

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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: **Chapter 11**
: **Case No. 08-12229 (MFW)**
: **(Jointly Administered)**
: **Re: Docket No. 10995**
: **Hearing Date: February 21, 2013 at 10:30 a.m. (ET)**
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**WMI LIQUIDATING TRUST’S OBJECTION TO MOTION OF
MICHAEL A. ZARRO TO REINSTATE PROOF OF CLAIM 1743 AND VACATE
ORDER DISALLOWING CLAIM AND FOR ATTORNEYS’ FEES AND COSTS**

WMI Liquidating Trust (“WMILT”), as successor in interest to Washington Mutual, Inc. (“WMI”) and WMI Investment Corp., formerly debtors and debtors in possession (collectively, the “Debtors”), files this objection (the “Objection”) to the *Motion of Michael A. Zarro to Reinstate Proof of Claim 1743 and Vacate Order Disallowing Claim and For Attorneys’ Fees and Costs*, dated January 24, 2013 [D.I. 10995] (the “Motion”), filed by Michael Zarro (“Zarro”) and, in support of the Objection, respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Motion seeks the reinstatement of Zarro’s proof of claim on the basis of, among other things, excusable neglect, and asserts that either WMILT or its counsel should be held liable for the fees and costs that Zarro incurred in connection with the Motion because, according to Zarro, WMILT inexplicably and unjustifiably required Zarro to file the Motion.

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 WMILT, as defined herein, are located at 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.



Zarro alleges that, because he and WMILT had engaged in preliminary negotiations regarding a stipulation to reinstate his proof of claim, it was unfair and in bad faith that WMILT did not ultimately finalize and execute such stipulation. In doing so, not only does Zarro disregard the fact that the parties were unable to reach a resolution, but Zarro also ignores the circumstances surrounding the parties' initial discussions about his disallowed claim, which discussions took place in the summer of 2012, and how the circumstances had changed as of late November 2012, when WMILT informed Zarro that a motion to reinstate would be necessary. Indeed, at the time that Zarro initially informed WMILT that he was seeking reinstatement, Zarro was one of two claimants of which WMILT was aware that was seeking reinstatement of his claim. Subsequent to the parties' initial discussions regarding Zarro's proof of claim, WMILT filed six additional omnibus claims objections, which objections inspired various other disallowed claimants to seek reinstatement of their previously disallowed claims. As WMILT informed Zarro in late November 2012, the fact that numerous other claimants had and would seek the reinstatement of their claims necessitated that WMILT apply a consistent set of procedures with respect to all such claimants. The Court echoed this notion at the omnibus hearing on December 11, 2012, at which hearing the Court considered a motion to reinstate and found that it would "deal with each person who files a motion for reconsideration on the merits of those who have established in my mind an excuse for failing to timely respond . . . And I think I just have to deal with them on each fact presented to me." 12/11/12 Hr'g Tr. 33:2-7.

2. Accordingly, even if Zarro can establish excusable neglect, which is unclear from the facts alleged in the Motion, WMILT submits that the Court, rather than the parties, should make this determination as it recently did with respect to other motions to reinstate filed by other claimants in October and November of last year. As the record in these

chapter 11 cases reflects, all claimants whose claims have been reinstated to date have filed motions seeking reinstatement. Where the movant pled facts that were particularly sympathetic or compelling, WMILT agreed to reinstate the applicable proofs of claim. In contrast, where it was less clear that the facts alleged in a particular motion satisfied the excusable neglect standard, as is the case here, WMILT contested the respective motion and left for the Court to consider whether a particular claimant had satisfied the excusable neglect standard. Here, Zarro asserts that he failed to respond to the Sixth Omnibus Objection in July of 2009 because he was not represented by counsel at that time and he was unaware of the consequences of failing to respond. Notably, the Court has denied motions to reinstate on facts similar to those alleged in the Motion. *See* D.I. 10844, *Order Denying Motion of Peter Struck to Reconsider and Vacate Order Disallowing and Expunging Certain Claims (Re: Sixth Omnibus Objection (Substantive) to Claims), Solely as it Relates to Claim No. 2748.*

3. In light of the foregoing, WMILT submits that (i) the Motion should be denied to the extent the Court determines that Zarro has failed to establish excusable neglect, and (ii) clearly, neither WMILT nor its counsel is liable for Zarro's attorneys' fees and costs here, where WMILT engaged in good faith negotiations with Zarro and, later, in good faith, determined that changed circumstances precluded WMILT from continuing negotiations and finalizing a stipulation with Zarro absent a formal motion to reinstate.

BACKGROUND

4. On September 26, 2008 (the "Commencement Date"), each of the Debtors commenced with this Court a voluntary case pursuant to chapter 11 of the Bankruptcy Code.

5. On December 12, 2011, the Debtors filed their *Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*

[D.I. 9178] (as modified, the “Plan”).² By order [D.I. 9759] (the “Confirmation Order”), dated February 23, 2012, this Court confirmed the Plan and, upon satisfaction or waiver of the conditions described in the Plan, the transactions contemplated by the Plan were substantially consummated on March 19, 2012.

Zarro’s Claim

6. By order, dated January 30, 2009, the Court established March 31, 2009 (the “Bar Date”) as the deadline for filing proofs of claim against the Debtors in these chapter 11 cases.

