Docket #11039 Date Filed: 2/26/2013

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**
	:	**Re: Docket No. 11011**
	:	**Hearing Date: March 7, 2013 at 10:30 a.m. (ET)**
	:	**Response Deadline: February 26, 2013 at 4:00 p.m. (ET)**

WMI LIQUIDATING TRUST'S LIMITED OBJECTION AND OBJECTION TO MOTION OF CHANDAN SHARMA FOR ORDER GRANTING LEAVE TO FILE AMENDMENT TO PROOF OF CLAIM NO. 2539 OR, IN THE ALTERNATIVE, ALLOWING CHANDAN SHARMA TO ASSERT ALTERNATE ARGUMENT REGARDING CLAIM BASED ON WAMU SEVERANCE PLAN

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 limited objection (the "Limited Objection") and objection (the "Objection") to the *Motion of Chandan Sharma for Order Granting Leave to File Amendment to Proof of Claim No. 2539 or, in the Alternative, Allowing Chandan Sharma to Assert Alternate Argument Regarding Claim Based on WaMu Severance Plan*, dated February 1, 2013 [D.I. 11011] (the "Motion"), filed by Chandan Sharma ("Sharma"), and, in support of the Limited Objection and the Response, respectfully represents 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 WMILT, as defined herein, are located at 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.

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PRELIMINARY STATEMENT

1. WMILT does not object to that portion of the Motion with respect to Sharma's Alternate WSP Claim (as defined below) and requests that the Court grant WMILT sixty (60) days to file renewed objections, and discovery, to the extent necessary, based on Sharma's Alternate WSP Claim. Conversely, the Motion, filed almost four years after the Bar Date (as defined below), more than one year after confirmation of the Plan (as defined below), and more than four months into discovery in the Employee Claims Litigation (as defined below) should be denied, in part, because (i) in attempting to amend the Original Claim (as defined below) to assert a new claim pursuant to Sharma's Retention Bonus Agreement, the Motion asserts a new claim under the guise of an amendment; and (ii) Sharma fails to satisfy the excusable neglect standard in *Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380 (1993).

2. In the alternative, should the Court find that the relief requested in the Motion relates-back to Sharma's Original Claim (as defined below), and asserts an amendment and not a new claim, the Motion should still be denied, in part, because the balance of equities weighs in WMILT's favor and against permitting the amendment.

JURISDICTION AND VENUE

3. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

4. On September 26, 2008 (the "Commencement Date"), each of the Debtors commenced with the 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"). By order [D.I. 9759], dated February 23, 2012 (the "Confirmation Order"), the 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.

6. Pursuant to the Confirmation Order, the Court provided that:

> As of the commencement of the Confirmation Hearing, a proof of Claim may not be filed or amended without the authority of the Court. Notwithstanding that the Court may permit the filing or amendment of such a proof of Claim, the Debtors are not required to reserve Liquidating Trust Assets to pay or otherwise satisfy any such Claims. Confirmation Order ¶ 45.

Sharma's Original Claim

7. By order, dated January 30, 2009 (the "Bar Date Order"), 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. Pursuant to the Bar Date Order, each creditor, subject to certain limited exceptions, was required to file a proof of claim on or before the Bar Date.

8. In accordance with the Bar Date Order, Kurtzman Carson Consultants, LLC ("KCC"), the Debtors' court-appointed claims and noticing agent, mailed notices of the Bar Date [D.I. 0875 and 0926] and proof of claim forms to, among others, all of the Debtors' creditors and other known holders of claims as of the Commencement Date. Notice of the Bar Date also was published once in *The New York Times (National Edition)* [D.I. 0848], *The Wall Street Journal* [D.I. 0846], *The Seattle Times*, and *The Seattle Post-Intelligencer* [D.I. 0847].

9. On or before the Bar Date, Sharma filed proof of claim number 2539 (the "Original Claim"), alleging a total of $581,627.55 in payments owed pursuant to (i) the WMI

Supplemental Executive Retirement Accumulation Plan (the "SERAP"), (ii) a WMB Change in Control Agreement ("WMB CIC Agreement"), and (iii) a Cash Long-Term Incentive Agreement ("Cash LTI Agreement"). A copy of Sharma's Original Claim is annexed hereto as **Exhibit 1**.

10. 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").

