held by such person, as to the extent to which such person is entitled to participate in such payment or distribution, and as to other facts

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pertinent to the rights of such person under this Article XV and, if such evidence is not furnished, the Trustee may defer any payment to such person pending judicial determination as to the right of such person to receive such payment.

15.6 Payments on Securities Permitted. Nothing contained in this Article XV or elsewhere in this Indenture, or in any of the Securities (or any Coupons appertaining thereto), shall (a) affect the obligation of the Company to make, or prevent the Company from making, at any time except in the event of any event specified in Section 15.2, payments at any time of principal of (or premium, if any) or interest, if any, on the Securities of any series (or any Coupons appertaining thereto) or of any sinking fund payments with respect to the Securities of any series, or (b) prevent the application by the Trustee or any Paying Agent of any moneys held by the Trustee or such Paying Agent in trust for the benefit of the holders of Securities of any series (and any Coupons appertaining thereto) as to which notice of redemption shall have been mailed or published at least once prior to the happening of an event specified in paragraph (b) or (c) of Section 15.2 to the payment of or on account of the principal of (and premium, if any, on) and interest, if any, on such Securities (and any Coupons appertaining thereto), or (c) prevent the application by the Trustee or any Paying Agent of any moneys deposited prior to the happening of any event specified in paragraph (b) or (c) of Section 15.2 with the Trustee or such Paying Agent in trust for the purpose of paying a specified installment or installments of interest on the Securities of any series (or any Coupons appertaining thereto), to the payment of such installments of interest on the Securities of any series (or any Coupons appertaining thereto).

15.7 Effectuation of Subordination by Trustee. Each holder of Securities (or any

Coupons appertaining thereto), by his acceptance thereof, authorizes and directs the Trustee in his behalf to take such action as may be necessary or appropriate to effectuate the subordination provided in this Article XV and appoints the Trustee his attorney-in-fact for any and all such purposes.

The Trustee shall not be deemed to owe any fiduciary duty to the holders of Senior Debt and, with respect to the holders of Senior Debt, the Trustee undertakes to perform or to observe only such of its covenants and obligations as are specifically set forth in this Article XV, and no implied covenants or obligations with respect to the holders of Senior Debt shall be read into this Indenture against the Trustee. Subject to the provisions of Section 6.1, the Trustee shall not be liable to any holder of Senior Debt if it shall mistakenly pay over or deliver to holders of Securities (or any Coupons appertaining thereto), the Company or any other person moneys or assets to which any holder of Senior Debt shall be entitled by virtue of this Article XV or otherwise.

15.8 Knowledge of Trustee. Notwithstanding the provisions of this Article XV or any other provisions of this Indenture, the Trustee shall not be charged with knowledge of the existence of any facts which would prohibit the making of any payment of moneys to or by the Trustee, or the taking of any other action by the Trustee, unless and until the Trustee shall have received written notice thereof from the Company, any Holder, any Paying Agent or the holder or representative of any class of Senior Debt.

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Prior to the receipt of any such written notice, the Trustee, subject to the provisions of Section 6.1, shall be entitled in all respects to assume that no such facts exist; provided that, if on a date not less than one day prior to the date upon which by the terms hereof any such moneys may become payable for any purpose (including, without limitation, the payment of the principal of or interest, if any, on any Securities (or any Coupons appertaining thereto)), the Trustee shall not have received with respect to such moneys the notice provided for in this Section 15.8, then, anything herein contained to the contrary notwithstanding, the Trustee shall have full power and authority to receive such moneys and to apply the same to the purpose for which they were received, and shall not be affected by any notice to the contrary which may be received by it on or after such prior date.

15.9 Trustee May Hold Senior Debt. The Trustee shall be entitled to all the rights set forth in this Article XV with respect to any Senior Debt at the time held by it, to the same extent as any other holder of Senior Debt, and nothing in Section 6.13 or elsewhere in this Indenture shall deprive the Trustee of any of its rights as such holder.

15.10 Rights of Holders of Senior Debt Not Impaired.No right of any present or future holder of any Senior Debt to enforce the subordination herein shall at any time or in any way be prejudiced or impaired by any act or failure to act on the part of the Company or by any non-compliance by the Company with the terms, provisions and covenants of this Indenture, regardless of any knowledge thereof any such holder may have or be otherwise charged with.

15.11 Rights and Obligations Subject to Power of Court.The right of the holders of Senior Debt and the obligations of the Trustee and the Holders of Securities (and any Coupons appertaining thereto) set forth in this Article XV are subject to the power of a court of competent jurisdiction to make other equitable provision reflecting the rights conferred in this Indenture upon the Senior Debt and the holders thereof with respect to the Securities (and any Coupons appertaining thereto) and the holders thereof by a plan of reorganization under applicable bankruptcy law.

15.12 Definitions.The following terms shall have the following meanings:

"Junior Subordinated Notes" means the Company's 8.375% Junior Subordinated Debentures due 2027, its 8.206% Subordinated Deferrable Interest Notes due 2027, its 8.36% Subordinated Notes due 2026, its 8.25% Subordinated Deferrable Interest Notes due 2025, and its 5.375% Subordinated Defeasible Interest Debentures due 2041.

"Senior Debt" means all Debt of the Company except Subordinated Debt and Junior Subordinated Notes.

"Subordinated Debt" means the Company's 7.875% Senior Subordinated Debt due 2004, 8.875% Subordinated Notes due 2007 and 8.25% Subordinated Notes due 2010 and any other Debt of the Company which is subordinate and junior in right of payment to any other Debt of the Company by the terms of the instrument creating or evidencing such Subordinated Debt and senior to the Junior Subordinated Notes.

EXHIBIT B

EX-4.5 5 a2076160zex-4_5.htm EXHIBIT 4.5

[QuickLinks](#) -- Click here to rapidly navigate through this document**WASHINGTON MUTUAL, INC.****Standard Multiple-Series****Indenture Provisions****Dated as of April , 2002****Table of Contents**

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(a) if any of the Securities affected by such event are Registered Securities, such notice shall be sufficiently given (unless otherwise herein expressly provided) if in writing and mailed, first-class postage prepaid, to each Holder affected by such event, at his address as it appears in the Security Register, within the time prescribed for the giving of such notice, and

(b) if any of the Securities affected by such event are Bearer Securities, such notice shall be sufficiently given (unless otherwise herein expressly provided or unless otherwise specified in such Securities) if published once in an Authorized Newspaper in New York City and London and mailed to such Persons whose names and addresses were previously filed with the Trustee, within the time prescribed for the giving of such notice. In case by reason of the suspension of regular mail service or by reason of any other cause it shall be impracticable to give such notice to Holders by mail, then such notification as the Company shall direct the Trustee in writing to give shall constitute a sufficient notification for every purpose hereunder. In any case where notice to Holders is given by mail, neither the failure to mail such notice, nor any defect in any notice so mailed, to any particular Holder shall affect the sufficiency of such notice with respect to other Holders.

In case by reason of the suspension of publication of any Authorized Newspaper or Authorized Newspapers or by reason of any other cause it shall be impracticable to publish any notice to Holders of Bearer Securities as provided above, then such notification to Holders of Bearer Securities as the Company shall direct the Trustee in writing to give shall constitute sufficient notice to such Holders for every purpose hereunder. Neither the failure to give notice by publication to Holders of Bearer Securities as provided above, nor any defect in any notice so published, shall affect the sufficiency of any notice to Holders of Registered Securities given as provided herein.

Where this Indenture provides for notice in any manner, such notice may be waived in writing by the Person entitled to receive such notice, either before or after the event, and such waiver shall be the equivalent of such notice. Waivers of notice by Holders of Securities shall be filed with the Trustee, but such filing shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

1.7 Conflict with Trust Indenture Act. This Indenture is subject to, and shall be governed by, the provisions of the Trust Indenture Act that are required to be a part of this Indenture. If any provision hereof limits, qualifies or conflicts with a provision of the Trust Indenture Act that is required under such Act to be a part of and govern this Indenture, the latter provision shall control. If any provision of this Indenture modifies or excludes any provision of the Trust Indenture Act that may be so modified or excluded, the latter provision shall be deemed to apply to this Indenture as so modified or to be excluded, as the case may be.

1.8 Effect of Headings and Table of Contents. The Article and Section headings herein and the Table of Contents are for convenience only and shall not affect the construction hereof.

1.9 Successors and Assigns. All covenants and agreements in this Indenture by the Company shall bind its successors and assigns, whether so expressed or not.

1.10 Separability Clause. In case any provision in this Indenture or in the Securities shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

1.11 Benefits of Indenture. Nothing in this Indenture or in the Securities or Coupons, express or implied, shall give to any Person other than the parties hereto and their successors hereunder and the Holders, any benefit or any legal or equitable right, remedy or claim under this Indenture.

1.12 Governing Law. This Indenture and the Securities and Coupons shall be governed by and construed in accordance with the laws of the State of New York, without regard to conflicts of laws provisions thereof other than Section 5-1401 of the New York General Obligations Law.

1.13 Legal Holidays. Except as otherwise specified as contemplated by Section 3.1, in any case where any Interest Payment Date Redemption Date or Stated Maturity of any Security shall not be a Business Day at any Place of Payment, then

thereby, or upon any obligation, covenant or agreement of this Indenture, against any incorporator, direct or indirect stockholder, officer or director, as such, past, present or future, of the Company, or of any successor corporation, either directly or through the Company or any successor corporation, whether by virtue of any constitutional provision, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise; it being expressly agreed and understood that this Indenture and all the Securities of all series (and any Coupons appertaining thereto) are solely corporate obligations, and that no personal liability whatsoever shall attach to, or be incurred by, any incorporator, direct or indirect stockholder, officer or director, as such, past, present or future, of the Company or of any successor corporation, either directly or through the Company or any successor corporation, because of the incurring of the indebtedness hereby authorized or under or by reason of any of the obligations, covenants, promises or agreements contained in this Indenture or in any of the Securities of any series (or any Coupons appertaining thereto) or to be implied here from or therefrom, and that all liability, if any, of that character against every such incorporator, stockholder, officer and director is, by the acceptance of the Securities of any series (or any Coupons appertaining thereto), and as a condition of, and as part of the consideration for, the execution of this Indenture and the issue of the Securities (and any Coupons appertaining thereto), expressly waived and released.