7. On or before the Bar Date, Zarro filed proof of claim number 1743 (the “Claim”), alleging \$224,000.00 in payments owed to Zarro pursuant to a retention bonus agreement with WMB in connection with Zarro’s former employment with WMB.³ A copy of the cover sheet of the Claim is annexed hereto as **Exhibit 1**.

8. On June 26, 2009, the Debtors filed the *Debtors’ Fifth Omnibus (Substantive) Objection to Claims* [D.I. 1233] (the “Fifth Omnibus Objection”) and the *Debtors’ Sixth Omnibus (Substantive) Objection to Claims* [D.I. 1234] (the “Sixth Omnibus Objection”), both of which objected to certain employee claims, among others, on the basis that the claims were wrongly filed against WMI, which was not a party to the underlying agreements. The Debtors objected to the Claim in the Sixth Omnibus Objection.

² Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

³ WMILT expressly reserves its right to object to any efforts by Zarro to amend the Claim or assert new theories of recovery.

9. On June 26, 2009, the Debtors' noticing agent caused the Sixth Omnibus Objection and the notice of such objection to be served on Zarro at the address set forth on the Claim. See Affidavit of Service, D.I. 10813, annexed hereto, in relevant part, as **Exhibit 2**.

10. In accordance with the Sixth Omnibus Objection and the notice filed therewith, responses to the Sixth Omnibus Objection, if any, were required to be filed with the Court and the Debtors on or prior to July 16, 2009 (the "Response Deadline"). Zarro failed to interpose any response with the Court or the Debtors on or before the Response Deadline.

11. On May 11, 2012, WMILT, as successor to the Debtors, filed the *Certification of Counsel Regarding (A) Hearing on Employee Claims and (B) Debtors' Fifth and Sixth Omnibus (Substantive) Objection to Claims* [D.I. 10163] (the "May Certification of Counsel"), requesting that the Court disallow the claims of all non-responding claimants on the Fifth Omnibus Objection and Sixth Omnibus Objection, including the Claim, so that WMILT could (i) release funds then reserved on account of the non-responding employee claimants and distribute such funds to other creditors, and (ii) proceed with a hearing with respect to the responding claimants' claims.

12. By order, dated May 15, 2012, the Court entered the *Third Order Granting Debtors' Fifth Omnibus (Substantive) Objection to Claims* [D.I. 10179, as corrected by D.I. 10225] and the *Fourth Order Granting Debtors' Sixth Omnibus (Substantive) Objection to Claims* [D.I. 10181, as corrected by D.I. 10226] (collectively, the "May Orders"), disallowing the claims of the non-responding employee claimants on the Fifth Omnibus Objection and Sixth Omnibus Objection, respectively, including the Claim.

13. On June 14, 2012, at an omnibus hearing, Zarro's counsel approached counsel for WMILT to discuss whether WMILT would stipulate to reinstate Zarro's Claim.

During the time period from June 26, 2012 through August 1, 2012, counsel for Zarro sent multiple emails to counsel for WMILT to inquire whether WMILT would consider entering into a stipulation to reinstate Zarro's Claim.

14. On August 15, 2012, WMILT filed (i) the *WMI Liquidating Trust's Seventy-Ninth Omnibus (Substantive) Objection to Claims* [D.I. 10504] (the "Seventy-Ninth Omnibus Objection"), which objected to certain employee claims on the basis that, among other things, WMI was not a party to the underlying agreements and no "Change in Control," as defined in the applicable agreements, occurred, and (ii) additional objections to certain other employee claims, including the *WMI Liquidating Trust's Eightieth Omnibus (Substantive) Objection to Claims* [D.I. 10505], *WMI Liquidating Trust's Eighty-First Omnibus (Substantive) Objection to Claims* [D.I. 10506], and *WMI Liquidating Trust's Eighty-Second Omnibus (Substantive) Objections to Change in Control Claims* [D.I. 10507] (collectively, together with the Seventy-Ninth Omnibus Objection, the "August Omnibus Objections").⁴ Out of an abundance of caution and because WMILT was on notice of Zarro's desire to seek reinstatement of the Claim, WMILT included Zarro's Claim on the Seventy-Ninth Omnibus Objection, as WMILT similarly had included in the Seventy-Ninth Omnibus Objection the claims of the remaining claimants on the Fifth Omnibus Objection and Sixth Omnibus Objection.

15. On the same day, WMILT's counsel sent Zarro's counsel a draft stipulation to reinstate the Claim. On August 28, 2012, Zarro's counsel returned comments to

⁴ On September 14, 2012, WMILT filed the *Certification of Counsel Regarding WMI Liquidating Trust's Seventy-Ninth, Eightieth, Eighty-First, and Eighty-Second Omnibus (Substantive) Objections to Claims* [D.I. 10664] (the "September Certification of Counsel"), requesting that the Court disallow the claims of all non-responding claimants on the August Omnibus Objections, so that WMILT could (i) release funds then reserved on account of the non-responding employee claimants and distribute such funds to other creditors, and (ii) proceed with a hearing with respect to the responding claimants' claims. See September Certification of Counsel ¶ 7. By various orders, each dated September 19, 2012 [D.I. 10689, 10690, 10691, 10692] (collectively, the "September Orders"), the Court disallowed the claims of the non-responding employee claimants on the Seventy-Ninth through Eighty-Second Omnibus Objections.

the draft and, subsequent thereto, the parties engaged in limited communications regarding the potential stipulation, however, no further drafts were exchanged and the parties never finalized or executed a stipulation with respect to Zarro's Claim.

