TRENK, DIPASQUALE,
DELLA FERA & SODONO, P.C.
347 Mount Pleasant Avenue
West Orange, NJ 07052
(973) 243-8600
Anthony Sodono III, Esq.
Ross J. Switkes, Esq.
John R. Stoelker, Esq.
Attorneys for Claimant Jacob E. Sorensen

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WASHINGTON MUTUAL, INC., et. al.[1],	Case No. 08-12229 (MFW)
Debtors.	(Jointly Administered)

RESPONSE OF JACOB E. SORENSEN TO WMI LIQUIDATING TRUST'S SIXTH AND SEVENTY-NINTH OMNIBUS (SUBSTANTIVE) OBJECTIONS TO CLAIMS

Jacob E. Sorensen ("Mr. Sorensen" or "Claimant"), by and through his undersigned counsel, hereby responds to the Sixth Omnibus (Substantive) Objection to Claims filed by Washington Mutual, Inc. ("WMI") and WMI Investment Corp. (collectively with WMI, the "Debtors"), and the Seventy-Ninth Omnibus (Substantive) Objection to Claims filed by the WMI Liquidating Trust ("WMILT") (collectively, the "Objections"), and in support thereof respectfully states as follows:

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The principal offices of WMI Liquidating Trust are located at 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.

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BACKGROUND FACTS

I. WMI Bankruptcy

1. The Debtors filed voluntary petitions under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") on September 26, 2008 (the "Petition Date"), thus commencing the above-captioned cases.

2. By order dated February 23, 2012 (the "Confirmation Order"), this Court confirmed the Debtors' Seventh Amended Join Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Plan").

3. Upon information and belief, the effective date of the Plan was March 19, 2012. On the effective date, certain of the Debtors' assets were transferred to WMILT for administration under the Plan.

4. At all relevant times prior to the Petition Date, WMI owned Washington Mutual Bank ("WMB") and its subsidiaries.

5. On the Petition Date, the Director of the Office of Thrift Supervision directed the FDIC to take immediate possession of the assets of WMB as receiver. The FDIC in its role as receiver then sold substantially all of the assets of WMB to JPMorgan Chase Bank, National Association ("JPMC"). The assets of WMB constituted, indirectly, substantially all of the operating banking assets of WMI.

II. Claimant's Claim

6. Prior to the Petition Date, Claimant was employed by WMB. On or around July 1, 2007, Claimant entered into a Change in Control Agreement (the "CIC") with WMI and/or WMB. See Certification of Jacob E. Sorensen ("Sorensen Certif") at Exh. **"A."**

7. Pursuant to paragraph 5(c) of the CIC, Claimant was entitled to receive a lump sum equal to "one and a half times" his annual compensation if his employment was terminated without cause or he resigned under certain circumstances within two years after a "change in control."

8. Paragraph 5(f)(5) defined "change in control" to include "[t]he sale or transfer (in one transaction or a series of related transactions) of all or substantially all of [WMI's] assets to another Person (other than a Subsidiary) whether assisted or unassisted, voluntary or involuntary.

9. Claimant asserts that the FDIC seizure and sale of assets to JPMC constituted an involuntary sale or transfer of substantially all of WMI's operating banking assets, thus triggering a "change in control" under the CIC.

10. Claimant's employment was terminated by JPMC effective October 1, 2009 (the "Termination Date"), pursuant to a Job Transition dated December 2, 2008. See Sorensen Certif. at Exh. **"B."**

11. Claimant's Termination Date was well within two years after the "change in control." Accordingly, pursuant to the CIC, Claimant became entitled to 150% of his total compensation. In 2009, Claimant's total annual compensation was approximately $249,922.05. Accordingly, Claimant is entitled to a lump sum of $374,883.07 under the CIC, less his severance of $61,407.76, for a total of $313,475.31.

12. In 2007 and 2008, due to well documented layoffs and significant financial losses, WMI was concerned about its ability to retain key employees. Accordingly, it undertook certain measures to address this concern in early 2008. Specifically, members of WMI's Executive Committee began offering special retention bonuses to a limited number of key employees. A standard form letter referencing a "Special Bonus Opportunity" was prepared by WMI's Human

Resources department and was formatted to be signed by the applicable Executive Committee member.

13. Claimant was offered a Special Bonus Opportunity in the amount of $70,000 so long as certain stipulations were met. These included achieving a certain profit target as well as performing services throughout a specific target date. Claimant's Agreement stated as follows:

> I'm pleased to offer you this opportunity to earn a special bonus of $70,000 as a reward for your continued service to Washington Mutual (the "Company" or "WaMu").