ARTICLE XV Subordination

15.1 Agreement to Subordinate. Anything to the contrary herein notwithstanding, the Company covenants and agrees, and each Holder of Securities of any series designated as Subordinated Debt (as defined below) (or any Coupons appertaining thereto) by acceptance thereof likewise covenants and agrees, that the indebtedness represented by the Securities of such series (and any Coupons appertaining thereto) and the payment of the principal of (and premium, if any, on) and interest, if any, on each and all of the Securities of such series (and any Coupons appertaining thereto) shall be subordinate and junior in right of payment, to the extent and in the manner hereinafter set forth, to the prior payment in full of all Senior Debt (as defined below), whether outstanding at the date hereof or incurred after the date hereof, but shall in all respects rank *pari passu* with all other Subordinated Debt (as defined below) other than the Junior Subordinated Notes (as defined below).

15.2 No Payments to Holders of Securities in Certain Circumstances.

(a) In the event of any sale under or in accordance with any judgment or decree rendered in any proceeding by or on behalf of any Holder of Securities (or any Coupons appertaining thereto)

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or in the event of any distribution, division or application, partial or complete, voluntary or involuntary, by operation of law or otherwise, of all or any part of the assets of the Company, or the proceeds thereof, to creditors of the Company occurring by reason of any liquidation, dissolution or winding up of the Company, or in the event of any receivership, insolvency, bankruptcy, liquidation, readjustment, reorganization or other similar proceeding relative to the Company or its debts or properties, then in any such event the holders of any and all Senior Debt shall be preferred in the payment of their claims over the Holders of Securities (or any Coupons appertaining thereto), and such Senior Debt shall be first paid and satisfied in full before any payment or distribution of any kind or character, whether in cash, property or securities (other than securities which are subordinate and junior in right of payment to the payment of all Senior Debt which may at the time be outstanding), shall be made upon the Securities (or any Coupons appertaining thereto); and in any such event any dividend or distribution of any kind or character, whether in cash, property or securities (other than in securities which are subordinate and junior in right of payment to the payment of all Senior Debt which may at the time be outstanding) which shall be made upon or in respect of the indebtedness evidenced by the Securities (or any Coupons appertaining thereto), or any renewals or extensions thereof, shall be paid over to the holders of such Senior Debt, *pro rata*, for application in payment thereof unless and until such Senior Debt shall have been paid and satisfied in full; and

(b) In the event that pursuant to the provisions hereof any Security is declared or becomes due and payable before its Stated Maturity because of an occurrence of an Event of Default (under circumstances when paragraph (a) of this Section 15.2 shall not be applicable), no amount shall be paid by the Company in respect of the principal of or interest, if any, on the Securities (or any Coupons appertaining thereto) in excess of current interest payments as provided herein, except at the Stated Maturity thereof or in accordance with any regular mandatory prepayments as contemplated by Section 3.1 for Securities of any series (or any Coupons appertaining thereto) (all subject to paragraph (a) of this Section 15.2), unless and until all Senior Debt outstanding at the time such Security so becomes

due and payable because of any such event shall have been paid in full or payment thereof shall have been provided for in a manner satisfactory to the holders of such outstanding Senior Debt; and

(c) without limiting the effect of any of the other provisions of this Article XV, during the continuance of any default with respect to any Senior Debt, no payment of principal, sinking fund, interest or premium shall be made on or with respect to the indebtedness evidenced by the Securities (or any Coupons appertaining thereto) or any renewals or extensions hereof, if either (1) notice of such default in writing or by telegram has been given to the Company by any holder or holders of any Senior Debt, provided that judicial proceedings shall be commenced with respect to such default within 120 days thereafter or (2) judicial proceedings shall be pending in respect of such default.

The Company covenants and agrees, for the benefit of each and every present and future holder of Senior Debt, that in the event that pursuant to the provisions hereof any Security is declared or becomes due and payable because of an occurrence of an Event of Default, then each holder of any Senior Debt then outstanding shall have the right to declare immediately due and payable on demand all or any part of such Senior Debt owing and payable to such holder, regardless of any other maturity or terms of said Senior Debt; and if and when any such default has occurred, or any notice of default under the terms hereof may be served upon the Company, then in each such event the Company shall and hereby agrees that it will immediately notify the holders of the Senior Debt of such default or notice thereof, as the case may be.

15.3 Payments by Trustee or Holders of Securities to Holders of Senior Debt. In the event that any payment by, or distribution of assets of, the Company of any kind or character, whether in cash, property or securities, shall be received by the Trustee or the Holders of Securities (or any Coupons

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appertaining thereto) before all Senior Debt is paid in full, contrary to the provisions of Section 15.2, such payment or distribution shall be paid over to the holders of such Senior Debt or their representative or representatives or to the trustee or trustees under any indenture under which any instruments evidencing any of such Senior Debt may have been issued, ratably as aforesaid, for application to the payment of all Senior Debt remaining unpaid until all such Senior Debt shall have been paid in full, after giving effect to any concurrent payment or distribution (or provision therefor) to the holders of such Senior Debt.

15.4 Subrogation. Subject to the payment in full of all Senior Debt, the Holders of Securities (and any Coupons appertaining thereto) shall be subrogated to the rights of the holders of Senior Debt to receive payments or distributions of cash, property or securities of the Company applicable to the Senior Debt until all amounts owing on the Securities (and any Coupons appertaining thereto) shall be paid in full, and, as between the Company, its creditors other than holders of Senior Debt, and the Holders of Securities (and any Coupons appertaining thereto), no such payment or distribution made to the holders of Senior Debt by virtue of this Article XV which otherwise would have been made to the Holders of Securities (and any Coupons appertaining thereto) shall be deemed to be a payment by the Company on account of the Senior Debt, it being understood that the provisions of this Article XV are and are intended solely for the purpose of defining the relative rights of the Holders of Securities (and any Coupons appertaining thereto), on the one hand, and the holders of Senior Debt, on the other hand.

15.5 Obligation of Company Unconditional. Nothing herein shall impair, as between the Company and the Holders of Securities (and any Coupons appertaining thereto), the right of the Holder of any Security or any Coupon, which is absolute and unconditional, to receive payment of the principal (and premium, if any) and interest, if any, thereon in accordance with their terms, or shall prevent the Trustee or any Paying Agent from applying any moneys deposited with it hereunder to the payment of principal of (or premium, if any) or interest, if any, on any of the Securities (or any Coupons appertaining thereto), in each case except as otherwise provided in this Article XV, nor shall anything herein prevent any Holder of Securities (or any Coupons appertaining thereto) from exercising all remedies otherwise permitted by applicable law or hereunder upon default hereunder, subject to the rights, if any, of holders of Senior Debt as herein provided. Each and every holder of Securities (or any Coupons appertaining thereto) by acceptance thereof shall undertake and agree for the benefit of each holder of Senior Debt to execute, verify, deliver and file any proofs of claim, consents, assignments or other instruments which any holder of Senior Debt may at any time require in order to prove and realize upon any rights or claims pertaining to the Securities (or any Coupons appertaining thereto) and to effectuate the full benefit of the subordination contained in this Article XV.

Upon any payment or distribution of assets of the Company referred to in this Article XV, the Trustee and the Holders

EXHIBIT C

WASHINGTON MUTUAL, INC.

To

THE BANK OF NEW YORK,
as Trustee

FIRST SUPPLEMENTAL INDENTURE

Dated as of April 30, 2001

5.375% Junior Subordinated Deferrable Interest Debentures due 2041

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"Preferred Securities" has the meaning set forth in the Recitals.

"Preferred Security Certificate" has the meaning set forth in the Declaration.

"Property Trustee" has the meaning set forth in the Declaration.

"Pro Rata" has the meaning set forth in the Declaration.

"Purchase Agreement" has the meaning set forth in the Declaration.

"Quotation Agent" means (i) Lehman Brothers Inc. and its respective successors, provided that if Lehman Brothers Inc. ceases to be a Primary Treasury Dealer, the Company will substitute another Primary Treasury Dealer therefor, or (ii) any other Primary Treasury Dealer selected by the Company.

"Remarketing" means:

(i) as long as the Trust has not been liquidated, the operation of the procedures for remarketing specified in Section 6.6 of the Declaration; and

(ii) if the Trust has been liquidated, the operation of the procedures for remarketing specified in Article VIII.

"Remarketing Agent" has the meaning set forth in the Declaration.

"Remarketing Agreement" has the meaning set forth in the Declaration.

"Remarketing Date" has the meaning set forth in the Declaration.

"Remarketing Settlement Date" has the meaning set forth in the Declaration.

"Repurchase Price" has the meaning set forth in the Declaration.

"Repurchase Right" has the meaning set forth in the Declaration.

"Required Repurchase Date" has the meaning set forth in the Declaration.

"Reset Rate" has the meaning set forth in the Declaration.

