

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC, <u>et al.</u> ,	:	Case No.: 08-12229 (MFW)
	:	
Debtors.	:	(Jointly Administered)
	:	
	:	Related Docket No.: 9389
	:	Objection Deadline: January 25, 2012 at 4:00 p.m.

RESPONSE OF WELLS FARGO BANK, N.A., IN ITS CAPACITY AS THE PIERS TRUSTEE, TO THE MOTION OF DEBTORS FOR AN ORDER PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE, BANKRUPTCY RULES 7023 AND 9019, AND FEDERAL RULE OF CIVIL PROCEDURES 23(e), APPROVING THE STIPULATION AND AGREEMENT BETWEEN THE DEBTORS AND CLASS REPRESENTATIVES OF THE LTW HOLDERS RESOLVING ADVERSARY PROCEEDING AND THE LTW PROOFS OF CLAIMS

Wells Fargo Bank, National Association, solely in its capacity as successor Indenture Trustee (the “**PIERS Trustee**”), by and through its undersigned counsel, hereby respectfully submits this Response to the captioned debtors’ (the “**Debtors**”) motion [Docket No. 9389] (the “**Motion**”) ¹ for an order approving a stipulation between the Debtors and the Class Representatives of the LTW Holders (the “**LTW Holders**”).

On January 3, 2012, the Court entered a memorandum opinion in the LTW adversary proceeding [Docket No. 312] (the “**LTW Opinion**”) granting summary judgment in favor of WMI and dismissing in its entirety the complaint filed by the LTW Holders. The Court determined in the LTW Opinion that the Dime Warrants are Equity Interests and that, even if the LTW Holders held Claims, those Claims would be subordinated pursuant to Section 510(b) of the Bankruptcy Code.

¹ Unless otherwise defined, capitalized terms have the meanings ascribed to them in Motion.



On January 11, 2012, Debtors filed the Motion. In the Motion, Debtors propose to provide LTW Holders a \$9 million unsecured claim which, pursuant to the Plan, will be paid at 100% plus post-petition interest.² The LTW Holders would also be granted a \$10 million 510(b) claim. Finally, the Debtors agreed to liquidate the LTW Holders' equity claim at an amount that is lower and less dilutive to equity holders than what it would have been without the settlement.

The Debtors have estimated in the Disclosure Statement that the following creditors may receive the following recoveries if the Plan is confirmed:

Creditor Class	Pre-petition Claim Amount	Total Recovery Amount	Recovery % for Principal	Recovery % Including Principal and Interest
Senior Fixed Notes	\$2,786 ³	\$3,244	100%	99%
Senior Floating Notes	\$1,347	\$1,386	100%	96%
Senior Subordinated Notes	\$1,666	\$2,037	100%	98%
CCBs	\$70	\$81	100%	100%
General Unsecured	\$375	\$391	100%	97%
PIERS	\$789	\$94	12%	11%

See Disclosure Statement at pp. 45 – 46 and Exhibit C (Liquidation Analysis).

Because of the subordinate position of the PIERS in the Debtors' capital structure, and as a result of the Court's September 13, 2011 Opinion, the PIERS class is the only creditor

² The PIERS Trustee is unable to determine how much interest would be payable, or for what period, and respectfully suggests there should be no such interest allowed.

³ Dollars in Millions

class under the Plan that is assured to receive less than a 100% recovery. In fact, the Debtors estimate only an 11% - 12% recovery to PIERS creditors. If the general unsecured claim pool increases by the \$9 million amount the Debtors propose to pay to the LTW Holders, recoveries to PIERS creditors will decrease while recoveries to the Senior Noteholders, Senior Subordinated Noteholders and the CCB's remain unaffected. The PIERS Trustee believes that General Unsecured Creditors will be only slightly affected by the settlement, and will still stand to recover 100% of their pre-petition claims (plus most of their post-petition interest) even if the settlement is approved.

The main benefit to the estate from this settlement is that the LTW Holders have now agreed to support Plan confirmation and will cease being obstacles to the Debtors' reorganization efforts. The PIERS Trustee notes that such a benefit is a limited one at best, as it rewards the scorched earth tactics undertaken throughout these proceedings by the LTW Holders, at great expense to PIERS creditors. Indeed it is ironic that the only party who continued to press the frivolous theory that PIERS creditors hold Equity Interests rather than Claims at the prior confirmation hearing now asks this Court to approve a settlement that calls for PIERS creditors to pay counsel fees of the LTW Holders, who, as the Court has correctly ruled, do not hold Claims.

