

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

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| <i>In re</i> | : | Chapter 11 |
| | : | |
| WASHINGTON MUTUAL, INC., <i>et al.</i> , ¹ | : | Case No. 08-12229 (MFW) |
| | : | |
| Debtors. | : | Jointly Administered |
| | : | |
| | x | |

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF WASHINGTON MUTUAL, INC., *ET AL.*,
TO THE TPS CONSORTIUM’S “SUBMISSION FOR INCLUSION IN THE RECORD”**

The Official Committee of Unsecured Creditors (the “Creditors’ Committee”) of Washington Mutual, Inc. and WMI Investment Corp. (collectively, the “Debtors”), hereby files its objection to the “Submission for Inclusion in the Record” (D.I. # 8315) (the “TPS Submission”) filed by the Consortium of Trust Preferred Security Holders (the “TPS Consortium”), through which the TPS Consortium offers TPS Ex. 301-A and TPS Ex. 301-B into the record of the confirmation hearing held July 13-21, 2011.

1. The Creditors’ Committee objects to TPS Ex. 301-B, labeled “Waterfall Impact Applying Contract and Federal Judgment Rate (“FJR”): August 31, 2011 Emergence.” The exhibit purportedly “calculates cumulative net distributable assets based on three relevant metrics: (1) Contract Rate; (2) FJR as of September 26, 2008 (the “Petition Date”); and (3) FJR as of July 15, 2011.” TPS Submission, ¶ 3. It is being offered in connection with the colloquy between the Court and Mr. Siegel regarding the economic impact of the FJR, while Mr. Maxwell was on the stand. 7/15/2011 Tr. 136:6 – 137:23.

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395).



2. Although Mr. Siegel represented that “We’ll exchange a chart before closings” and “We’ll exchange charts with the other side” (7/15/2011 Tr. 137:17-20), there was no such exchange, and TPS Ex. 301-B does not reflect any agreement of counsel. On the last day of trial, we found a copy of the document now marked as TPS Ex. 301-B on the counsel table, but no one made mention of it or sought to use it. We did not know who had created it. We did not know it was to be offered by the TPS Consortium until the TPS Submission was filed.

3. Had there been any discussion of the offered document, the Creditors’ Committee would have pointed out that TPS Ex. 301-B is highly misleading. It entirely fails to show the effect of contractual subordination provisions enforceable pursuant to section 510(a) of the Bankruptcy Code, and enforcement of such contractual subordination is required pursuant to the Plan. In contrast, the Liquidation Analyses presented by the Debtors in their Court-approved Revised Supplemental Disclosure Statement (D.I. # 7081, Ex. 1, relevant excerpt admitted as DX-253D) and in their “July 6, 2011 Updated Liquidation Analyses” (admitted as DX-375) both show the payout from the Debtors *and* ultimate recoveries after contractual subordination. The TPS Consortium conveniently omits the impact of contractual subordination in TPS Ex. 301-B, thereby painting a misleading picture that should be excluded. Fed. R. Evid. 403.

4. The place where the misleading nature of the TPS Ex. 301-B is most clear is in the set of columns on the far right side of the document, which purport to show a scenario of the FJR at 0.16%. Here, the TPS Consortium represents that the recoveries to the CCB and PIERS classes are 100% of their reduced claims. However, as shown in DX-375, in a scenario of the FJR at 1.95%, *after applying contractual subordination*, the PIERS recoveries drop to 36% of their pre-petition claims and 0% of their post-petition claims. When asked about the impact on CCB and PIERS recoveries with an assumed change in rate to 0.25%, Mr. Goulding

testified that they would be badly affected. Goulding testimony, 7/14/2011 Tr. at 173:11-24.

With the FJR at 0.16%, the recoveries for these junior classes would be even less. Indeed, if the TPS Consortium had offered a witness for TPS Ex. 301-B, our cross-examination would have shown that in this scenario the recoveries of the CCB class would be entirely wiped out.

5. Additionally, due to its misleading nature TPS Ex. 301-B is not relevant and must be excluded under Fed. R. Evid. 402.

6. Furthermore, TPS Ex. 301-B is not relevant for three additional reasons:

- a. The Modified Sixth Amended Plan does not provide for imposition of the FJR. The issue of which FJR to choose is not before the Court. If the Court does not approve the Contract Rate, the Plan fails and resolicitation will be required.
- b. Even if the question of the imposition of the FJR were before the court – which it is not – the only possible FJR that could be used is the rate in effect on the Petition Date. *See* 3 Norton Bankr. Law & Practice 2d § 73:7 n. 55 (1997 & Supp.2000); *In re Chiapetta*, 159 B.R. 152, 161 (Bankr. E.D. Pa. 1993).
- c. Even assuming any scenario in which value flows to stakeholders more junior than the PIERS, such value would flow first to the unsecured creditors in Class 18 that are subordinated under section 510(b) – not to the TPS holders in Class 19 or other preferred stock holders in Class 20. *See* Goulding testimony, 7/14/2011 Tr. at 182:9 – 184:20. Thus the exhibit is not relevant if offered to show any hypothetical recovery to the TPS Consortium.

7. Additionally, TPS Ex. 301-B contains hearsay and must be excluded under Fed. R. Evid. 802. The declarant is unidentified and not available for cross-examination.

8. Accordingly, TPS Ex. 301-B should be excluded from evidence. If, however, the Court were inclined to admit TPS Exhibit 301-B, the Creditors' Committee requests an opportunity to submit a waterfall chart that corrects the failure of TPS Exhibit 301-B to show contractual subordination.

9. The Creditors' Committee does not object to the admission of TPS Exhibit 301-A, which merely compiles the FJR between June 24, 2011 and July 22, 2011. We consider the exhibit unnecessary, as the FJR is readily accessible to the Court through the United States Courts' internet sites.² Additionally, the date range is irrelevant, *see* Section 6(b), *supra*. But we do not object.

Dated: Wilmington, Delaware
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² See <http://www.uscourts.gov/FormsAndFees/Fees/PostJudgementInterestRates.aspx> and links therein; a helpful compilation of historical rates is available at <http://www.utd.uscourts.gov/documents/judgepage.html>.

CERTIFICATE OF SERVICE

I, David B. Stratton, hereby certify that on the 2nd day of August, 2011, I caused the foregoing **Objection of the Official Committee of Unsecured Creditors of Washington Mutual, Inc., et al., to the TPS Consortium’s “Submission for Inclusion in the Record”** to be served upon the parties on the attached service list by first-class mail or in the manner indicated.

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