"Senior Indebtedness" means the principal of, premium, if any, interest (including all interest accruing subsequent to the commencement of any bankruptcy or similar proceeding, whether or not a claim for post-petition interest is allowable as a claim in any such proceeding) on and all fees, costs, expenses and other amounts accrued or due on or in connection with:

(1) all indebtedness, obligations and other liabilities (contingent or otherwise) of the Company for borrowed money (including obligations of the Company in respect of overdrafts, foreign exchange contracts, currency exchange agreements, interest rate protection agreements, and any loans or advances from banks, whether or not evidenced by notes or similar instruments) or evidenced by bonds, debentures, notes or other instruments for the payment of money, or incurred in connection with the acquisition of any properties or assets (whether or not the recourse of the lender is to the whole of the assets of the Company or to only a portion thereof), other than any account payable or other accrued current liability or obligation to trade creditors incurred in the ordinary course of business;

(2) all obligations and liabilities (contingent or otherwise) in respect of leases of the Company required or permitted, in conformity with generally accepted accounting principles, to be accounted for as capitalized lease obligations on the balance sheet of the Company;

(3) all direct or indirect guaranties or similar agreements by the Company in respect of, and obligations or liabilities (contingent or otherwise) of the Company to purchase or otherwise acquire or otherwise assure a creditor against loss in respect of, indebtedness, obligations or liabilities of another Person of the kind described in clauses (1) and (2);

(4) any and all amendments, renewals, extensions and refundings of any indebtedness, obligation or liability of the kind described in clauses (1) through (3),

unless in the case of any particular indebtedness the instrument creating or evidencing the same or the assumption or guarantee thereof expressly provides that such indebtedness shall not be senior in right of payment to the Debentures or expressly provides that such Indebtedness is *pari passu* or junior to the Debentures.

"Special Event" has the meaning set forth in the Declaration.

"Special Record Date" has the meaning set forth in the Declaration.

"Trading Remarketing Event" has the meaning set forth in the Declaration.

"Trust" has the meaning set forth in the Recitals.

"Trust Securities" has the meaning set forth in the Recitals.

"Trustee" has the meaning set forth in the Recitals.

"Unit" has the meaning set forth in the Declaration.

"Warrant" has the meaning set forth in the Warrant Agreement.

"Warrant Agreement" has the meaning set forth in the Declaration.

"Warrant Requirements" has the meaning set forth in the Declaration.

ARTICLE II TERMS AND CONDITIONS OF THE DEBENTURES

Section 2.1 Designation and Principal Amount.

There is hereby authorized a series of Debt Securities designated the "5.375% Junior Subordinated Deferrable Interest Debentures due 2041", limited in aggregate principal amount to \$1,030,930,000 (or \$1,185,568,000 if the Initial Purchaser's option to purchase an additional \$150,000,000 of the Units is exercised in full).

Section 2.2 Maturity.

The Stated Maturity shall be July 1, 2041, unless reset in connection with a Remarketing to 60 days following the Remarketing Date.

Section 2.3 Global Debentures.

If distributed to holders of Trust Securities in connection with the involuntary or voluntary dissolution of the Trust:

(a) The Debentures in definitive form may be presented to the Trustee by the Property Trustee in exchange for a global security in an aggregate principal amount equal to all Outstanding Debentures (a "Global Debenture"). The Company upon any such presentation shall execute a Global Debenture in such aggregate principal amount and deliver the same to the Trustee for authentication and delivery in accordance with the Base Indenture and this First Supplemental Indenture. The Depository for the Debentures will be the The Depository Trust Company. The Global Debentures will be registered in the name of the Depository or its nominee, Cede & Co., and delivered by the Trustee to the Depository or a custodian appointed by the Depository for crediting to the accounts of its participants pursuant to the instructions of the Administrative Trustees. Payments on the Debentures issued as a Global Debenture will be made to the Depository or its nominee.

(b) If any Preferred Securities are held in definitive form, the Debentures in definitive form may be presented to the Trustee by the Property Trustee, and any Preferred Security Certificate which represents Preferred Securities other than Preferred Securities held by the depository for the Preferred Securities or its nominee ("Non Book-Entry Preferred Securities") will be deemed to represent beneficial ownership interests in Debentures presented to the Trustee by the Property Trustee having an aggregate principal amount equal to the aggregate stated liquidation

obligations of the sellers of such businesses).

Section 5.2 Additional Covenants Relating to the Trust.

For as long as the Preferred Securities remain outstanding, the Company will:

- (a) maintain, directly or indirectly, 100% ownership of the Common Securities; provided, however, that any permitted successor of the Company may succeed to the Company's ownership of such Common Securities;
- (b) cause the Trust to (a) remain a statutory business trust, except in connection with the distribution of the Debentures to the Holders, the redemption of all of the Securities, or certain mergers, consolidations, conversions or amalgamations, each as permitted by the Declaration, (b) not to voluntarily dissolve, wind up, liquidate or be terminated, except as permitted by this Declaration and (c) otherwise continue to be classified as a grantor trust for United States federal income tax purposes;
- (c) use its commercially reasonable efforts to ensure that the Trust will not be an "investment company" required to be registered under the Investment Company Act; and
- (d) not to take any action that would be reasonably likely to cause the Trust to be classified as an association or a publicly traded partnership taxable as a corporation for United States federal income tax purposes.

Section 5.3 Covenant in Event of Distribution of Debentures.

If the Debentures are to be distributed to the holders of the Preferred Securities upon dissolution of the Trust, the Company shall perform all acts and take all actions necessary to facilitate the distribution of the Debentures pursuant to Section 6.10 of the Declaration (including, without limitation, making the Debentures eligible for payment through The Depository Trust Company).

Section 5.4 Additional Covenant Relating to the Guarantee.

If an event of default under the Guarantee occurs and written notice of such event has been given to the Company, the Company shall be subject to the limitations and restrictions set forth in Section 5.1 relating to an Event of Default.

ARTICLE VI SUBORDINATION

Article 18 of the Base Indenture shall be superseded by this Article VI.

Section 6.1 Debentures Subordinated to Senior Indebtedness.

The Company covenants and agrees, and each Holder, by such Holder's acceptance thereof, likewise covenants and agrees, that the indebtedness represented by the Debentures and the payment of the principal of and interest on each and all of the Debentures is hereby expressly subordinated and

junior, to the extent and in the manner set forth and as set forth in this Section 6.1, in right of payment to the prior payment in full of all Senior Indebtedness.

(a) In the event of any distribution of assets of the Company upon any dissolution, winding up, liquidation or reorganization of the Company, whether in bankruptcy, insolvency, reorganization or receivership proceedings or upon an assignment for the benefit of creditors or any other marshalling of the assets and liabilities of the Company or otherwise, the holders of all Senior Indebtedness shall be entitled first to receive payment of the full amount due thereon in respect of all such Senior Indebtedness and all other amounts due or provision shall be made for such amount in cash, or other payments satisfactory to the holders of Senior Indebtedness, before the Holders are entitled to receive any payment or distribution of any character, whether in cash, securities or other property, on account of the principal of or interest on the indebtedness evidenced by the Debentures.

(b) In the event of any acceleration of maturity of the Debentures because of an Event of Default, unless the full amount due in respect of all Senior Indebtedness is paid in cash or other form of payment satisfactory to the holders of Senior Indebtedness, no payment shall be made by the Company with respect to the principal of or interest on the Debentures or to acquire any of the Debentures, and the Company shall give prompt written notice of such acceleration to such holders of Senior Indebtedness.

(c) In the event of and during the continuance of any default in payment of the principal of or interest on any Senior Indebtedness, unless all such payments due in respect of such Senior Indebtedness have been paid in full in cash or other payments satisfactory to the holders of Senior Indebtedness, no payment shall be made by the Company with respect to the principal of or interest on the Debentures or to acquire any of the Debentures. The Company shall give prompt written notice to the Trustee of any default under any Senior Indebtedness or under any agreement pursuant to which Senior Indebtedness may have been issued.

(d) During the continuance of any event of default with respect to any Senior Indebtedness, as such event of default is defined under any such Senior Indebtedness or in any agreement pursuant to which any Senior Indebtedness has been issued (other than a default in payment of the principal of or interest on any Senior Indebtedness), permitting the holder or holders of such Senior Indebtedness to accelerate the maturity thereof, no payment shall be made by the Company, directly or indirectly, with respect to principal of or interest on the Debentures for 179 days following notice in writing (a "Payment Blockage Notice") to the Company, from any holder or holders of such Senior Indebtedness or their representative or representatives or the trustee or trustees under any indenture or under which any instrument evidencing any such Senior Indebtedness may have been issued, that such an event of default has occurred and is continuing, unless such event of default has been cured or waived or such Senior Indebtedness has been paid in full; provided, however, if the maturity of such Senior Indebtedness is accelerated, no payment may be made on the Debentures until such Senior Indebtedness has been paid in full in cash or other payment satisfactory to the holders of such Senior Indebtedness or such acceleration (or termination, in the case of a lease) has been cured or waived.

For purposes of this Section 6.1(d), such Payment Blockage Notice shall be deemed to include notice of all other events of default under such indenture or instrument which are continuing at the time of the event of default specified in such Payment Blockage Notice. The provisions of this Section 6.1(d) shall apply only to one such Payment Blockage Notice given in any period of 365 days with respect to any issue of Senior Indebtedness, and no such continuing event of default that existed or was continuing on the date of delivery of any Payment Blockage Notice shall be, or shall be made, the basis for a subsequent Payment Blockage Notice.

(e) In the event that, notwithstanding the foregoing provisions of Sections 6.1(a), 6.1(b), 6.1(c) and 6.1(d), any payment on account of principal of or interest on the Debentures shall be made by or on behalf of the Company and received by the Trustee, by any Holder or by any Paying Agent (or, if

the Company is acting as its own Paying Agent, money for any such payment shall be segregated and held in trust):

(i) after the occurrence of an event specified in Section 6.1(a) or 6.1(b), then, unless all Senior Indebtedness is paid in full in cash, or provision shall be made therefor,

(ii) after the happening of an event of default of the type specified in Section 6.1(c) above, then, unless the amount of such Senior Indebtedness then due shall have been paid in full, or provision made therefor or such event of default shall have been cured or waived, or

(iii) after the happening of an event of default of the type specified in Section 6.1(d) above and delivery of a Payment Blockage Notice, then, unless such event of default shall have been cured or waived or the 179-day period specified in Section 6.1(d) shall have expired,

such payment (subject, in each case, to the provisions of Section 6.7 hereof) shall be held in trust for the benefit of, and shall be immediately paid over to, the holders of Senior Indebtedness or their representative or representatives or the trustee or trustees under any indenture under which any instruments evidencing any of the Senior Indebtedness may have been issued, as their interests may appear.