See Fukui Certif. at Exh. **"C."**

14. The Special Bonus Opportunity agreement required that Claimant:

> remain an employee of [Washington Mutual] (the "Employment Requirement"), have a current overall performance rating of Solid Contributor or better, and continue to perform [his] job duties as required and in accordance with [Washington Mutual] policies and procedures through June 30, 2010 (the "Bonus Period").

15. Claimant's Special Bonus Opportunity agreement provided that the "Employment Requirement" would be waived under the following circumstances:

> First, if [Washington Mutual] or its successor terminates your employment for any reason prior to a target date for reasons that do not constitute "cause" as defined in Section 5 of [the CIC], we will consider the Employment Requirement to have been fulfilled. Second, you will be treated as having fulfilled the Employment Requirement under this offer if, within two years after a change in control (as defined in Section 5 of [the CIC]), (i) your employment is terminated by [Washington Mutual] or a successor for any reason other than for cause (as defined in Section 5 of [the CIC]) or (ii) you resign for good reason (as defined in Section 5 of [the CIC]) and no reason exists for [Washington Mutual] to terminate you for cause (as defined in Section 5 of [the CIC]).

16. Claimant executed the Special Bonus Opportunity agreement on August 29, 2008. Claimant remained an employee of Washington Mutual through the occurrence of the

aforementioned "change in control." Accordingly, Claimant is entitled to the $70,000 special bonus pursuant to the Special Bonus Opportunity agreement.

17. On March 6, 2009, Claimant filed Proof of Claim numbers 1380 and 1388 (the "Claims") in the amounts of $70,000 and $313,475.31, respectively. Claim No. 1380 sets forth Claimant's $70,000 claim under the Special Bonus Opportunity agreement and Claim No. 1388 sets forth his $313,475.31 claim under the CIC. See Sorensen Certif. at Exh. **"D."**

III. Objections to Claimant's Claim

18. On June 26, 2009, Debtors filed their Sixth Omnibus (Substantive) Objection to Claims, which included an objection to the Claims of Claimant. The Sixth Omnibus Objection asks the Court to disallow the CIC and Special Bonus Opportunity agreement claims as allegedly filed against the wrong party.

19. On August 10, 2009, the Court entered an Order granting Debtors' Sixth Omnibus Objection. With respect to Claimant, however, the Sixth Omnibus Objection was not granted, and the hearing was continued.

20. On August 15, 2012, WMILT filed the Seventy-Ninth Omnibus (Substantive) Objection to Claims. In the Seventy-Ninth Omnibus Objection, WMILT asserts that no "change in control" occurred to trigger liability under the CIC, and that the amount of Claimant's claim is subject to a cap pursuant to Section 502(b)(7) of the Bankruptcy Code.

21. Discovery is currently ongoing in this matter.

LEGAL ARGUMENT

I. WMI's Liability to Claimant

22. The CIC and Special Bonus Opportunity agreement were poorly drafted *by* WMI, as they contain various ambiguities. Accordingly, it is unclear which entity is responsible for

payment of these respective claims. The CIC states that the agreement is between Claimant and a WMI Subsidiary which employed Claimant. Nowhere, however, does the agreement specify a particular subsidiary.

23. The Special Bonus Opportunity agreement is equally unclear, simply stating that it is offered "as a reward for [Claimant's] continued service to Washington Mutual (the "Company" or "WaMu"). WMB is never mentioned in the Special Bonus Opportunity agreement.

24. Further, any ambiguity should be construed against WMI as drafter. Neither the CIC nor the Special Bonus opportunity letter specifies that WMB, as opposed to WMI, is a party to the agreement. Accordingly, these agreements are ambiguous at best. Pursuant to well-recognized Washington law, any ambiguity regarding WMI's liability under these agreements must be construed against the drafting party, WMI. See Felt v. McCarthy, 922 P.2d 90, 93 (Wash. 1996). In Felt, the Supreme Court of Washington asserted that "[i]n choosing among the reasonable meanings of a[n]...agreement..., that meaning is generally preferred which operates against the party who supplies the words..." Id. (quoting Restatement (Second) of Contracts § 206 (1979)). Accordingly, as drafter, WMI shall have all ambiguities construed against it.

25. Pursuant to Delaware's choice-of-law rules, Delaware courts must look to a company's state of incorporation as the controlling law with regard to the relationship among the corporate entity, directors, officers and stockholders. Rosenmiller v. Bordes, 607 A.2d 465, 468 (Del. Ch. 1991). Accordingly, as both WMI and WMB are incorporated in Washington, Washington law controls WMI's liability under the CIC and Special Bonus Opportunity agreement.