Other Claimants Seeking Reinstatement of Their Disallowed Claims

16. During the time period from September through November, 2012, certain claimants filed responses to the Fifth, Sixth and/or August Omnibus Objections, asserting various reasons why they believed their previously disallowed claims should be reinstated. *See, e.g.,* D.I. 10726, *Response to Debtors' Sixth Omnibus (Substantive) Objection to Claims Filed by Genevieve Ann Smith*. In addition, WMILT's counsel received various phone calls and inquiries from previously disallowed claimants, inquiring about their disallowed claims. Likewise, as foretold, certain of the aforementioned persons, and others, filed motions to reinstate such disallowed claims.

17. On October 16, 2012, Patricia Schulte ("Schulte"), a claimant whose claim had been disallowed in the September Orders, filed a motion to reinstate her claim [D.I. 10771] (the "Schulte Motion"). As set forth in the Schulte Motion, Schulte alleged excusable neglect in failing to respond to the Seventy-Ninth Omnibus Objection because her husband was suffering from Myeodysplastic Syndrome (MDS) on or around the deadline to respond to the objection, and, as her husband's sole caretaker, she was understandably prevented from directing her full attention to the bankruptcy cases. Given the compelling factual circumstances set forth in the Schulte Motion, WMILT and Schulte entered into a stipulation to reinstate Schulte's claim, which stipulation was filed under certification of counsel on November 30, 2012 [D.I. 10868] and approved by order, dated December 3, 2012 [D.I. 10873].

18. On October 23, 2012, Peter Struck (“Struck”), a former claimant whose claim had been disallowed in the May Orders, filed a motion to reinstate his claim [D.I. 10788] (the “Struck Motion”). The Struck Motion alleged virtually no excuse for Struck’s failure to respond to the Sixth Omnibus Objection, and merely asserted that he did not recall receiving notice of the Sixth Omnibus Objection. Accordingly, WMILT objected to the Struck Motion and asserted that Struck failed to establish excusable neglect. *See* D.I. 10827. After a hearing to consider the Struck Motion and WMILT’s objection thereto, the Court denied such motion, finding that Struck had failed to establish excusable neglect. *See* D.I. 10844.

19. On October 29, 2012, Genevieve Smith (“Smith”), a claimant whose claims had been disallowed in the May Orders, filed a motion to reinstate her claims [D.I. 10800] (the “Smith Motion”). As set forth in the Smith Motion, Smith alleged excusable neglect in failing to respond to the Sixth Omnibus Objection because her husband was suffering from cancer, which understandably prevented her from directing her full attention to the bankruptcy cases. Given the compelling factual circumstances set forth in the Smith Motion, WMILT and Smith entered into a stipulation to reinstate Smith’s claims, which stipulation was filed under certification of counsel on January 1, 2013 [D.I. 10988] and approved by order, dated January 14, 2013 [D.I. 10989].

20. On November 13, 2012, claimant Scott Shaw (“Shaw”) filed a motion to reinstate his claim, which had previously been disallowed in the September Orders [D.I. 10831] (the “Shaw Motion”). The Shaw Motion alleged that Shaw’s failure to respond to the Eighty-Second Omnibus Objection was the result of excusable neglect because he had been traveling out of the country during relevant time periods. WMILT objected to the Shaw Motion and asserted that Shaw failed to establish excusable neglect. *See* D.I. 10867. After a hearing to consider the

Shaw Motion and WMILT's objection thereto, the Court granted the Shaw Motion and reinstated Shaw's Claim, finding that Shaw had established excusable neglect. *See* D.I. 10913.

21. On November 19, 2012 and subsequent thereto, Zarro's counsel contacted WMILT's counsel to inquire about whether a motion to reinstate would be necessary for his Claim, given the plethora of other motions to reinstate that had been filed by other claimants. In a series of email conversations, WMILT's counsel explained that circumstances had changed since the time that the parties originally began discussing a stipulation with respect to Zarro's claim and that, given the various other motions to reinstate and the Court's determinations with respect to such motions, it would be necessary for Zarro to file a motion seeking reinstatement of the Claim.

The Motion

22. On January 24, 2013, after waiting an additional two months, Zarro filed the Motion requesting that the Court reconsider and vacate the May Order with respect to the Claim and asserting that reconsideration and vacatur of the May Order is appropriate pursuant to section 502(j) of title 11 of the United States Code (the "Bankruptcy Code"), Rule 3008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60"). In particular, the Motion asserts, among other things, that (i) the Claim was disallowed without due process; (ii) Zarro's failure to timely respond to the Sixth Omnibus Objection amounts to "excusable neglect" because, at the time the Sixth Omnibus Objection was filed, he was not represented by counsel and was not aware that his failure to reply could result in the disallowance of the Claim, and (iii) vacating the May Order will have no impact on the judicial proceedings nor will it prejudice WMILT. The Motion further asserts that WMILT's counsel is liable, pursuant to 28 U.S.C. § 1927, for the payment of Zarro's attorneys'

fees and expenses associated with the preparation and prosecution of the Motion. The Motion seeks attorneys' fees and expenses on the basis that WMILT declined to enter into a stipulation to reinstate Zarro's Claims and instead told Zarro to file a motion for reinstatement.