Section 6.2 Subrogation.

Subject to the payment in full of all Senior Indebtedness to which the indebtedness evidenced by the Debentures is in the circumstances subordinated as provided in Section 6.1 hereof, the Holders shall be subrogated to the rights of the holders of such Senior Indebtedness to receive payments or distributions of cash, property or securities of the Company applicable to such Senior Indebtedness until all amounts owing on the Debentures shall be paid in full, and, as between the Company, its creditors other than holders of such Senior Indebtedness, and the Holders, no such payment or distribution made to the holders of Senior Indebtedness by virtue of this Article which otherwise would have been made to the holders of the Debentures shall be deemed to be a payment by the Company on account of such Senior Indebtedness, provided that the provisions of this Article are and are intended solely for the purpose of defining the relative rights of the Holders, on the one hand, and the holders of Senior Indebtedness, on the other hand.

Section 6.3 Obligation of the Company is Absolute and Unconditional.

Nothing contained in this Article or elsewhere in this Indenture or in the Debentures is intended to or shall impair, as between the Company, its creditors other than the holders of Senior Indebtedness, and the Holders, the obligation of the Company, which is absolute and unconditional, to pay to the Holders the principal of and interest on the Debentures as and when the same shall become due and payable in

EXHIBIT D

GUARANTEE OF WASHINGTON MUTUAL, INC.

THIS GUARANTEE, dated as of November 1, 2007, is executed by Washington Mutual, Inc., a Washington corporation (the "**Guarantor**"), in favor of the beneficiaries set forth herein (this "**Guarantee**").

WHEREAS, Washington Mutual Bank, a federally chartered savings bank (the "**Company**"), New American Capital, Inc., a Delaware corporation ("**NACI**"), and Mercer Acquisition LLC, a Nevada limited liability company and wholly owned subsidiary of the Company ("**Acquisition**"), have entered into an Agreement for Merger, dated as of October 23, 2007, and NACI and Acquisition have entered into a Plan of Merger, dated as of October 23, 2007, which contemplate the merger of NACI with and into Acquisition (the "**Merger**") and have executed a Certificate of Merger in connection with the Merger to be filed with the Secretary of State of the State of Delaware on November 1, 2007 and an Articles of Merger in connection with the Merger to be filed with the Secretary of State of the State of Nevada on November 1, 2007;

WHEREAS, simultaneously with such merger or as soon as practicable thereafter Acquisition shall transfer all of its assets and liabilities to the Company (the "**Transfer**", and, together with the Merger, the "**Transaction**") pursuant to an Assumption and Assignment Agreement, dated as of October 23, 2007, between Acquisition and the Company;

WHEREAS, after the occurrence of the Transfer, the Company will have acquired all of the assets of Acquisition and assumed all of the obligations of Acquisition;

WHEREAS, in connection with the Transfer, the Company will, pursuant to the Second Supplemental Indenture dated as of November 1, 2007 (the "**Supplemental Indenture**") by and among the Company, NACI and Deutsche Bank Trust Company Americas, as trustee named therein (the "**Indenture Trustee**"), assume the obligations of NACI under that certain Indenture dated as of March 31, 2004 (as amended, the "**Indenture**"), and under the Securities (as defined in the Indenture), with such assumption of obligations to be effective as of the Transfer;

WHEREAS, in connection with the Transfer, the Company will, pursuant to the Supplemental Indenture, succeed to and be substituted for NACI as if the Company had been named in (a) that certain Guarantee Agreement dated as of March 31, 2004 between NACI and the Deutsche Bank Trust Company Americas, as guarantee trustee named therein (the "**Guarantee Trustee**") (the "**Guarantee Agreement**") and (b) that certain Amended and Restated Trust Agreement of CCB Capital Trust VI dated as of March 31, 2004 between NACI and Deutsche Bank Trust Company Americas, as the property trustee named therein (the "**Property Trustee**"), Deutsche Bank Trust Company Delaware, as the Delaware trustee named therein (the "**Delaware Trustee**") and the administrative trustees named therein (the "**Administrative Trustees**" and together with the Property Trustee and the Delaware Trustee, the "**Trust Trustees**") (the "**Trust Agreement**");

WHEREAS, the Company will, upon consummation of the Transaction, succeed to the obligations of NACI under that certain Fee Schedule and Notice of Acceptance dated as of March 31, 2004 (the “**Fee Agreement**”);

WHEREAS, each of the Indenture Trustee, the Guarantee Trustee, the Property Trustee, the Delaware Trustee and the Administrative Trustee are individually referred to herein as a “**Trustee**” and collectively as “**Trustees**”;

WHEREAS, Guarantor now wishes to guarantee the payment of the obligations and liabilities of the Company under the Indenture, the Securities issued thereunder, the Guarantee Agreement, the Trust Agreement and the Fee Agreement (collectively, the “**Covered Agreements**”) and to execute and deliver this Guarantee; and

WHEREAS, Guarantor will benefit, directly or indirectly, from the provision of this Guarantee.

NOW, THEREFORE, in consideration of the foregoing, and intending to be legally bound hereby, Guarantor agrees as follows:

Section 1. Guarantees.

(a) *Indenture Guarantees.* Subject to Section 2(c), Guarantor hereby irrevocably and unconditionally guarantees to each Holder, and to the Indenture Trustee and its successors and assigns, that: (i) the principal of and any premium and interest (including any Additional Interest) on all the Securities promptly will be paid in full when due, whether at the Interest Payment Date or Stated Maturity, by acceleration, call for redemption or otherwise, and interest on the overdue principal of and any premium and interest (including any Additional Interest) on all the Securities, if lawful, and all other obligations of the Company to the Holders and the Indenture Trustee under the Indenture and the Securities, will be promptly paid in full or performed, all in accordance with the applicable terms thereof, and (ii) in case of any extension of time of payment or renewal of any Securities or any of such other obligations, the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at the Interest Payment Date or Stated Maturity, by acceleration or otherwise.

(b) *Guarantee Agreement Guarantee.* Subject to Section 2(c), Guarantor hereby irrevocably and unconditionally guarantees to the Holders and to the Guarantee Trustee and its successors and assigns, the payment and performance of all obligations of the Company under the Guarantee Agreement, in accordance with the terms thereof.

(c) *Trust Agreement Guarantee.* Subject to Section 2(c), Guarantor hereby irrevocably and unconditionally guarantees to the Trust Trustees and their successors and assigns, and to all other beneficiaries of the Company’s obligations under the Trust Agreement, the payment and performance of all obligations of the Company under the Trust Agreement, in accordance with the terms thereof.

(d) *Fee Agreement Guarantee.* Subject to Section 2(c), Guarantor hereby irrevocably and unconditionally guarantees to Deutsche Bank Trust Company Americas the

payment and performance of all obligations of the Company under the Fee Agreement, in accordance with the terms thereof.

(e) The guaranteed obligations set forth in paragraphs (a) through (d) of this Section 1 are referred to collectively herein as the “**Guaranteed Obligations.**”

(f) Each capitalized term used in paragraphs (a) through (d) of this Section 1 and not otherwise defined in this Guarantee has the meaning assigned to it in the applicable Covered Agreement.

Section 2. Additional Provisions.

(a) Failing payment when due by the Company of any Guaranteed Obligation for whatever reason, Guarantor shall be obligated to pay the same immediately. Guarantor hereby agrees that its obligations hereunder shall be unconditional, irrespective of the validity, regularity or enforceability of the Indenture, the Securities, the Guarantee Agreement, the Trust Agreement or the Fee Agreement, as applicable, the absence of any action to enforce the same, any waiver or consent by any beneficiary of a Guaranteed Obligation with respect to any provisions hereof or of the applicable Covered Agreement, the recovery of any judgment against the Company, any action to enforce the same or any other circumstance which might otherwise constitute a legal or equitable discharge or defense of a guarantor. Guarantor hereby waives diligence, presentment, demand of payment, filing of claims with a court in the event of insolvency or bankruptcy of the Company, any right to require a proceeding first against the Company, protest, notice and all demands whatsoever and covenants that this Guarantee shall not be discharged except by complete performance of the obligations contained in the Covered Agreements.

(b) If any beneficiary of a Guaranteed Obligation or a Trustee is required by any court or otherwise to return to the Company or any custodian, trustee, liquidator or other similar official acting in relation to the Company, any amount paid by the Company to a Trustee or such beneficiary, this Guarantee, to the extent theretofore discharged, shall be reinstated in full force and effect.

(c) It is the intention of Guarantor that the obligations of Guarantor hereunder shall be, but not in excess of, the maximum amount permitted by applicable law. Accordingly, if the obligations in respect of this Guarantee would be annulled, avoided or subordinated to the creditors of Guarantor by a court of competent jurisdiction in a proceeding actually pending before such court as a result of a determination both that this Guarantee was made without fair consideration and, immediately after giving effect thereto, Guarantor was insolvent or unable to pay its debts as they mature or left with an unreasonably small capital, then the obligations of Guarantor under this Guarantee shall be reduced by such court if such reduction would result in the avoidance of such annulment, avoidance or subordination; provided, however, that any reduction pursuant to this paragraph shall be made in the smallest amount as is strictly necessary to reach such result. For purposes of this paragraph, “fair consideration,” “insolvency,” “unable to pay its debts as they mature,” “unreasonably small capital” and the effective times of reductions, if any, required by this paragraph shall be determined in accordance with applicable law.