11. On August 15, 2012, WMILT filed (i) *WMI Liquidating Trust's Eighty-Second Omnibus (Substantive) Objections to Claims* [D.I. 10507] (the "Eighty-Second 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 Seventy-Ninth Omnibus (Substantive) Objection to Change in Control Claims* [D.I. 10504], *WMI Liquidating Trust's Eightieth Omnibus (Substantive) Objection to Claims* [D.I. 10505], and *WMI Liquidating Trust's Eighty-First Omnibus (Substantive) Objection to Claims* [D.I. 10506] (collectively, together with the Eighty-Second Omnibus Objection, the "August Omnibus Objections"). WMILT objected to the Original Claim in the Eighty-Second Omnibus Objection.

12. On September 17, 2012, WMILT filed *WMI Liquidating Trust's Eighty-Fourth Omnibus (Substantive) Objection to, Among Others, Change in Control Claims* [D.I. 10677], *WMI Liquidating Trust's Eighty-Fifth Omnibus (Substantive) Objection to Change in Control Claims* [D.I. 10678], *WMI Liquidating Trust's Eighty-Eighth Omnibus (Substantive) Objection to Disputed Equity Interests* [D.I. 10681], and the *Objection of WMI Liquidating Trust to Proof of Claim Filed by Claimant Medina & Thompson (Claim No. 1218)* [D.I. 10676]

(collectively, the "September Omnibus Objections," and, together with the Fifth Omnibus Objection, Sixth Omnibus Objection, and the August Omnibus Objections, the "Omnibus Objections").

13. Following the filing of the Omnibus Objections, certain claimants filed responses to such objections (the "Responding Claimants").

14. On May 16, 2012, the Court entered orders granting the Fifth Omnibus Objection and the Sixth Omnibus Objection with respect to the non-responding employee claimants. *See* D.I. 10179 (as corrected by D.I. 10225), D.I. 10181 (as corrected by D.I. 10226).

15. On September 19, 2012, the Court entered orders granting the Seventy-Ninth Omnibus Objection, Eightieth Omnibus Objection, Eighty-First Omnibus Objection, and Eighty-Second Omnibus Objection with respect to the non-responding employee claimants. *See* D.I. 10689, 10690, 10691, and 10692.

16. On September 10, 2012, the Court held a status conference with respect to the Omnibus Objections and, at such time, requested that WMILT and the Responding Claimants confer regarding discovery and other procedures with respect to a hearing or series of hearings to consider the relief requested in the Omnibus Objections (the "Employee Claims Hearing" or "Employee Claims Litigation"). As a result of such conferences and the Court's input with respect to remaining issues, on October 15, 2012, the Court entered the *Agreed Order Establishing Procedures and Deadlines Concerning Hearing on Employee Claims and Discovery in Connection Therewith* (the "October Scheduling Order") [D.I. 10777], which provided for, among other things, the consolidation of the litigation with respect to the Omnibus Objections, a schedule of deadlines related to these litigation, discovery protocols to be followed

by the parties, and defined the more than eighty (80) remaining employee claimants (the "Remaining Claimants").

17. Thereafter, WMILT and certain of the Remaining Claimants began the discovery process and quickly realized that, based upon the discovery propounded, additional time would be required to complete such process and prepare for the Employee Claims Hearing. Consequently, and as a result of such mutual understanding, on January 7, 2013, the Court entered the *Agreed Order Amending Scheduling Orders with Respect to Employee Claims Hearing and Adversary Proceedings* (the "Amended Scheduling Order") [D.I. 10975], pursuant to which the Court, among other things, amended the deadlines set forth in the October Scheduling Order and established June 3, 2013 as the hearing date to consider the change of control issues raised by the Omnibus Objections. WMILT is continuing its discovery efforts in accordance with the Amended Scheduling Order. As of the date hereof, WMILT has reviewed in excess of 360,000 documents, responded to several of the Remaining Claimants' requests for production, and served all Remaining Claimants with interrogatories and requests for production. All discovery responses are due by the parties on March 11, 2013.

18. On February 1, 2013, Sharma filed the Motion.

THE MOTION

19. Sharma seeks leave of the Court to amend the Original Claim to add (i) an alternate claim under the WaMu Severance Plan (the "Alternate WSP Claim"); and (ii) a new claim under his Retention Bonus Agreement, dated August 4, 2008 (the "RBA Claim") in the amount of $74,737. A copy of Sharma's Retention Bonus Agreement is annexed hereto as **Exhibit 2**. In particular, the Motion asserts, among other things, that (i) Sharma's Alternate WSP Claim and RBA Claim relate back to the Original Claim because all arise from Sharma's

employment relationship with Washington Mutual, and are therefore amendments and not new claims; and (ii) the amendments should be permitted because Sharma satisfies the five factors set forth in *Foman v. Davis* that courts consider in deciding whether to grant leave to amend a federal complaint: (i) undue delay; (ii) bad faith; (iii); dilatory motive; (iv) prejudice; and (v) futility of the amendment (the "*Foman* Factors"). 371 U.S. 178 (1962). In the alternative, should the Court deny the proposed amendments, the Motion requests permission to assert the Alternate WSP Claim and RBA Claim as a late-filed new claims at the Hearing on March 7, 2013.

