

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

In re:	)	Chapter 11
	)	Case No. 08-12229 (MFW)
Washington Mutual, Inc., <i>et al.</i> , <sup>1</sup>	)	(Jointly Administered)
	)	
Debtors.	)	Reference Docket No. 1234 & 10989
	)	

**RESPONSE OF GENEVIEVE SMITH DEBTOR’S SIXTH  
OMNIBUS (SUBSTANTIVE) OBJECTIONS TO CLAIMS**

Genevieve Smith (“Claimant”), by and through her undersigned counsel, hereby files this response (the “Response”) to the *Debtors’ Sixth Omnibus (Substantive) Objections to Claims* [Docket No. 1234] (the “6th Omnibus Objection”). In support of her Response, Claimant states the following:

**The Claims**

1. Claimant was the Chief Marketing Officer of WMI and its subsidiaries (collectively, “WaMu”) between 2005 and 2008. In her position as Chief Marketing Officer, Claimant was responsible for brand management, advertising, customer optimization, research, eCommerce, line of business and corporate marketing for WaMu. Claimant’s claims stem from agreements she entered into during her employment.

2. Claimant timely filed the following proofs of claim, which are pending in this case under the *Order Approving the Stipulation and Agreement between WMI Liquidating Trust and Genevieve Smith, Partially Reinstating Proof of Claim Nos. 2264 and 2265 and Subjecting Such Claims to the Sixth Omnibus Objection to Claims* [Docket No. 10989]:

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<sup>1</sup> The Debtors in these cases are: Washington Mutual, Inc. (“WMI”) and WMI Investment Corp.



- a. Claim 2264, a general unsecured claim in the amount of \$1,212,750 for amounts due under a Change in Control Agreement (“CIC Agreement”);  
and
- b. Claim 2265, a general unsecured claim in the amount of \$120,000 under a Special Bonus Opportunity Agreement between Claimant and WMI (collectively, the “Claims”).

### **The Sixth Omnibus Objection**

3. In its 6th Omnibus Objection, the Debtors, and now the Washington Mutual, Inc. Liquidating Trust (“WMILT”), assert that the agreements which form the basis of the Claims were between Claimant and Washington Mutual Bank, a non-debtor; thus, WMILT argues that it has no liability thereto.

4. In the alternative, WMILT asserts that no “change in control” has occurred and, as a result, the contractual predicates to payment in the agreements associated with each claim did not occur.

5. The Trust has also asserted that, even if a change in control occurred, that 11 U.S.C. §502(b)(7) caps certain of the Claimant’s claims.

### **ARGUMENT**

#### **WMI is a Party to the Agreements Underlying the Claims**

6. WMI is liable directly or as the parent holding company of WMB based on one or more theories and facts, including, but are not limited to:

- a. WMB is the alter ego of WMI. *See State ex rel. Higgins v. SourceGas, LLC*, 2012 WL 1721783, at \*5 (Del. Super.). “Courts in Delaware will ignore the separate corporate existence of a subsidiary and attribute its activities in Delaware only if the subsidiary is the alter ego or a mere

instrumentality of the parent.”<sup>2</sup> A subsidiary corporation may be deemed the alter ego of the parent corporation “where a corporate parent exercises complete domination and control over the subsidiary.”<sup>3</sup> “Generally, a corporate parent will only be held liable for the obligations of its subsidiaries ‘upon a showing of fraud or some inequity[;]’”

- b. WMI was the sponsor of virtually all employee benefit plans;
- c. the consolidated reporting of their business activities and operating results;
- d. upon information and belief, Claimant was Chief Marketing Officer of both WMB and WMI;
- e. the CIC Agreement and the amendment thereto was executed by an authorized officer of WMI;
- f. WMI was a control person under applicable law;
- g. WaMu was routinely referred to as “Washington Mutual” or “WaMu” by the executives, management, and employees of WaMu and legal documents, memorandum, and emails often used these terms rather than referring to a particular legal entity or entities;
- h. all payroll, administrative, and operational functions for WaMu were run out of WMB; and
- i. upon equitable grounds.

7. Furthermore, the Special Bonus Opportunity Letter Agreement is a contract between Claimant and WMI. It was issued by WMI and was signed by President and Chief Operating Officer of WMI, Steve Rotella.

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<sup>2</sup> *Grasty v. Michail*, 2004 WL 396388, at \*1 (Del.Super.).

<sup>3</sup> *Id.* (citing *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F.Supp. 260, 266 (D.Del.1989)).