(d) Guarantor shall be subrogated to all rights of the beneficiaries of this Guarantee against the Company in respect of any amounts paid by Guarantor pursuant to the provisions of this Guarantee or the applicable Covered Agreement; provided, however, that Guarantor shall not be entitled to enforce or exercise any right that it may acquire by way of subrogation as a result of payment under this Guarantee, if at the time of any such payment, any amounts are due and unpaid under this Guarantee.

(e) The obligation of Guarantor to make any payment hereunder may be satisfied by causing the Company to make such payment.

Section 3. Ranking.

(a) The Guaranteed Obligations of Guarantor with respect to the Indenture will be junior and subordinated to the Guarantor Senior Debt on the same basis as the Securities are junior and subordinated to Senior Debt (as defined in the Indenture). For the purposes of the foregoing sentence, the Indenture Trustee and the Holders (as such terms are defined in the Indenture) will have the right to receive and/or retain payments by Guarantor only at such times as they may receive and/or retain payments in respect of the Securities pursuant to the Indenture, including Article XII thereof. The Guaranteed Obligations of the Guarantor with respect to the Indenture do not constitute Guarantor Senior Debt of the Guarantor.

(b) The Guaranteed Obligations of Guarantor with respect to the Guarantee Agreement will be junior and subordinated to the Guarantor Senior Debt on the same basis as the Securities are junior and subordinated to Senior Debt (as defined in the Indenture). For the purposes of the foregoing sentence, the Holders (as such term is defined in the Guarantee Agreement) will have the right to receive and/or retain payments by Guarantor only at such times as they may receive and/or retain payments from the Company pursuant to the Guarantee Agreement, including Section 6.2 thereof. The Guaranteed Obligations of the Guarantor with respect to the Guarantee Agreement do not constitute Guarantor Senior Debt of the Guarantor.

Section 4. Release of Guarantor. Guarantor shall be released from all of its obligations under this Guarantee if:

(a) The Company or Guarantor has transferred all or substantially all of either of their properties and assets to any Person (whether by sale, merger or consolidation or otherwise), or has merged into or consolidated with another Person, pursuant to a transaction in compliance with the Covered Agreements and:

(1) the corporation to whom all or substantially all of the properties and assets of the Company or Guarantor are transferred, or with whom the Company or Guarantor has merged or consolidated, has expressly assumed in writing all the obligations of the Guarantor under this Guarantee; and

(2) such Person or any of such Affiliates (or such parent) shall be a corporation organized and existing under the laws of the United States or any State thereof or the District of Columbia and immediately before and immediately after giving effect to such transaction, no event of default under any of the Covered Agreements, and

no event or condition which, after notice or lapse of time or both, would become an event of default, shall have occurred and be continuing;

(b) Guarantor liquidates (other than pursuant to any bankruptcy law), provided that if a Person and its Affiliates, if any, shall acquire all or substantially all of the assets of Guarantor upon such liquidation, Guarantor shall liquidate only if (i) the Person and each such Affiliate (or the common corporate parent of such Person and its Affiliates, if such Person and its Affiliates are wholly owned by such parent) which acquire or will acquire all or a portion of the assets of Guarantor shall expressly assume in writing all the obligations of Guarantor under this Guarantee and (ii) such Person or any of such Affiliates (or such parent) shall be a corporation organized and existing under the laws of the United States or any State thereof or the District of Columbia and immediately after giving effect to such transaction, no event of default under any of the Covered Agreements, and no event or condition which, after notice or lapse of time or both, would become an event of default, shall have occurred and be continuing; or

(c) The Company ceases for any reason to be a “wholly owned subsidiary” of Guarantor (as such term is defined in Rule 1-02(aa) of the Regulation S-X promulgated by the SEC).

Upon any assumption of this Guarantee by any Person pursuant to this Section 4, such Person may exercise every right and power of Guarantor under this Guarantee with the same effect as if such successor corporation had been named as Guarantor herein, and all the obligations of Guarantor hereunder shall terminate.

Section 5. Additional Definitions.

(a) “**Affiliate**” of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, “control” when used with respect to any specified Person means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms “controlling” and “controlled” have meanings correlative to the foregoing.

(b) “**Guarantor Debt**” means, with respect to Guarantor, whether recourse as to all or a portion of the assets of Guarantor, whether currently existing or hereafter incurred and whether or not contingent and without duplication, (i) every obligation of Guarantor for money borrowed; (ii) every obligation of Guarantor evidenced by bonds, debentures, notes or other similar instruments, including obligations incurred in connection with the acquisition of property, assets or businesses; (iii) every reimbursement obligation of Guarantor with respect to letters of credit, bankers’ acceptances or similar facilities issued for the account of Guarantor; (iv) every obligation of Guarantor issued or assumed as the deferred purchase price of property or services (but excluding trade accounts payable or other accrued liabilities arising in the ordinary course of business); (v) every capital lease obligation of Guarantor; (vi) all indebtedness of Guarantor, whether incurred on or prior to the date of this Guarantee or thereafter incurred, for claims in respect of derivative products, including interest rate, foreign exchange rate and commodity forward contracts, options and swaps and similar arrangements; (vii) every

obligation of the type referred to in clauses (i) through (vi) of another Person and all dividends of another Person the payment of which, in either case, Guarantor has guaranteed or is responsible or liable for, directly or indirectly, as obligor or otherwise; and (viii) any renewals, extensions, refundings, amendments or modifications of any obligation of the type referred to in clauses (i) through (vii).

(c) **“Guarantor Senior Debt”** means the principal of and any premium and interest on (including interest accruing on or after the filing of any petition in bankruptcy or for reorganization relating to the Guarantor, whether or not such claim for post-petition interest is allowed in such proceeding) all Debt of the Guarantor, whether incurred on or prior to the date of this Indenture or thereafter incurred, unless it is provided in the instrument creating or evidencing the same or pursuant to which the same is outstanding, that such obligations are not superior in right of payment to the Securities; *provided, however*, that if the Guarantor is subject to the regulation and supervision of an “appropriate Federal banking agency” within the meaning of 12 U.S.C. 1813(q), the Guarantor shall have received the approval of such appropriate Federal banking agency prior to issuing any such obligation if not otherwise generally approved; *provided further*, that Guarantor Senior Debt shall not include any other debt securities, and guarantees in respect of such debt securities, issued to any trust other than the Trust (or a trustee of such trust), partnership or other entity affiliated with the Guarantor that is a financing vehicle of the Guarantor (a “financing entity”), in connection with the issuance by such financing entity of equity securities or other securities that are treated as equity capital for regulatory capital purposes guaranteed by the Guarantor pursuant to an instrument that ranks pari passu with or junior in right of payment to the Indenture, including, without limitation, the debt securities issued under the Indenture, dated November 28, 2001, between NACI and Wilmington Trust Company, as trustee, including, without limitation, the debt securities issued under the Indenture, dated March 15, 2002, between NACI and Wells Fargo Bank, National Association, as trustee, including, without limitation, the debt securities issued under the Indenture, dated March 26, 2002, between NACI and State Street Bank and Trust Company of Connecticut, National Association, as trustee, including, without limitation, the debt securities issued under the Indenture, dated September 25, 2003, between NACI and Wilmington Trust Company, as trustee, including, without limitation, the debt securities issued under the Indenture, dated December 19, 2003, between NACI and Wilmington Trust Company, as trustee.

(d) **“Person”** means any individual, corporation, partnership, joint venture, trust, unincorporated organization or government or any agency or political subdivision thereof or any other entity of whatever nature.

Section 6. Miscellaneous.

(a) *Governing Law.* THIS AGREEMENT SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH AND GOVERNED BY THE LAWS OF THE STATE OF NEW YORK.

(b) *Interpretation.* Except as otherwise set forth herein, capitalized terms used herein without definition herein have the meanings ascribed thereto in the applicable Covered Agreement.

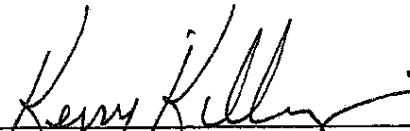
(c) *Headings.* The Section headings of this Guarantee have been inserted for convenience of reference only, are not to be considered a part of this Guarantee and shall in no way modify or restrict any of the terms or provisions hereof.

[Signature Page Follows]

IN WITNESS WHEREOF, the undersigned has executed this Guarantee as of the date and year first above written.

GUARANTOR:

WASHINGTON MUTUAL, INC.

By: 
Name: Kerry Killinger
Title: Chairman and CEO

CCB VI



JUNIOR SUBORDINATED INDENTURE

between

COMMERCIAL CAPITAL BANCORP, INC.

and

DEUTSCHE BANK TRUST COMPANY AMERICAS,
as Trustee

Dated as of March 31, 2004



(b) Upon presentation of any Security redeemed in part only, the Company shall execute and the Trustee shall authenticate and deliver to the Holder thereof, at the expense of the Company, a new Security or Securities, of authorized denominations, in aggregate principal amount equal to the unredeemed portion of the Security so presented and having the same Original Issue Date, Stated Maturity and terms.

(c) If any Security called for redemption shall not be so paid upon surrender thereof for redemption, the principal of and any premium on such Security shall, until paid, bear interest from the Redemption Date at the rate prescribed therefor in the Security.

ARTICLE XII

Subordination of Securities

SECTION 12.1. *Securities Subordinate to Senior Debt.*

The Company covenants and agrees, and each Holder of a Security, by its acceptance thereof, likewise covenants and agrees, that, to the extent and in the manner hereinafter set forth in this Article XII, the payment of the principal of and any premium and interest (including any Additional Interest) on each and all of the Securities are hereby expressly made subordinate and subject in right of payment to the prior payment in full of all Senior Debt.