OBJECTION

23. WMILT objects to the Motion and submits that (i) due process was satisfied and the Claim was properly disallowed, (ii) to the extent that Zarro has failed to satisfy the "excusable neglect" standard, the Claim should not be reinstated, and (iii) Zarro has alleged no evidence that either WMILT or its counsel has engaged in conduct sufficient to warrant sanctions pursuant to 28 U.S.C. § 1927 and his request for attorneys' fees and costs associated with the Motion should be denied.

Disallowance Of The Claim Did Not Violate Due Process

24. The Motion vaguely asserts, without providing any factual or legal support, that Zarro's due process rights were violated when the Court entered the May Order disallowing the Claim. Importantly, the Motion does not assert that Zarro failed to receive actual notice of the Sixth Omnibus Objection or the May Certification of Counsel. Instead, the Motion merely asserts that Zarro's counsel could not locate any relevant affidavits of service on the docket. In the absence of any evidence that Zarro failed to receive actual notice of the Sixth Omnibus Objection, it is unclear on what basis Zarro is alleging that his due process rights were violated. To the contrary, upon information and belief, Zarro received actual notice of the Sixth Omnibus Objection and May Certification of Counsel. *See In re Hawthorne*, 326 B.R. 1, 5 (Bankr. D.D.C. 2005) ("[D]ue process is satisfied by mailing the objection and notice to the name and address specified on the proof of claim for the receipt of notices in the case."); *In re Anderson*, 330 B.R. 180, 186 (Bankr. S.D. Tex. 2005) (same). Zarro failed to respond on or

before the Response Deadline, did nothing in response to the May Certification of Counsel, and, accordingly, the Court disallowed his Claim in May, 2012 along with the claims of other non-responding claimants. The fact that a hearing on the Fifth and Sixth Omnibus Objections had at one point been scheduled for June, 2012 and Zarro's Claim was disallowed prior to such hearing is irrelevant. As WMILT explained in its May Certification of Counsel, the proposed order disallowing the claims of the non-responding claimants was intended to streamline the employee claims hearing and limit that proceeding to the responding claimants.

Reinstatement of the Claim Is Inappropriate To The Extent Zarro Has Failed To Demonstrate Excusable Neglect

25. Bankruptcy Rule 3008, which implements section 502(j) of the Bankruptcy Code, grants the Court discretion to reconsider a claim that has been previously allowed or disallowed after an objection. *See* Bankruptcy Rule 3008, Advisory Committee Note (1983) (“Reconsideration of a claim that has been previously allowed or disallowed after objection is discretionary with the court.”). A claimant seeking reconsideration of allowance or disallowance of a claim “has the burden of proving its entitlement to the relief sought, and that begins with a demonstration of cause. Absent cause, a motion for reconsideration under § 502(j) should not be granted.” *In re Morning Star*, 433 B.R. 714, 717 (Bankr. N.D. Ind. 2010) (internal citations omitted). Neither the Bankruptcy Code nor the applicable rules of procedure define “cause” for the reconsideration of a claim. Accordingly, where a motion for reconsideration is filed beyond ten (10) days after entry of the order, courts look to the standard in Rule 60, incorporated into bankruptcy cases by Bankruptcy Rule 9024. *See VFB LLC v. Campbell Soup Co.*, 336 B.R. 81, 86 (D. Del. 2005) (“[A] motion for reconsideration under Bankruptcy Rule 3008 that is filed beyond the 10-day deadline should be treated as a motion under Bankruptcy Rule 9024, which incorporates Civil Rule 60.”); *Morningstar*, 433 B.R. at 717 (explaining that,

in the absence of a definition of “cause”, “[t]he most commonly used standard, and the one adopted by the majority of courts, is that found in Rule 60(b)”; *Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 227 (9th Cir. B.A.P. 1995) (collecting cases that have looked to Rule 60(b) to define “cause” under section 502(j) of the Bankruptcy Code). Rule 60(b)(1) provides:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect

Fed. R. Civ. P. 60(b)(1). “The moving party bears a heavy burden because Rule 60 provides extraordinary relief and is, therefore, generally viewed with disfavor.” *In re Barquet Group, Inc.*, 477 B.R. 454, 460-61 (Bankr. S.D.N.Y. 2012) (citing *Bowman v. Jack Bond (In re Bowman)*, 253 B.R. 233, 240 (8th Cir. B.A.P. 2000)); see *In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 613 (Bankr. D. Del. 2006) (“As the party seeking relief, the creditor seeking to file a late proof of claim bears the burden of proving excusable neglect by a preponderance of the evidence.”).