26. Assuming, arguendo, that WMB, rather than WMI, is directly liable to Claimant pursuant to the CIC and Special Bonus Opportunity agreement, WMI is nevertheless indirectly liable to Claimant under Washington law. "Courts may disregard the corporate form (i.e., pierce the corporate veil) and hold a parent corporation liable for the actions of its subsidiary under either the doctrine of corporate disregard or the theory of alter ego." In re Wade Cook Financial Corp., 375 B.R. 580, 598 (B.A.P. 9th Cir. 2007).

27. The well-recognized doctrine of corporate disregard establishes that "a corporation may not be used as a cloak or disguise to escape corporate liability, and...the corporate veil may be pierced when necessary to do justice in particular cases." Superior Portland Cement v. Pacific Coast Cement Co., 205 P.2d 597, 620 (Wash. 1949). This doctrine is especially applicable "in cases involving a parent or principal corporation and subsidiary corporations which acquiesce in and register the decrees of their principal." Id.

28. Two elements must be proven for a court to disregard the separateness of corporate entities (i) the corporate form must be intentionally used to violate or evade a duty; and (ii) disregard is necessary to prevent unjustified loss to the injured party. Id. (citing Meisel v. M & N Modern Hydraulic Press Co., 97 Wash.2d 403 (1982)).

29. To pierce the corporate veil and find a parent corporation liable, the party seeking relief must show that there is an overt intention by the corporation to disregard the corporate entity in order to avoid a duty owed to the party seeking to invoke the doctrine. Id. (citing Morgan v. Burks, 93 Wash.2d 580, 587 (1980); Anderson v. Section 11, Inc., 28 Wash.App. 814 (1981)). Claimant believes that facts learned during the discovery process will support piercing the corporate veil to hold WMI liable.

30. WMI may be liable to Claimant under a theory of agency. Under Washington law, an agency relationship "results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." Moss v. Vadnam, 463 P.2d 159, 164 (Wash. 1970). Control is the critical factor, and in order to hold a parent liable on an agency theory, the parent must "exercise total control over the subsidiary, well beyond the normal control exercised by parents over subsidiaries." Campagnolo S.R.L. v. Full Speed Ahead, Inc., 2010 WL 2079694, *7 (W.D. Wash. May 20, 2010). A court will look to whether "the parent exercises 'complete domination' over the subsidiary or whether the subsidiary is a shell corporation. Id. While there exists ample evidence to establish the liability of WMI under an agency theory, additional discovery will be required to more specifically determine WMI's adherence to corporate formalities.

31. In their Sixth and Seventy-Ninth Omnibus Objections, the Debtors and WMILT argue that WMI is not bound by the terms of Claimant's CIC because WMI is not a party to the agreement. Due to the poor drafting and ambiguity of the CIC, it is entirely unclear whether WMI is a party to the agreement. Assuming, arguendo, that WMI is not a party to the CIC, however, it may still be liable to Claimant under a theory of contractual agency. This would not be the first such finding with regard to WMI and WMB.

32. A principal-agent relationship between WMI and WMB was found by this Court to exist with respect to a contract entered into by WMB. The Court held that the agreement was structured in such a way as to support a finding that WMB was acting as an agent of WMI. In re Washington Mutual, Inc., 421 B.R. 143, 150 (Bankr. D. Del. 2009). The existence of an agency relationship is a question of fact "unless the facts are undisputed or permit only one conclusion."

Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc., 103 P.3d 1256, 1261 (Wash.App. 2005). Because the nature of the relationship between WMI and WMB is very much in dispute, additional facts will be necessary to determine whether WMB acted as WMI's agent in entering into the CIC with Claimant and other former employees.

33. In addition to WMI's potential liability under an agency theory, Washington also recognizes the "alter ego" doctrine, which provides that where one entity "so dominates and controls a corporation that such corporation is [the entity's] alter ego, a court is justified in piercing the veil of the corporate entity and holding that the corporation and private person are one and the same." Rapid Settlements, Ltd. v. Symetra Life Ins. Co., 271 P.3d 925, 930 (Wash. App. 2012) (quoting Standard Fire Ins. Co. v. Blakeslee, 771 P.2d 1172 (Wash. App. 1989)). Piercing the corporate veil under an alter ego theory is appropriate where there is "such a commingling of property rights or interests as to render it apparent that [the two entities] are intended to function as one, and further, to regard them as separate would aid in the consummation of a fraud or wrong upon others." J.I. Case Credit Corp. v. Stark, 392 P.2d 215, 218 (Wash. 1964). With the assistance of discovery, Claimant believes that the facts surrounding the relationship between WMI and WMB will dictate result in the imposition of "alter ego" liability.