Thus, the proposed settlement between Debtors and the LTW Holders is uniquely unfair to PIERS creditors, who are being forced to bear almost the entire cost of the settlement. The Court has ruled that the LTW Holders hold Equity Interests and, therefore, that their "recovery" should be shared ratably with the other common equity holders of the Debtors. Yet rather than enforce the Court's ruling, which came after extensive motion practice, several fruitless mediation sessions and a multi-day trial, all at tremendous expense to the estate (which,

as all parties know, effectively means at tremendous expense to PIERS creditors), the Debtors have agreed to reward the LTW Holders for their obstructionist tactics, at the expense of innocent PIERS creditors.

Absent consent of the PIERS class, equity holders, such as the Court has determined the LTW Holders to be, are not permitted by the Bankruptcy Code to share in any distributions until the PIERS creditors have been paid in full. But that is just what the Debtors are seeking to accomplish outside of the Plan by giving a recovery to LTW Holders that, based on the LTW Opinion, would otherwise belong to the PIERS creditors. If other classes of creditors, such as the Senior Noteholders, the Senior Subordinated Noteholders, or the CCB's, are willing to give up a portion of their recoveries to make the LTW Holders "go away," that is certainly within their right to do so. But it strikes the PIERS Trustee as grossly inequitable to ask PIERS creditors to fund this settlement virtually alone.

However, notwithstanding that the cost of the proposed settlement is disproportionately borne by the PIERS creditors, the PIERS Trustee is not objecting to the settlement for two very limited reasons. First, the PIERS Trustee reluctantly must attend the dire warnings from the Debtors that any more significant "speed-bumps" on the road to confirmation will have the net effect of decimating whatever recovery the PIERS may still be entitled to under the Plan, by the simple reason that the continuing accrual of interest on senior debt claims (and the accrual of estate professional fees) will further erode any potential recovery for the PIERS creditors.⁴ Second, the settlement appears to eliminate the need for the Debtors to continue to reserve \$337,000,000, which should result in more cash being available on the Plan's Effective

⁴ The PIERS Trustee's appeal of the Court's ruling with respect to the subordination of the PIERS to contract rate interest remains pending, but for purposes of this statement, the PIERS Trustee must assume the facts as they currently exist.

Date, and thereby reduce the continuing accrual of interest which would otherwise erode the PIERS' recovery. While the PIERS Trustee believes that valid grounds exist to eliminate the reserve completely even if the Motion is not approved, the PIERS Trustee recognizes that a motion would be required and the outcome of that motion cannot be assured.

Equity holders will naturally be supportive of the settlement because they benefit substantially from the settlement while not being asked to contribute anything to it.⁵ Indeed, by virtue of the settlement, the LTW Holders will be entitled to a significantly smaller portion of the reorganized debtors' equity than might have been the case had the Court's ruling been honored, thus increasing the recovery for all other equity holders. And at the same time, all other noteholders continue to anticipate recoveries exceeding 100% of their allowed prepetition claims: (a) Senior Noteholders holding Fixed Rate Notes: 116%; (b) Senior Noteholder holding Floating Rate Notes: 103%; (c) Senior Subordinated holders: 122%; and (d) CCB's: 116%, but are not being asked to contribute anything.

The PIERS Trustee files this Response because it is concerned that the deal being struck with the LTW Holders may serve as a template for the Debtors' attempt to bring other recalcitrant, and likely out-of-the-money claimants under their "galactic" settlement tent prior to Confirmation. The PIERS Trustee urges the Court to scrutinize closely the fairness and equity of any more such settlements that may be presented and that similarly seek to impose the burden of funding almost entirely against the already limited recovery projected for the PIERS creditors when the Debtors' principal creditors stand to recover in excess of 100% of their prepetition claims. Such a bleeding away of the PIERS recovery – however small each individual cut may

⁵ Although it is true that LTW Holders are being granted a 510(b) claim that would receive distributions ahead of equity, the Debtors estimate that 510(b) creditors will not receive distributions under the Plan.

be – may enable the Debtors to claim victory in some battles, but in the process they will have lost the war by failing to adequately incentivize PIERS creditors to support the Debtors’ efforts.

Dated: Wilmington, Delaware
January 25, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached pleading was served on the following individuals this 25th day of January, 2012, in the manner indicated:

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