26. As the statute and case law make clear, neglect alone is insufficient for the Court to vacate the order disallowing Zarro’s Claim. Rather, the neglect must be “excusable.” See *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993) (discussing the meaning of “neglect” and subsequently noting that “[t]his leaves, of course, [Bankruptcy Rule 9006’s] requirement that the party’s neglect of the bar date be ‘excusable’”); *Global Indus. Techs., Inc. v. Ash Trucking Co. (In re Global Indus. Techs., Inc.)*, 375 B.R. 155, 156 (Bankr. W.D. Pa. 2007) (“*Pioneer Investment* does not provide an ‘out’ for all negligent conduct. The negligent conduct must be excusable.”); see also *In re JWP Info. Servs., Inc.*, 231 B.R. 209, 211 (Bankr. S.D.N.Y. 1999) (noting that the “precise definition” of excusable neglect “is elusive” but

that, nevertheless, “[i]t is not . . . a rule designed to excuse all defaults, or even excuse those defaults where relief would not prejudice the other party.”).

27. Indeed, in *Pioneer*, the Supreme Court developed a two-step test for determining whether a party’s failure to act by a certain date was due to excusable neglect. *See generally* 507 U.S. 380. A movant first must show that its failure to timely respond to a notice or order constituted neglect, which is normally associated with a movant’s inadvertence, mistake, or carelessness. *Id.* at 387-88. After establishing neglect, the movant must show, by a preponderance of the evidence, that the neglect was excusable, which is determined by balancing the following factors: (a) the danger of prejudice to the debtor; (b) the length of the delay and whether or not it would impact the case; (c) the reason for the delay; in particular, whether the delay was within the control of the movant; and (d) whether the movant acted in good faith. *Id.* at 395.

28. Balancing the foregoing factors here, it is not clear that Zarro has carried his burden of demonstrating “excusable neglect” by a preponderance of the evidence. First, the Motion alleges that the “excusable neglect” standard has been satisfied because, at the time that the Sixth Omnibus Objection was filed and served, Zarro was not represented by counsel and was not aware that his failure to respond could result in the disallowance of his claim. Notwithstanding the assertion that Zarro was not aware that his failure to respond could result in the disallowance of his claim, the Sixth Omnibus Objection and the notice served in connection therewith provided ample notice that Bach’s claim would be disallowed. And, although courts must make “reasonable accommodations to protect the rights of pro se litigants, [such litigants] are not exempt from compliance with relevant rules of procedural and substantive law.” *See In re Ginsberg*, 164 B.R. 870, 875 (Bankr. S.D.N.Y. 1994) (applying the excusable neglect standard

to decide whether a pro se party should be permitted to file a time-barred complaint objecting to a debtor's discharge under section 727 of the Bankruptcy Code) (citing *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)); *In re Hongjun Sun*, 323 B.R. 561, 566 (Bankr. E.D.N.Y. 2005) ("The Supreme Court has . . . never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.) (internal quotation marks omitted). Certainly by the time that Zarro received the May Certification of Counsel, he knew that WMILT was seeking the disallowance of the Claim due to his failure to respond, and yet, Zarro still failed to act. Moreover, Zarro has not alleged, nor presented any evidence to demonstrate, that he failed to receive notice of the Sixth Omnibus Objection or the related pleadings or orders. The Motion focuses almost entirely on events that took place after the Claim was disallowed in May, 2012, none of which speak to his failure to timely respond in July, 2009.

29. Second, contrary to Zarro's assertions, vacating the May Order with respect to the Claim will prejudice the administration of these chapter 11 cases. *See Cable & Wireless*, 338 B.R. at 614 ("In applying the *Pioneer* test, courts place the greatest weight on whether any prejudice to the other parties will occur by allowing a late claim.") (internal quotation marks omitted); *In re Contessa Liquidating Co.*, No. 2:11-bk-13454-PC, 2012 WL 2153271, at *6 (Bankr. C.D. Cal. June 13, 2012) (explaining that the prejudice factor requires the court to "examine the adverse effect, if any, that granting [the claimant's] [m]otion will have on the debtor and the administration of the case"). In particular, granting the Motion here, where Zarro has alleged only a vague and unsupported excuse for his failure to respond, would open the door for any additional non-responding claimants to seek reinstatement of their previously disallowed claims. *See id.* at 614 (listing "whether allowance of the claim would open the

floodgates to other future claims” as one of the “[r]elevant factors that may be considered when determining whether there is danger of prejudice to the debtors”); *cf. In re Keene Corp.*, 188 B.R. 903, 913 (Bankr. S.D.N.Y. 1995) (finding that movant failed to demonstrate excusable neglect and considering, among other things, that allowing the movant’s late-filed claim “could adversely affect the administration of the case by possibly opening the floodgates to many similar claims”); *In re Hill Stores Co.*, 167 B.R. 348, 352 (Bankr. S.D.N.Y. 1994) (declining to allow a late-filed ballot on the basis of excusable neglect and noting that allowing the ballot “could lead to litigation commenced by any of the 51 others who similarly did not timely remit their class 6 election ballots but have so far chosen not to litigate the issue”); *In re Specialty Equip. Cos.*, 159 B.R. 236, 239 (Bankr. N.D. Ill. 1993) (“Allowance of [movant’s late-filed] claim would set a precedent that is an invitation to havoc.”). On the Fifth and Sixth Omnibus Objections alone, non-responding claimants asserted approximately \$54 million in claims. The risk that WMILT would have to generate reserves or ultimately, distributions, for such claims is highly prejudicial to Creditors holding Allowed Claims (not only because they would not receive distributions, but also, through the incurrence of additional interest with respect to Allowed Claims), to WMILT and the administration of these chapter 11 cases.