## A Change in Control Occurred

8. If a change in control occurred as defined in ¶5 of the CIC Agreement, Claimant is entitled to the full amount of her Claims. Thus, the real issue in Claimant's Claims under the CIC Agreement is whether a change in control occurred, and, more specifically, whether the seizure of Washington Mutual Bank ("WMB") by the FDIC constituted the "[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."<sup>4</sup>

9. The seizure of WMB constituted the "sale or transfer (in one transaction 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." In a motion WMI filed in an adversary proceeding, WMI very succinctly described the events surrounding the seizure of WMB:

On September 25, 2008, a delegation of the FDIC and OTS arrived at WMI headquarters for the purpose of placing WMB in 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 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.<sup>5</sup>

Therefore, a "Change in Control" as defined in section 5(g) of the CIC Agreement did occur.

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<sup>4</sup> CIC Agreement, at ¶ 5(g).

<sup>5</sup> *Motion to Extend Time for Asserting Counterclaims Against JPMorgan Chase Bank, N.A. Filed by WMI Investment Corp., Washington Mutual, Inc., C.A. No. 09-50551-MFW, at ¶¶ 9-10 (May 1, 2009).*

10. WMILT would have the Court conclude otherwise and asserts that the term "[WMI's] assets" means only the assets directly owned by WMI and that "a corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." Under WMILT's view, the assets of WMI are only those assets directly owned by WMI, not including assets of WMB, in other words, the *unconsolidated* assets of WMI. WMILT further asserts that, even if WMB's assets fall within the plain meaning of the term, which Claimants argue is the case, WMB's assets did not constitute "all or substantially all" of the *consolidated* assets of WMI. WMILT is wrong on both counts.

11. In construing this provision of the CIC Agreement, the Court should take notice of the fact that WMI, as a publicly held savings and loan holding company, maintained its financial statements and publicly reported its assets on a *consolidated* basis, inclusive of WMB's assets. The phrase "assisted or unassisted voluntary or involuntary" are commonly used to describe asset transfers made by the FDIC as receiver in connection with failed bank purchase and assumption transactions. Giving these terms their plain meaning creates a strong and reasonable inference that the term "[WMI's] assets" was intended to include WMB's assets. Excluding WMB's assets renders the use of these words vague and ambiguous.

12. In any event, the FDIC, as receiver for WMB, succeeded by operation of law to all rights, titles, powers, and privileges of WMB, including the power to take over its assets. Additionally, the Bank Seizure operated as a matter of law to divest WMI of all its rights, titles, powers and privileges as the stockholder of WMB.<sup>6</sup> The FDIC's succession by operation of law

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<sup>6</sup> See Federal Deposit Insurance Act ("FDIC Act"), 12 USC § 1821(d)(2)(A)(i) ("The Corporation shall as conservator or receiver, and by operation of law, succeed to (i) all rights, titles, powers, and privileges of the insured depository institution and of any stockholder, accountholder, depositor, officer or director of such institution with respect to the institution and the assets of the institution . . ."). *See also* FDIC Act, 12 USC § 1821(d)(2)(B)(i).

to WMB's assets constituted an involuntary transfer of substantially all of WMI's *consolidated* assets. WMI's loss of powers as the stockholder of WMB by operation of law constituted an involuntary transfer of substantially all of WMI's *unconsolidated* assets. Accordingly, whichever interpretation of WMI's assets is applied, consolidated or unconsolidated, the seizure of WMB constituted a "Change in Control" under the CIC Agreements.

### **WaMu Severance Plan**

13. In the alternative, and should the Court determine that a change in control event did not occur, Claimant is entitled to benefits under the WaMu Severance Plan. To the extent necessary, Claimant requests approval to amend her proof of claim to seek this alternative form of relief. Any failure to amend her claim previously will not be prejudicial to WMILT due to the existing reserve for her Claims.

### **JPMC Payments**

14. To the extent that Claimant received any payments from J. P. Morgan Chase Bank ("JPMC"), such payments should not be deducted from any of Claimant's claims. WMILT argues that ¶ 5(c) of the CIC Agreement requires payments due under the CIC Agreement to be offset by any payment JPMC paid to Claimants. The relevant portion of ¶ 5(c) of the CIC Agreement states:

Notwithstanding the preceding, the amount paid to employee under this Section 6(c) shall be offset by any payment received by Employee from the Company or any acquired company pursuant to: (i) a severance or change in control agreement, arrangement or plan, with the exception of any such payment received more than two years before either clause (i) or clause (ii) of this Section 5(c) was satisfied, or (ii) The Worker Adjustment and Retraining Notification Act (WARN Act) or any similar state or local law.

15. The plain language of ¶ 5(c) makes it clear that it does not require Claimant to offset any payments received from JPMC. First, JPMC is not an "acquired company" for the purposes of ¶ 6(c). Second, from the plain reading of the paragraph, it is clear that the intent of ¶

6(c) is to protect WMI from having to distribute full payments under the CIC Agreement to employees from acquired companies who have already received severance benefits from their previous employer within a two-year period after being acquired by WMI. Nothing in this paragraph suggests that such protections were intended to be extended to JPMC under the CIC Agreement.