LIMITED OBJECTION

20. While WMILT does not believe that either the *Foman* Factors or the "excusable neglect" standard have been satisfied, WMILT does not object to Sharma to amending the Original Claim to assert an alternative theory of recovery pursuant to the WaMu Severance Plan should the Court find that a "change in control" did not occur and Sharma does not receive "change in control" payments pursuant to his respective WMB CIC Agreement.

21. However, WMILT requests that, should the relief requested be granted, WMILT be granted sixty (60) days to file renewed omnibus objections based on the foregoing amendment. In addition, to the extent the Court grants the Motion, WMILT requests that the Court allow WMILT to bring additional adversary proceedings it may have related to the claim, and, to the extent WMILT determines it needs additional discovery, to propound additional discovery related to the claim.

OBJECTION

22. The Motion, filed almost four years after the Bar Date, more than one year after confirmation of the Plan, and more than four months into discovery in the Employee Claims Litigation should be denied, in part, because (i) in attempting to amend the Original Claim to assert a claim pursuant to Sharma's Retention Bonus Agreement the Motion asserts a new claim under the guise of an amendment; and (ii) Sharma fails to satisfy the "excusable neglect" standard in *Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380 (1993).

23. In the alternative, should the Court find that the RBA Claim relates-back to the Original Claim and is actually an amendment and not a new claim, the Motion should still be denied, in part, because the balance of the equities weighs in WMILT's favor and against permitting the amendment.

Sharma is Asserting a New Claim, Not a True Amendment

24. The decision to grant or deny a post-bar date amendment to a timely filed proof of claim rests within the sound discretion of the bankruptcy court. *See In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 309 (3d Cir. 1999). Amendments may not be used as a mechanism to circumvent the bar date; therefore, a bankruptcy court must carefully scrutinize a post-bar date amendment to ensure that the alleged amendment truly amends a timely-filed proof of claim. *See Midland Cogeneration Venture Ltd. P'ship v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115, 133 (2d Cir. 2005). In particular, a "bar [date] order serves the important purpose of enabling the parties to a bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate and the general amount of the claims, a necessary step in achieving the goal of successful reorganization." *In re Keene Corp.,* 188 B.R. 903, 907 (Bankr. S.D.N.Y. 1995) (internal quotation marks omitted). It "does not function

merely as a procedural gauntlet . . . but as an integral part of the reorganization process." *Id.* (internal quotation marks omitted).

25. To determine whether to allow a creditor to amend its proof of claim, courts typically engage in a two part inquiry. *See In re Enron Corp.*, 01-16034 AJG, 2007 WL 610404, at *4 (Bankr. S.D.N.Y. Feb. 23, 2007). First, courts consider whether the motion asserts a new claim or whether it truly seeks to amend a timely filed proof of claim. *See id.* Second, the Court must weigh several equitable factors to determine whether the amendment should be allowed. *See id.*; *Integrated Res., Inc. v. Ameritrust Co. Nat'l Ass'n (In re Integrated Res., Inc.)*, 157 B.R. 66, 70 (S.D.N.Y. 1993); *In re McLean Indus., Inc.*, 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990). "The second prong is to be applied only if the first prong is satisfied and the claim qualifies as an amendment and not simply a new claim." *In re Enron Corp.*, 2007 WL 610404, at *4 (internal quotation marks omitted).

26. In determining whether the first prong is satisfied, many bankruptcy courts apply Federal Rule of Civil Procedure 15 ("Rule 15"). *See In re MK Lombard Group I, Ltd.*, 301 B.R. 812, 816 (Bankr. E.D. Pa. 2003) (noting that "[t]he trend of the cases appear to apply Rule 7015 to contested matters" and citing cases); *see also In re McLean Indus., Inc.*, 121 B.R. at 708 (noting that "[a]lthough most bankruptcy courts do not discuss Rule 15 when determining the propriety of an amendment under the Code, several courts . . . have found Rule 15 to control amendments to claims"); *see also In re Enron Corp.*, 2007 WL 610404, at *4 n.4 (noting that Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7015 provides that Rule 15 applies in adversary proceedings and Bankruptcy Rule 9014 permits a bankruptcy court to extend Rule 7015 to contested matters as well as adversary proceedings). Under Rule 15(c)(2), a subsequent claim is an amendment and not a new claim if it relates back to the date of the original, timely-

filed proof of claim. That is, if the subsequent claim "[arises] out of the conduct, transaction or occurrence set out—or attempted to be set out—in the original pleading." *In re Quinn*, 423 B.R. 454, 463 (Bankr. D. Del. 2009) (quoting Fed. R. Civ. P. 15(c)).