SECTION 12.2. *No Payment When Senior Debt in Default; Payment Over of Proceeds Upon Dissolution, Etc.*

(a) In the event and during the continuation of any default by the Company in the payment of any principal of or any premium or interest on any Senior Debt (following any grace period, if applicable) when the same becomes due and payable, whether at maturity or at a date fixed for prepayment or by declaration of acceleration or otherwise, then, upon written notice of such default to the Company by the holders of such Senior Debt or any trustee therefor, unless and until such default shall have been cured or waived or shall have ceased to exist, no direct or indirect payment (in cash, property, securities, by set-off or otherwise) shall be made or agreed to be made on account of the principal of or any premium or interest (including any Additional Interest) on any of the Securities, or in respect of any redemption, repayment, retirement, purchase or other acquisition of any of the Securities.

(b) In the event of a bankruptcy, insolvency or other proceeding described in clause (d) or (e) of the definition of Event of Default (each such event, if any, herein sometimes referred to as a "*Proceeding*"), all Senior Debt (including any interest thereon accruing after the commencement of any such proceedings) shall first be paid in full before any payment or distribution, whether in cash, securities or other property, shall be made to any Holder of any of the Securities on account thereof. Any payment or distribution, whether in cash, securities or other property (other than securities of the Company or any other entity provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in these subordination provisions with respect to the indebtedness evidenced by the Securities, to the payment of all Senior Debt at the time outstanding and to any securities issued in respect thereof under any such plan of reorganization or readjustment), which would otherwise

(but for these subordination provisions) be payable or deliverable in respect of the Securities shall be paid or delivered directly to the holders of Senior Debt in accordance with the priorities then existing among such holders until all Senior Debt (including any interest thereon accruing after the commencement of any Proceeding) shall have been paid in full.

(c) In the event of any Proceeding, after payment in full of all sums owing with respect to Senior Debt, the Holders of the Securities, together with the holders of any obligations of the Company ranking on a parity with the Securities, shall be entitled to be paid from the remaining assets of the Company the amounts at the time due and owing on account of unpaid principal of and any premium and interest (including any Additional Interest) on the Securities and such other obligations before any payment or other distribution, whether in cash, property or otherwise, shall be made on account of any capital stock or any obligations of the Company ranking junior to the Securities and such other obligations. If, notwithstanding the foregoing, any payment or distribution of any character or any security, whether in cash, securities or other property (other than securities of the Company or any other entity provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in these subordination provisions with respect to the indebtedness evidenced by the Securities, to the payment of all Senior Debt at the time outstanding and to any securities issued in respect thereof under any such plan of reorganization or readjustment) shall be received by the Trustee or any Holder in contravention of any of the terms hereof and before all Senior Debt shall have been paid in full, such payment or distribution or security shall be received in trust for the benefit of, and shall be paid over or delivered and transferred to, the holders of the Senior Debt at the time outstanding in accordance with the priorities then existing among such holders for application to the payment of all Senior Debt remaining unpaid, to the extent necessary to pay all such Senior Debt (including any interest thereon accruing after the commencement of any Proceeding) in full. In the event of the failure of the Trustee or any Holder to endorse or assign any such payment, distribution or security, each holder of Senior Debt is hereby irrevocably authorized to endorse or assign the same.

(d) The Trustee and the Holders, at the expense of the Company, shall take such reasonable action (including the delivery of this Indenture to an agent for any holders of Senior Debt or consent to the filing of a financing statement with respect hereto) as may, in the opinion of counsel designated by the holders of a majority in principal amount of the Senior Debt at the time outstanding, be necessary or appropriate to assure the effectiveness of the subordination effected by these provisions.

(e) The provisions of this Section 12.2 shall not impair any rights, interests, remedies or powers of any secured creditor of the Company in respect of any security interest the creation of which is not prohibited by the provisions of this Indenture.

(f) The securing of any obligations of the Company, otherwise ranking on a parity with the Securities or ranking junior to the Securities, shall not be deemed to prevent such obligations from constituting, respectively, obligations ranking on a parity with the Securities or ranking junior to the Securities.

GUARANTEE OF WASHINGTON MUTUAL, INC.

THIS GUARANTEE, dated as of November 1, 2007, is executed by Washington Mutual, Inc., a Washington corporation (the "**Guarantor**"), in favor of the beneficiaries set forth herein (this "**Guarantee**").

WHEREAS, Washington Mutual Bank, a federally chartered savings bank (the "**Company**"), New American Capital, Inc., a Delaware corporation ("**NACI**"), and Mercer Acquisition LLC, a Nevada limited liability company and wholly owned subsidiary of the Company ("**Acquisition**"), have entered into an Agreement for Merger, dated as of October 23, 2007, and NACI and Acquisition have entered into a Plan of Merger, dated as of October 23, 2007, which contemplate the merger of NACI with and into Acquisition (the "**Merger**") and have executed a Certificate of Merger in connection with the Merger to be filed with the Secretary of State of the State of Delaware on November 1, 2007 and an Articles of Merger in connection with the Merger to be filed with the Secretary of State of the State of Nevada on November 1, 2007;

WHEREAS, simultaneously with such merger or as soon as practicable thereafter Acquisition shall transfer all of its assets and liabilities to the Company (the "**Transfer**", and, together with the Merger, the "**Transaction**") pursuant to an Assumption and Assignment Agreement, dated as of October 23, 2007, between Acquisition and the Company;

WHEREAS, after the occurrence of the Transfer, the Company will have acquired all of the assets of Acquisition and assumed all of the obligations of Acquisition;

WHEREAS, in connection with the Transfer, the Company will, pursuant to the Second Supplemental Indenture dated as of November 1, 2007 (the "**Supplemental Indenture**") by and among the Company, NACI and Wilmington Trust Company, as trustee named therein, assume all of the obligations of NACI under that certain Indenture dated as of September 25, 2003 (as amended, the "**Indenture**"), and under the Debt Securities (as defined in the Indenture), with such assumption of obligations to be effective as of the Transfer;

WHEREAS, in connection with the Transfer, the Company will, pursuant to the Supplemental Indenture, succeed to and be substituted for NACI as if the Company had been named in (a) that certain Guarantee Agreement dated as of September 25, 2003 between NACI and Wilmington Trust Company, as trustee named therein (the "**Guarantee Agreement**") and (b) that certain Amended and Restated Declaration of Trust of CCB Capital Trust IV dated as of September 25, 2003 between NACI and Wilmington Trust Company, as trustee named therein (the "**Trust Agreement**"). As used herein, the term "**Trustee**" shall mean Wilmington Trust Company in its capacity as trustee under the Indenture, the Guarantee Agreement, and the Trust Agreement, as the context requires, and in its individual capacity;

WHEREAS, the Company will, upon consummation of the Transaction, succeed to the obligations of NACI under that certain Fee Agreement dated as of September 25, 2003 by and between NACI and Wilmington Trust Company (the "**Fee Agreement**");

WHEREAS, Guarantor now wishes to guarantee the payment of the obligations and liabilities of the Company under the Indenture, the Debt Securities issued thereunder, the Guarantee Agreement, the Trust Agreement and the Fee Agreement (collectively, the “Covered Agreements”) and to execute and deliver this Guarantee; and

WHEREAS, Guarantor will benefit, directly or indirectly, from the provision of this Guarantee.

NOW, THEREFORE, in consideration of the foregoing, and intending to be legally bound hereby, Guarantor agrees as follows:

Section 1. Guarantees.

(a) *Indenture Guarantees.* Subject to Section 2(c), Guarantor hereby irrevocably and unconditionally guarantees to each Securityholder, and to the Trustee and its successors and assigns, that: (i) the principal of and premium, if any, and interest on all of the Debt Securities promptly will be paid in full when due, whether at an Interest Payment Date or the Maturity Date, by acceleration, call for redemption or otherwise, and interest on the overdue principal of and premium, if any, and interest on all of the Debt Securities, if lawful, and all other obligations of the Company to the Securityholders and the Trustee under the Indenture and the Debt Securities, will be promptly paid in full or performed, all in accordance with the applicable terms thereof (including that all of the covenants and conditions of the Indenture and the Debt Securities to be performed or observed by the Company under the Indenture and the Debt Securities will be duly and punctually performed or observed), and (ii) in case of any extension of time of payment or renewal of any Debt Securities or any of such other obligations, the same will be promptly paid in full when due or performed in accordance with the terms of the extension or renewal, whether at an Interest Payment Date or the Maturity Date, by acceleration or otherwise.

(b) *Guarantee Agreement Guarantee.* Subject to Section 2(c), Guarantor hereby irrevocably and unconditionally guarantees to the Securityholders and to the Trustee and its successors and assigns, the payment and performance of all obligations of the Company under the Guarantee Agreement, in accordance with the terms thereof.

(c) *Trust Agreement Guarantee.* Subject to Section 2(c), Guarantor hereby irrevocably and unconditionally guarantees to the Trustee and its successors and assigns, and to all other beneficiaries of the Company’s obligations under the Trust Agreement, the payment and performance of all obligations of the Company under the Trust Agreement, in accordance with the terms thereof.

(d) *Fee Agreement Guarantee.* Subject to Section 2(c), Guarantor hereby irrevocably and unconditionally guarantees to Wilmington Trust Company the payment and performance of all obligations of the Company under the Fee Agreement, in accordance with the terms thereof.

(e) The guaranteed obligations set forth in paragraphs (a) through (d) of this Section 1 are referred to collectively herein as the “**Guaranteed Obligations.**”

(f) Each capitalized term used in paragraphs (a) through (d) of this Section 1 and not otherwise defined in this Guarantee has the meaning assigned to it in the applicable Covered Agreement.

Section 2. Additional Provisions.