Neither WMILT Nor Its Counsel Are Liable for Sanctions Under 28 U.S.C. § 1927

30. 28 U.S.C. § 1927 provides that: “Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927. “[T]he principal purpose of imposing sanctions under 28 U.S.C. § 1927 is the deterrence of intentional and unnecessary delay in the proceedings.” *Zuk v. Eastern Pa. Psychiatric Inst.*, 103 F.3d 294, 297 (3d Cir. 1996) (internal quotation marks omitted). Imposition of sanctions

pursuant to 28 U.S.C. § 1927 requires a court to find that an attorney has “(1) multiplied proceedings; (2) in an unreasonable and vexatious manner; (3) thereby increasing the cost of the proceedings; and (4) doing so in bad faith or by intentional misconduct.” *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 188 (3d Cir. 2002) (internal quotation marks omitted). “Section 1927 is to be strictly construed.” *In re Jazz Photo Corp.*, 312 B.R. 524, 540-41 (Bankr. D.N.J. 2004) (citing *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 795 (7th Cir. 1983)). Indeed, the power to impose sanctions pursuant to section 1927 “is a power which the courts should exercise only in instances of a serious and studied disregard for the orderly process of justice.” *Williams v. Giant Eagle Mkts., Inc.*, 883 F.2d 1184, 1191 (3d Cir. 1989) (internal quotation marks omitted).

31. “Before a court can order the imposition of attorneys’ fees under [section] 1927, it must find willful bad faith on the part of the offending attorney.” *Jazz Photo Corp.*, 312 B.R. at 541 n.27 (citing *Baker Indus., Inc. v. Cerberus Ltd.*, 764 F.2d 204, 208 (3d Cir. 1985)); *see also Hackman v. Valley Fair*, 932 F.2d 239, 242 (3d Cir. 1991) (holding that a finding of bad faith on the part of the offending lawyer is a prerequisite for imposing sanctions under section 1927). Bad faith is a factual determination which can include finding that the claims advanced were without merit, that the attorney knew or should have known this, and that the claims were advanced for an improper purpose such as harassment. *Prudential Ins. Co.*, 278 F.3d at 188. Moreover, once a finding of bad faith is made, the appropriateness of sanctions is a matter entrusted to the discretion of the court. *Id.* at 181. And, a court may, “in its discretion, refuse to award attorney’s fees even where it finds the existence of bad faith, if, in balancing the equities, it nevertheless determines that an award in a particular case would not serve the interests of justice.” *Ford v. Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986) (citing, for example, that “it

would not be an abuse of discretion for a district court to deny an attorney's fees petition where neither party acted in good faith in bringing or maintaining the litigation").

32. The Motion erroneously states that WMILT engaged in negotiations regarding a stipulation to reinstate Zarro's Claim and then "suddenly and without cause" refused to continue negotiations. As set forth above, from the time that WMILT first engaged in discussions with Zarro regarding his disallowed claim to the time that WMILT requested that Zarro file the Motion, WMILT had received various other requests for reinstatement and litigated various other motions to reinstate, and a consistent set of procedures with respect to reinstatement of disallowed claims became necessary. As the Court explained at the December 11, 2012 omnibus hearing on the Struck Motion, "I just will deal with each person who files a motion for reconsideration on the merits of those who have established in my mind any excuse for failing to timely respond, I'll allow them relief from the order, but others I won't. And I think I just have to deal with them on each fact presented to me." 12/11/12 Hr'g Tr. 33:2-7. Moreover, the facts and circumstances surrounding Zarro's failure to respond to the Sixth Omnibus Objection do not present a particularly compelling or sympathetic case for "excusable neglect" like the other Movants whose claims WMILT agreed to reinstate. Rather, Zarro's Motion merely states that he did not have counsel at the time the Sixth Omnibus Objection was filed and served. Given the Court's statement that it would consider each motion to reinstate on a case-by-case basis, and the particular facts alleged by Zarro, WMILT's request that Zarro file the Motion was not unreasonable or vexatious, and certainly was not in bad faith. Accordingly, there is no evidence to support imposing sanctions on WMILT or its counsel pursuant to section 1927. *Cf. Ford*, 790 F.2d 342 (finding no basis for bad faith where counsel filed an employment

discrimination suit after knowing that the statute of limitations period had expired because he could not be certain whether a potential affirmative defense would in fact be plead).

CONCLUSION

33. WMILT submits that the Claim should be reinstated only to the extent the Court finds that Zarro has satisfied the “excusable neglect” standard. Moreover, an award of attorneys’ fees and costs associated with the Motion is not appropriate here, where WMILT in good faith negotiated with Zarro until changed circumstances warranted WMILT’s decision to adopt a consistent set of procedures with respect to the reinstatement of claims.

WHEREFORE WMILT respectfully requests that the Court deny the Motion and grant WMILT such other and further relief as is just.