II. Change in Control

34. In its Seventy-Ninth Omnibus Objection, WMILT asserts that a "change in control" never occurred and, accordingly, that Claimant was never entitled to payment under the terms of the CIC and the Special Bonus Opportunity agreement. A "change in control" pursuant to section 5(f)(1) of the CIC, however, undoubtedly occurred when the FDIC seized and sold the assets of WMB, constituting substantially all of the operating banking assets of WMI, to JPMC.

35. Section 5(f)(1) of Claimant's CIC states that a "change in control" includes the "sale or transfer (in one or a series of transactions) of all or substantially all of the Company's assets to another Person (other than a Subsidiary) whether assisted or unassisted, voluntary or involuntary." By the Debtors' own admission, such a "change in control" occurred when WMB's assets were seized and sold to JPMC:

> On September 25, 2008, a delegation of the FDIC and OTS arrived at WMI headquarters for the purpose of placing WMB in a receivership. WMB's assets (including the stock of WMB fsb) were seized by the Director of the OTS and the FDIC was appointed receiver (the "Seizure"). Less than an hour after the Seizure, JPMC held a special public investor call announcing that it had purchased the banking operations of WMI. In fact, the FDIC had simultaneously sold substantially all of the assets of WMB, including the stock of its subsidiary WMB fsb, to JPMC in exchange for payment of $1.88 billion and the assumption of all deposit liabilities."

Debtor's Motion for an Order Enlarging Time for Asserting Counter Claims against JPMC, filed May 1, 2009, at ¶¶ 9-10.

36. WMB's assets, which were subject to the Seizure as set forth above, constituted "all or substantially all" of WMI's consolidated assets. This fact is evidenced by the FDIC's press release announcing the Seizure and sale of WMB's assets to JPMC. As set forth in the press release, the combined assets of WMB and its subsidiary, Washington Mutual FSB, were approximately $307 billion, which constituted 99% of the $309.7 billion of consolidated assets reported by WMI in its Consolidated Statements of Financial Condition for the calendar quarter ending June 30, 2008, included with its Quarterly Report on Form 10-Q, filed on August 11, 2008 with the Securities Exchange Commission. Moreover, WMI's stock ownership in WMB, also divested as a result of the Seizure, constituted "all or substantially all" of WMI's unconsolidated assets. The impact of the Seizure on WMI is undeniable, as WMI filed its chapter 11 petition the

following day, admittedly as a result of the Seizure. WMILT's assertion that a "change in control" never occurred is meritless. The seizure and sale of WMB's assets was precisely the type of "change in control" contemplated by the parties to the CIC and Special Employment Opportunity agreement.

37. Both the CIC and Special Bonus Opportunity agreement were drafted by WMI as a means of inducing the Claimant and other similarly situated employees to continue their employment with WMB. For this reason and those set forth above, the Fifth and Seventy-Ninth Omnibus Objections must be disregarded, and Claimant must be paid the full amount of his Claim.

III. Limitation on Claim Pursuant to § 502(b)(7)

38. WMILT also asserts that, even if WMILT is liable to Claimant and a "change in control" occurred pursuant to the CIC, Claimant's claim is limited by the provisions of Section 507(b)(7) of the Bankruptcy Code.

39. Section 507(b)(7) has no application to Claimant's entitlement under the Special Bonus Opportunity agreement. Under the Special Bonus Opportunity agreement, Claimant would receive the special bonus even if he had remained an employee of Washington Mutual after the end of the Bonus Period set forth therein. In other words, termination of the Claimant was not a condition precedent to receiving the bonus payment. The Special Bonus Opportunity agreement provided for a "retention" bonus, not a severance payment. Accordingly, Section 507(b)(7) is inapplicable, and Claimant is entitled to the bonus amount of $70,000.

40. In the event that the Court finds that this provision applies to the CIC, Claimant remains entitled to $249,922.05, his 2009 annual compensation as supported by the exhibits to his Proof of Claim No. 1388.

CONCLUSION

For the foregoing reasons, the Court should overrule the Objection as it relates to the CIC, the Special Bonus Opportunity agreement, and Claimant's Claims.

RESERVATION OF RIGHTS

Nothing in this Response shall constitute a waiver of Claimant's right to assert any additional grounds for opposing the Sixth and Seventy-Ninth Omnibus Objections. Moreover, Claimant reserves the right to more fully brief the issues discussed herein.

TRENK, DIPASQUALE,
DELLA FERA & SODONO, P.C.
Attorneys for Claimant Jacob E. Sorensen

DATED: January 10, 2013

By: _____
ANTHONY SODONO, III