(a) Failing payment when due by the Company of any Guaranteed Obligation for whatever reason, Guarantor shall be obligated to pay the same immediately. Guarantor hereby agrees that its obligations hereunder shall be unconditional, irrespective of the validity, regularity or enforceability of the Indenture, the Debt Securities, the Guarantee Agreement, the Trust Agreement or the Fee Agreement, as applicable, the absence of any action to enforce the same, any waiver or consent by any beneficiary of a Guaranteed Obligation with respect to any provisions hereof or of the applicable Covered Agreement, the recovery of any judgment against the Company, any action to enforce the same or any other circumstance which might otherwise constitute a legal or equitable discharge or defense of a guarantor. Guarantor hereby waives diligence, presentment, demand of payment, filing of claims with a court in the event of insolvency or bankruptcy of the Company, any right to require a proceeding first against the Company, protest, notice and all demands whatsoever and covenants that this Guarantee shall not be discharged except by complete performance of the obligations contained in the Covered Agreements.

(b) If any beneficiary of a Guaranteed Obligation or the Trustee is required by any court or otherwise to return to the Company or any custodian, trustee, liquidator or other similar official acting in relation to the Company, any amount paid by the Company to the Trustee or such beneficiary, this Guarantee, to the extent theretofore discharged, shall be reinstated in full force and effect.

(c) It is the intention of Guarantor that the obligations of Guarantor hereunder shall be, but not in excess of, the maximum amount permitted by applicable law. Accordingly, if the obligations in respect of this Guarantee would be annulled, avoided or subordinated to the creditors of Guarantor by a court of competent jurisdiction in a proceeding actually pending before such court as a result of a determination both that this Guarantee was made without fair consideration and, immediately after giving effect thereto, Guarantor was insolvent or unable to pay its debts as they mature or left with an unreasonably small capital, then the obligations of Guarantor under this Guarantee shall be reduced by such court if such reduction would result in the avoidance of such annulment, avoidance or subordination; provided, however, that any reduction pursuant to this paragraph shall be made in the smallest amount as is strictly necessary to reach such result. For purposes of this paragraph, "fair consideration," "insolvency," "unable to pay its debts as they mature," "unreasonably small capital" and the effective times of reductions, if any, required by this paragraph shall be determined in accordance with applicable law.

(d) Guarantor shall be subrogated to all rights of the beneficiaries of this Guarantee against the Company in respect of any amounts paid by Guarantor pursuant to the provisions of this Guarantee or the applicable Covered Agreement; provided, however, that Guarantor shall not be entitled to enforce or exercise any right that it may acquire by way of

subrogation as a result of payment under this Guarantee, if at the time of any such payment, any amounts are due and unpaid under this Guarantee.

(e) The obligation of Guarantor to make any payment hereunder may be satisfied by causing the Company to make such payment.

Section 3. Ranking.

(a) The Guaranteed Obligations of Guarantor with respect to the Indenture will be junior and subordinated to the Guarantor Senior Debt on the same basis as the Debt Securities are junior and subordinated to Senior Indebtedness (as defined in the Indenture). For the purposes of the foregoing sentence, the Trustee and the Securityholders (as such terms are defined in the Indenture) will have the right to receive and/or retain payments by Guarantor only at such times as they may receive and/or retain payments in respect of the Debt Securities pursuant to the Indenture, including Article XV thereof. The Guaranteed Obligations of the Guarantor with respect to the Indenture do not constitute Guarantor Senior Debt of the Guarantor.

(b) The Guaranteed Obligations of Guarantor with respect to the Guarantee Agreement will be junior and subordinated to the Guarantor Senior Debt on the same basis as the Debt Securities are junior and subordinated to Senior Indebtedness (as defined in the Indenture). For the purposes of the foregoing sentence, the Holders (as such term is defined in the Guarantee Agreement) will have the right to receive and/or retain payments by Guarantor only at such times as they may receive and/or retain payments from the Company pursuant to the Guarantee Agreement, including Section 5.2 thereof. The Guaranteed Obligations of the Guarantor with respect to the Guarantee Agreement do not constitute Guarantor Senior Debt of the Guarantor.

Section 4. Release of Guarantor. Guarantor shall be released from all of its obligations under this Guarantee if:

(a) The Company or Guarantor has transferred all or substantially all of either of their properties and assets to any Person (whether by sale, merger or consolidation or otherwise), or has merged into or consolidated with another Person, pursuant to a transaction in compliance with the Covered Agreements and:

(1) the corporation to whom all or substantially all of the properties and assets of the Company or Guarantor are transferred, or with whom the Company or Guarantor has merged or consolidated, has expressly assumed in writing all the obligations of the Guarantor under this Guarantee; and

(2) immediately before and immediately after giving effect to such transaction, no event of default under any of the Covered Agreements, and no event or condition which, after notice or lapse of time or both, would become an event of default, shall have occurred and be continuing;

(b) Guarantor liquidates (other than pursuant to any bankruptcy law), provided that if a Person and its Affiliates, if any, shall acquire all or substantially all of the assets of Guarantor upon such liquidation, Guarantor shall liquidate only if (i) the Person and

each such Affiliate (or the common corporate parent of such Person and its Affiliates, if such Person and its Affiliates are wholly owned by such parent) which acquire or will acquire all or a portion of the assets of Guarantor shall expressly assume in writing all the obligations of Guarantor under this Guarantee and (ii) such Person or any of such Affiliates (or such parent) shall be a corporation organized and existing under the laws of the United States or any State thereof or the District of Columbia and immediately after giving effect to such transaction, no event of default under any of the Covered Agreements, and no event or condition which, after notice or lapse of time or both, would become an event of default, shall have occurred and be continuing; or

(c) The Company ceases for any reason to be a “wholly owned subsidiary” of Guarantor (as such term is defined in Rule 1-02(aa) of the Regulation S-X promulgated by the SEC).

Upon any assumption of this Guarantee by any Person pursuant to this Section 4, such Person may exercise every right and power of Guarantor under this Guarantee with the same effect as if such successor corporation had been named as Guarantor herein, and all the obligations of Guarantor hereunder shall terminate.

Section 5. Additional Definitions.

(a) “**Affiliate**” of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, “control” when used with respect to any specified Person means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms “controlling” and “controlled” have meanings correlative to the foregoing.

(b) “**Guarantor Debt**” means with respect to Guarantor, whether recourse as to all or a portion of the assets of Guarantor and whether or not contingent, (i) every obligation of Guarantor for money borrowed; (ii) every obligation of Guarantor evidenced by bonds, debentures, notes or other similar instruments, including obligations incurred in connection with the acquisition of property, assets or businesses; (iii) every reimbursement obligation of Guarantor with respect to letters of credit, bankers’ acceptances or similar facilities issued for the account of Guarantor; (iv) every obligation of Guarantor issued or assumed as the deferred purchase price of property or services (but excluding trade accounts payable or accrued liabilities arising in the ordinary course of business); (v) every capital lease obligation of Guarantor; (vi) all indebtedness of Guarantor whether incurred on or prior to the date of this Guarantee or thereafter incurred, for claims in respect of derivative products, including interest rate, foreign exchange rate and commodity forward contracts, options and swaps and similar arrangements; and (vii) every obligation of the type referred to in clauses (i) through (vi) of another Person and all dividends of another Person the payment of which, in either case, Guarantor has guaranteed or is responsible or liable for, directly or indirectly, as obligor or otherwise.

(c) “**Guarantor Senior Debt**” means (i) the principal, premium, if any, and interest in respect of (A) Guarantor Debt for money borrowed and (B) Guarantor Debt evidenced by securities, debentures, notes, bonds or other similar instruments issued by the

Guarantor, (ii) all capital lease obligations of the Guarantor, (iii) all obligations of the Guarantor issued or assumed as the deferred purchase price of property, all conditional sale obligations of the Guarantor and all obligations of the Guarantor under any title retention agreement (but excluding trade accounts payable arising in the ordinary course of business), (iv) all obligations of the Guarantor for the reimbursement of any letter of credit, any banker's acceptance, any security purchase facility, any repurchase agreement or similar arrangement, any interest rate swap, any other hedging arrangement, any obligation under options or any similar credit or other transaction, (v) all obligations of the type referred to in clauses (i) through (iv) above of other Persons for the payment of which the Guarantor is responsible or liable as obligor, guarantor or otherwise and (vi) all obligations of the type referred to in clauses (i) through (v) above of other Persons secured by any lien on any property or asset of the Guarantor (whether or not such obligation is assumed by the Guarantor), whether incurred on or prior to the date of this Guarantee or thereafter incurred, unless, with the prior approval of the OTS if not otherwise generally approved, it is provided in the instrument creating or evidencing the same or pursuant to which the same is outstanding that such obligations are not superior or are *pari passu* in right of payment to the Debt Securities; provided, however, that Guarantor Senior Indebtedness shall not include (A) any debt securities issued to any trust other than the Trust (as defined in the Indenture) (or a trustee of such trust) that is a financing vehicle of the Guarantor (a "financing entity"), in connection with the issuance by such financing entity of equity or other securities in transactions substantially similar in structure to the transactions contemplated hereunder and in the Trust Agreement or (B) any guarantees of the Guarantor in respect of the equity or other securities of any financing entity referred to in clause (A) above.

(d) "Person" means any individual, corporation, partnership, joint venture, trust, unincorporated organization or government or any agency or political subdivision thereof or any other entity of whatever nature.

Section 6. Miscellaneous.

(a) *Governing Law.* THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK.

(b) *Interpretation.* Except as otherwise set forth herein, capitalized terms used herein without definition herein have the meanings ascribed thereto in the applicable Covered Agreement.