Dated: Wilmington, Delaware
February 14, 2013

/s/ Amanda R. Steele
Mark D. Collins (No. 2981)
Paul N. Heath (No. 3704)
Amanda R. Steele (No. 5530)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
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– and –

Brian S. Rosen, Esq.
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys to WMI Liquidating Trust

EXHIBIT 1

**Zarro Proof of Claim
(In relevant part)**

B 10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT	District of Delaware	PROOF OF CLAIM
---------------------------------------	-----------------------------	-----------------------

Name of Debtor: Washington Mutual, Inc., et al.	Case Number: 08-12229
---	---------------------------------

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property): Michael R. Zarro	<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.
Name and address where notices should be sent: Michael R. Zarro 4735 225th Ave SE, Sammamish, WA 98075	Court Claim Number: _____ <i>(If known)</i>
Telephone number: (206) 500-4962	Filed on: _____

Name and address where payment should be sent (if different from above): Michael R. Zarro 4735 225th Ave SE, Sammamish, WA 98075	<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
Telephone number: (206) 500-4962	<input type="checkbox"/> Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: \$ <u>224,000.00</u>	5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.
If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.	Specify the priority of the claim.
If all or part of your claim is entitled to priority, complete item 5.	<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).
<input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.	<input checked="" type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. § 507 (a)(4).

2. Basis for Claim: <u>Retention Bonus</u> <i>(See instruction #2 on reverse side.)</i>	<input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).
3. Last four digits of any number by which creditor identifies debtor: _____	<input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).
3a. Debtor may have scheduled account as: <u>Zarro, Michael</u> <i>(See instruction #3a on reverse side.)</i>	<input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).

4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.	<input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)().
Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other	Amount entitled to priority: \$ <u>10,950.00</u>
Describe:	<i>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>
Value of Property: \$ _____ Annual Interest Rate: % _____	
Amount of arrearage and other charges as of time case filed included in secured claim,	
If any: \$ _____ Basis for perfection: _____	
Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____	

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.	
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. <i>(See instruction 7 and definition of "redacted" on reverse side.)</i>	
DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.	
If the documents are not available, please explain:	

Date:	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.
/s/ Michael R. Zarro	<i>[Signature]</i> 3/15/09

RECEIVED
MAR 17 2009

KURTZMAN CARSON CONSULTANTS

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.



0812229031700000000026

EXHIBIT 2

**Affidavit of Service for Sixth Omnibus Objection
(In relevant part)**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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

AFFIDAVIT OF SERVICE

I, Timothy J. Kelsey, being duly sworn according to law, depose and say that I am employed by Kurtzman Carson Consultants LLC, the Court appointed claims and noticing agent for the Debtors in the above-captioned cases.

On June 26, 2009, I caused to be served the following documents listed below upon the parties listed on **Exhibit A** via U.S. First Class mail:

- **Debtors' Fifth Omnibus (Substantive) Objection to Claims**
[Docket No. 1233]
- **Debtors' Sixth Omnibus (Substantive) Objection to Claims**
[Docket No. 1234]
- **Debtors' Seventh Omnibus (Non-Substantive) Objection to Claims**
[Docket No. 1235]

In addition, on June 26, 2009 I caused to be served the following documents listed below upon the parties listed on **Exhibit B** via U.S. First Class mail:

- **Debtors' Fifth Omnibus (Substantive) Objection to Claims**
[Docket No. 1233]
- **Notice of Debtors Fifth Omnibus (Substantive) Objections to Claims**

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 Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.



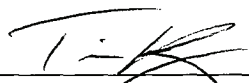
In addition, on June 26, 2009 I caused to be served the following documents listed below upon the parties listed on **Exhibit C** via U.S. First Class mail:

- **Debtors' Sixth Omnibus (Substantive) Objection to Claims**
[Docket No. 1234]
- **Notice of Debtors' Sixth Omnibus (Substantive) Objection to Claims**

In addition, on June 26, 2009 I caused to be served the following documents listed below upon the parties listed on **Exhibit D** via U.S. First Class mail:

- **Debtors' Seventh Omnibus (Non-Substantive) Objection to Claims**
[Docket No. 1235]
- **Notice of Debtors' Seventh Omnibus (Non-Substantive) Objection to Claims**

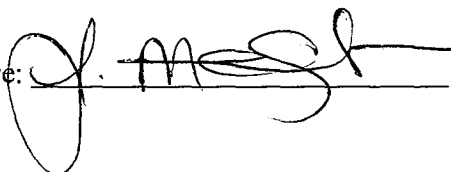
Dated: July 15, 2009



Timothy J. Kelsey

State of California
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on July 15, 2009, by Timothy J. Kelsey, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Signature: 