16. Additionally, Washington law does not require Claimant's claims to be offset by any amount she may have received from JPMC on account of her employment with WMI.<sup>7</sup>

#### **Section 502(b)(7) Does Not Apply**

17. Claimant contends that the limitations contained in 11 U.S.C. § 502(b)(7) do not apply to Claimant's claims under the Special Bonus Opportunity. The Special Bonus Opportunity agreements were offered to induce individuals to remain employees of Washington Mutual through the specified bonus periods. This Court has described severance payments, including "change in control" payments, as "prospective compensation" paid on termination in lieu of compensation for periods subsequent to termination and not compensation for services already rendered.<sup>8</sup> Unlike a severance payment, in this instance each key employee was to receive the bonus under the Special Bonus Opportunity if the employee remained an employee of Washington Mutual through the bonus period. These were retention bonuses, not severance payments. Termination of employment was not a condition precedent to receiving the bonus. The fact that the bonus period was cut short and the employees lost their jobs as a result of the FDIC's seizure of WMB should be of no consequence with respect to the interpretation of Claimant's claims. The FDIC seizure does not alter the character of their compensation. Claimant's employment requirement was fulfilled pursuant to the terms of the Special Bonus

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<sup>7</sup> See *Spacelabs Medical, Inc. v. Farah*, 1999 Wash. App. LEXIS 487, at \*13 9 (Wash. App. Ct.).

<sup>8</sup> See *In re VeraSun Energy Corp.*, 467 B.R. 757 (Bankr. D. Del. 2012).

Opportunity and her bonus was earned for services rendered during the bonus period, regardless of the duration of the bonus period.

18. If the Court determines that the limitations contained in 11 U.S.C. § 502(b)(7) are applicable, Claimants submit that the calculation of annual compensation should be determined by applying the formula contained in ¶ 6(d) of the CIC Agreements.<sup>9</sup>

### **Joinder**

19. Claimant joins in any other responses filed by other Claimants who are similarly situated with regard to the 6th Omnibus Objection.

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<sup>9</sup> CIC Agreement, ¶ 6(d) states:

For purposes of Section 6(c), Employee's "annual compensation" shall equal the sum of (i) the highest of the Employee's annual base salary for the calendar year in which termination or resignation occurs, the prior calendar year, or the calendar year immediately preceding the year in which the Change in Control occurred, (ii) the highest of (A) the Employee's unadjusted target bonus for the calendar year in which the termination or resignation occurs, (B) the Employee's actual bonus (including, for the avoidance of doubt, any portion of the actual bonus that was deferred or exchanged at the Employee's election for equity awards) for the prior calendar year (annualized if Employee was not employed by the Company for the entire previous calendar year), or (C) the Employee's actual bonus (including, for the avoidance of doubt, any portion of the actual bonus that was deferred or exchanged at the Employee's election for equity awards) for the calendar year immediately preceding the year in which the Change in Control occurred (annualized if Employee was not employed by Washington Mutual for the entire such calendar year), and (iii) the amount of the contributions or accruals made or anticipated to have been made on Employee's behalf to the Company's benefit plans for the calendar year in which the termination or resignation occurs, including without limitation contributions to and accruals under qualified and nonqualified defined contribution and defined benefit pension plans and plans qualified under Section 125 of the Internal Revenue Code of 1986, as amended (the "Code"). For purposes of this Section 6(d), bonus refers to monthly, quarterly, annual and other periodic performance-based bonuses based on individual and/or company results, and excludes non-periodic lump sum bonuses (such as sign-on and retention bonuses (even if such bonuses are also performance-based bonuses) and cash and non-cash -prizes and awards, including awards from sales contests) and the value of equity awards except as otherwise specifically provided herein. For purposes of this paragraph, any increase in the value of benefits to be provided under the Executive Target Replacement Income Plan shall not be counted as a contribution or accrual under Section 6(d)(iii) .



WHEREFORE, Claimants respectfully request that the Court (i) overrule and deny WMILT's objections to the extent it seeks to disallow or expunge Claimant's claims, (ii) allow Claimant's claims in their full amount, and (iii) provide such other relief as the Court deems just and proper.

PHILLIPS, GOLDMAN & SPENCE, P.A.

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Date: January 28, 2013

**CERTIFICATE OF SERVICE**

I, Celeste A. Hartman, Senior Paralegal, do hereby certify that I am over the age of 18 and that on January 28, 2013, I caused a copy of the *Response of Genevieve Smith to Debtors' Sixth Omnibus (Substantive) Objections to Claims* to be served upon the following persons via the Court's cm/ecf system and by email.

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Under penalty of perjury, I certify the foregoing to be true and correct.

/s/ Celeste A. Hartman  
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