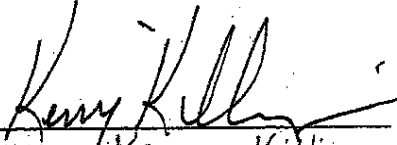
(c) *Headings.* The Section headings of this Guarantee have been inserted for convenience of reference only, are not to be considered a part of this Guarantee and shall in no way modify or restrict any of the terms or provisions hereof.

[Signature Page Follows]

IN WITNESS WHEREOF, the undersigned has executed this Guarantee as of the date and year first above written.

GUARANTOR:

WASHINGTON MUTUAL, INC.

By: 
Name: Kerry Killinger
Title: Chairman and CEO

COMMERCIAL CAPITAL BANCORP, INC.

as Issuer

INDENTURE

Dated as of September 25, 2003

WILMINGTON TRUST COMPANY

as Trustee

FLOATING RATE JUNIOR SUBORDINATED DEBT SECURITIES DUE 2033

holder on or after the respective due date (or Optional Redemption Date or Special Redemption Date (as the case may be)) specified in the Debt Securities.

ARTICLE XV
SUBORDINATION OF DEBT SECURITIES

Section 15.01 Agreement to Subordinate.

The Company covenants and agrees, and each holder of Debt Securities issued hereunder and under any supplemental indenture (the "Additional Provisions") by such holder's acceptance thereof likewise covenants and agrees, that all Debt Securities shall be issued subject to the provisions of this Article XV; and each holder of a Debt Security, whether upon original issue or upon transfer or assignment thereof, accepts and agrees to be bound by such provisions.

The payment by the Company of the payments due on all Debt Securities issued hereunder and under any Additional Provisions shall, to the extent and in the manner hereinafter set forth, be subordinated and junior in right of payment to the prior payment in full of all Senior Indebtedness of the Company, whether outstanding at the date of this Indenture or thereafter incurred.

No provision of this Article XV shall prevent the occurrence of any default or Event of Default hereunder.

Section 15.02 Default on Senior Indebtedness.

In the event and during the continuation of any default by the Company in the payment of principal, premium, interest or any other payment due on any Senior Indebtedness of the Company following any applicable grace period, or in the event that the maturity of any Senior Indebtedness of the Company has been accelerated because of a default, and such acceleration has not been rescinded or canceled and such Senior Indebtedness has not been paid in full, then, in either case, no payment shall be made by the Company with respect to the payments due on the Debt Securities.

In the event that, notwithstanding the foregoing, any payment shall be received by the Trustee when such payment is prohibited by the preceding paragraph of this Section, such payment shall, subject to Section 15.06, be held in trust for the benefit of, and shall be paid over or delivered to, the holders of Senior Indebtedness or their respective representatives, or to the trustee or trustees under any indenture pursuant to which any of such Senior Indebtedness may have been issued, as their respective interests may appear, but only to the extent that the holders of the Senior Indebtedness (or their representative or representatives or trustee) notify the Trustee in writing within 90 days of such payment of the amounts then due and owing on the Senior Indebtedness and only the amounts specified in such notice to the Trustee shall be paid to the holders of Senior Indebtedness.

Section 15.03 Liquidation; Dissolution; Bankruptcy.

Upon any payment by the Company or distribution of assets of the Company of any kind or character, whether in cash, property or securities, to creditors upon any dissolution,

winding-up, liquidation or reorganization of the Company, whether voluntary or involuntary or in bankruptcy, insolvency, receivership or other proceedings, all amounts due upon all Senior Indebtedness of the Company shall first be paid in full, or payment thereof provided for in money in accordance with its terms, before any payment is made by the Company on the Debt Securities; and upon any such dissolution, winding-up, liquidation or reorganization, any payment by the Company, or distribution of assets of the Company of any kind or character, whether in cash, property or securities, to which the Securityholders or the Trustee would be entitled to receive from the Company, except for the provisions of this Article XV, shall be paid by the Company, or by any receiver, trustee in bankruptcy, liquidating trustee, agent or other Person making such payment or distribution, or by the Securityholders or by the Trustee under this Indenture if received by them or it, directly to the holders of Senior Indebtedness of the Company (pro rata to such holders on the basis of the respective amounts of Senior Indebtedness held by such holders, as calculated by the Company) or their representative or representatives, or to the trustee or trustees under any indenture pursuant to which any instruments evidencing such Senior Indebtedness may have been issued, as their respective interests may appear, to the extent necessary to pay such Senior Indebtedness in full, in money or money's worth, after giving effect to any concurrent payment or distribution to or for the holders of such Senior Indebtedness, before any payment or distribution is made to the Securityholders.

In the event that, notwithstanding the foregoing, any payment or distribution of assets of the Company of any kind or character, whether in cash, property or securities, prohibited by the foregoing shall be received by the Trustee before all Senior Indebtedness of the Company is paid in full, or provision is made for such payment in money in accordance with its terms, such payment or distribution shall be held in trust for the benefit of, and shall be paid over or delivered to, the holders of such Senior Indebtedness or their representative or representatives, or to the trustee or trustees under any indenture pursuant to which any instruments evidencing such Senior Indebtedness may have been issued, as their respective interests may appear, as calculated by the Company, for application to the payment of all Senior Indebtedness of the Company remaining unpaid to the extent necessary to pay such Senior Indebtedness in full in money in accordance with its terms, after giving effect to any concurrent payment or distribution to or for the benefit of the holders of such Senior Indebtedness.

For purposes of this Article XV, the words "cash, property or securities" shall not be deemed to include shares of stock of the Company as reorganized or readjusted, or securities of the Company or any other corporation provided for by a plan of reorganization or readjustment, the payment of which is subordinated at least to the extent provided in this Article XV with respect to the Debt Securities to the payment of all Senior Indebtedness of the Company, that may at the time be outstanding, provided, that (a) such Senior Indebtedness is assumed by the new corporation, if any, resulting from any such reorganization or readjustment, and (b) the rights of the holders of such Senior Indebtedness are not, without the consent of such holders, altered by such reorganization or readjustment. The consolidation of the Company with, or the merger of the Company into, another corporation or the liquidation or dissolution of the Company following the conveyance, transfer or other disposition of its property as an entirety, or substantially as an entirety, to another corporation upon the terms and conditions provided for in Article XI of this Indenture shall not be deemed a dissolution, winding-up, liquidation or reorganization for the purposes of this Section if such other corporation shall, as a part of such consolidation, merger, conveyance or transfer, comply with the conditions stated in Article XI of

this Indenture. Nothing in Section 15.02 or in this Section shall apply to claims of, or payments to, the Trustee under or pursuant to Section 6.06 of this Indenture.

Section 15.04 Subrogation.

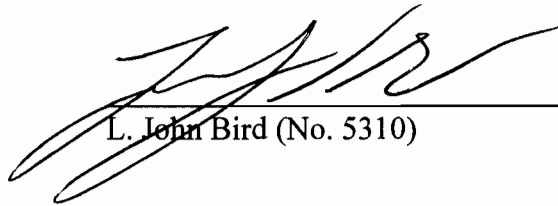
Subject to the payment in full of all Senior Indebtedness of the Company, the Securityholders shall be subrogated to the rights of the holders of such Senior Indebtedness to receive payments or distributions of cash, property or securities of the Company applicable to such Senior Indebtedness until all payments due on the Debt Securities shall be paid in full; and, for the purposes of such subrogation, no payments or distributions to the holders of such Senior Indebtedness of any cash, property or securities to which the Securityholders or the Trustee would be entitled except for the provisions of this Article XV, and no payment over pursuant to the provisions of this Article XV to or for the benefit of the holders of such Senior Indebtedness by Securityholders or the Trustee, shall, as between the Company, its creditors other than holders of Senior Indebtedness of the Company, and the holders of the Debt Securities be deemed to be a payment or distribution by the Company to or on account of such Senior Indebtedness. It is understood that the provisions of this Article XV are, and are intended, solely for the purposes of defining the relative rights of the holders of the Debt Securities, on the one hand, and the holders of such Senior Indebtedness, on the other hand.

Nothing contained in this Article XV or elsewhere in this Indenture, any Additional Provisions or in the Debt Securities is intended to or shall impair, as between the Company, its creditors other than the holders of Senior Indebtedness of the Company, and the holders of the Debt Securities, the obligation of the Company, which is absolute and unconditional, to pay to the holders of the Debt Securities all payments on the Debt Securities as and when the same shall become due and payable in accordance with their terms, or is intended to or shall affect the relative rights of the holders of the Debt Securities and creditors of the Company other than the holders of Senior Indebtedness of the Company, nor shall anything herein or therein prevent the Trustee or the holder of any Debt Security from exercising all remedies otherwise permitted by applicable law upon default under this Indenture, subject to the rights, if any, under this Article XV of the holders of such Senior Indebtedness in respect of cash, property or securities of the Company received upon the exercise of any such remedy.

Upon any payment or distribution of assets of the Company referred to in this Article XV, the Trustee, subject to the provisions of Article VI of this Indenture, and the Securityholders shall be entitled to conclusively rely upon any order or decree made by any court of competent jurisdiction in which such dissolution, winding-up, liquidation or reorganization proceedings are pending, or a certificate of the receiver, trustee in bankruptcy, liquidation trustee, agent or other Person making such payment or distribution, delivered to the Trustee or to the Securityholders, for the purposes of ascertaining the Persons entitled to participate in such distribution, the holders of Senior Indebtedness and other indebtedness of the Company, the amount thereof or payable thereon, the amount or amounts paid or distributed thereon and all other facts pertinent thereto or to this Article XV.

CERTIFICATE OF SERVICE

I, L. John Bird, hereby certify that on the 17th day of June, 2011, I caused a copy of the **Limited Objection of the Washington Mutual Inc. Noteholders Group to the Debtors' Modified Sixth Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code** to be served upon the parties listed on the service list attached hereto *via* the manner indicated.



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