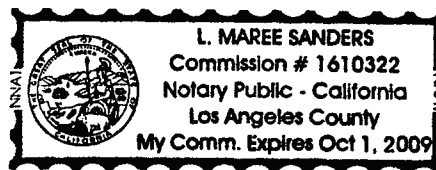


Exhibit C

Exhibit C
First Class Service List

Name	CreditorNoticeName	Address1	Address2	Address3	City	State	Zip
Marc Malone		7510 34th Ave NE			Seattle	WA	98115
Marc Wane		19700 Buckeye Meadow Ln			Northridge	CA	91326
MARGARET C YUNG		3860 83RD AVE SE			MERCER ISLAND	WA	98040
MARILYN TSIKOURIS		638 SPRING LAKE CIRCLE			TARPON SPRINGS	FL	34688-4973
Mark Pestana	Kevin Costello	Roddy Klein & Ryan	727 Atlantic Ave 2nd Fl		Boston	MA	02111
MARTA ATU Employees Retirement Plan	c o Labaton Sucharow LLP	140 Broadway			NEW YORK	NY	10005
MARTA ATU Employees Retirement Plan	LABATON SOCHAROW	JONATHAN GARDNER	140 BROADWAY		NEW YORK	NY	10005
MARY A POLICASTRO		222 E 93RD STREET			NEW YORK	NY	10128
matthew Wajner		210 Wall St No 1011			Seattle	WA	98121
Matthew Wedell		11748 82nd Ave NE			Kirkland	WA	98034
MCCALLA RAYMER LLC		SIX CONCOURSE PKWY NO 3200			ATLANTA	GA	30328
MCCALLA RAYMER LLC	McCalla Raymer LLC	1544 Old Alabama Rd			Roswell	GA	30076-2102
MELBA YAZELL		1419 SUNSET DRIVE			POPLAR BLUFF	MO	63901
MICHAEL A SIROTA		15229 SE 82ND COURT			NEWCASTLE	WA	98059
MICHAEL R ZARRO		4735 225TH AVE SE			SAMMAMISH	WA	98075
MICHAEL SMITH		5731 MUSTANG DR			SIMI VALLEY	CA	93063-6312
Michael Walter		11641 N 128th Pl			Scottsdale	AZ	85259
Michael Yang		5016 California SW No 405			Seattle	WA	98136
MK Shannon Awards and Rewards Inc	Marrilee K Shannon	14450 Rattlesnake Rd			Grass Valley	CA	95945
MSG Media a division of Madison Square Garden LP		2 Penn Plz 16th Fl			New York	NY	10121
NBC Universal Corp	c o Mary McKenna	30 Rockefeller Plz Rm 5153E			New York	NY	10112
NED GREEK INC	THE GREEK THEATRE	2700 NORTH VERMONT AVE			LOS ANGELES	CA	90027
NED GREEK INC	Nederlander Greek Inc The Greek Theatre	Attn David Green	6233 Hollywood Blvd		Los Angeles	CA	90028
ONE REEL	LEGAL DEPT	100 S KING ST NO 100			SEATTLE	WA	98104
Patricia A Lightholder		12435 232nd Ter NE			Redmond	WA	98053
Patricia M Roberts		700 New Hampshire Ave NW Apt 1017			Washington	DC	20037
Paul Stephen		1537 24th Ave NE			Issaquah	WA	98029
PETER L STRUCK		9130 SE 54TH ST			MERCER ISLAND	WA	98040
PRG Schultz		600 Galleria Pkwy Ste 100			Atlanta	GA	30339
PRG Schultz	PRG Schultz USA Inc	1488 PAYSOPHERE CIRCLE			Chicago	IL	60674
Richard C Perry		922 274th Pl SE			Sammamish	WA	98075
ROBERT C MCNITT		170 NORTH CANYON VIEW DR			LOS ANGELES	CA	90049
ROSALIE RICKS		1420 LINWOOD AVE			METAIRIE	LA	70003
ROSE RYKER PENDLEY		671 FILBERT STREET			HALF MOON BAY	CA	94019
SAVERIO RUFFOLO	STEPHEN J RIEBLING JR ESQ	RIEBLING PROTO SCHMIDT & SACHS LLP	190 E POST RD STE 402		WHITE PLAINS	NY	10601
Schlosser Geographic Systems Inc		600 University St Ste 3012			Seattle	WA	98101
SCOTT C TURNER		4659 225TH AVENUE SE			SAMMAMISH	WA	98075
SOUTHCOAST NEWSPAPERS INC	DBA NORTH COUNTY TIMES	PO BOX 54358			LOS ANGELES	CA	90054-0358
SOUTHCOAST NEWSPAPERS INC	NORTH COUNTY TIMES	207 E PENNSYLVANIA			ESCONDIDO	CA	92025
STEPHEN E E WHITTAKER		115 CRANE TERRACE			ORINDA	CA	94563
Steven D Tholl		PO Box 613			Edmonds	WA	98020
Steven Kenneth Stearns		2100 Western Ave No 51			Seattle	WA	98121
Steven Tholl		PO Box 613			Edmonds	WA	98020
SunGard Availability Services LP	Maureen A McGreevey Esq	680 E Swedesford Rd			Wayne	PA	19087
THE DALLAS MORNING NEWS		PO BOX 630054			DALLAS	TX	75263-0054
The Relizon Company dba Workflowone		220 E Monument Ave			Dayton	OH	45402-1223
Vincent Roggio	Harold Goldman Esq	Ansell Zaro Grimm & Aaron PC	1500 Lawrence Ave		Ocean	NJ	07712
Vinod R Panicker		7406 78th Ave SE			Mercer Island	WA	98040
Waste Management	c o Jacquelyn E Mills	1001 Fannin Ste 4000			Houston	TX	77002
WAUSAU FINANCIAL SYSTEMS INC	NW 5551	PO BOX 1450			MINNEAPOLIS	MN	55485-5551
Xiaoqing Dennis Zhang		5408 Sherwood Way			San Ramon	CA	94582