27. If the original claim did not "give fair notice of the conduct, transaction or occurrence that forms the basis of the claim asserted in the amendment," then the amendment asserts a new claim and will not be allowed. *In re Ben Franklin Hotel Assocs.*, 1998 WL 94808, at *3. More specifically, this requirement demands that the original proof of claim provide the debtor with notice of a creditor's "intention to pursue its rights under the . . . Agreement[ ]" that the creditor is attempting to amend its original proof of claim to pursue. *In re SemCrude, L.P.*, 443 B.R. 472, 479 (Bankr. D. Del. 2011); *see In re Integrated Res., Inc.* 157 B.R. at 70 (internal quotation marks omitted) (holding that notice must "evidenc[e] an intention to hold the estate liable."). The party asserting the relation-back bears the burden of proof on this issue. *In re Enron Corp.*, 2007 WL 610404, at *5.

28. An amendment will satisfy Rule 15 if its purpose is to (1) "cure defects in a claim as originally filed," (2) "describe a claim with greater particularity," or (3) "plead new theories of recovery *on facts set forth* in the original claim." *In re SemCrude*, 443 B.R. at 477 (emphasis added). Here, the Motion relies on entirely new facts in asserting the RBA Claim as an alleged amendment and, therefore, Sharma does not meet his burden on this threshold inquiry.

29. Through the Motion, Sharma is neither seeking to cure an obvious defect in the Original Claim nor to describe the Original Claim with greater particularity. Instead, the Motion seeks permission to include an alternate theory of recovery in the Original Claim under Sharma's Retention Bonus Agreement.

30. The Motion *does not* plead new theories of recovery on the same "conduct, transaction or occurrence set out—or attempted to be set out—in [Sharma's] original pleading" under Rule 15. The proposed "amendment" is based on an entirely new agreement, Sharma's Retention Bonus Agreement, rather than any of those included in or that formed the basis of, the Original Claim, namely: (i) the SERAP; (ii) a WMB CIC Agreement; and (iii) a Cash LTI Agreement. Thus, the Original Claim did not "evidenc[e] an intention to hold [WMILT] liable" under the Retention Bonus Agreement and Sharma's proposed amendment fails to relate back to the Original Claim. *Cf. In re SemCrude*, 443 B.R. at 477 (holding that claimant's claim for indemnity and breach of contract related back to his original proof of claim that asserted contingent claims for "any and all rights" it may have under state contract law and that *referenced the applicable contracts* between the creditor and debtors); *In re Edison Brothers Stores, Inc.*, No. 99-532(JCA), 2002 WL 999260, at *4 (Bankr. D. Del. May 15, 2002) (holding that the debtor had fair notice of the amendment where the creditor only sought to increase the amount of the creditor's original proof of claim).

31. Importantly, the Motion does not assert an amendment merely because the Original Claim and the new RBA Claim relate, in some manner, to Sharma's employment relationship with Washington Mutual. For example, in *Rump v. Philips Lifeline*, No. C 09-03271 SI, 2010 WL 4502485 (N.D. Cal. Nov. 2, 2010), the plaintiff asserted several causes of actions in his original complaint—all based on defendant's alleged failure to pay plaintiff wages and commissions owed to him under an oral employment contract. Plaintiff then sought to amend his complaint to add a claim for interference with economic expectations pursuant to a separate non-solicitation agreement plaintiff had with his former employer, the defendant. *Id.* at *3. The court found that, to relate back, the original and amended complaints must not arise from

separate episodes that took place at different times and places. *Id.* at *2. In order for two claims to share the same core of operative facts, the plaintiff must allege the same facts and rely on the same evidence to prove the claims. *Id.* Thus, the new cause of action (interference with economic expectations relating to the non-solicit agreement) and the original causes of action (relating to his oral employment contract) did not relate to one another. *Id.* at *3. Specifically, they were based on *separate agreements* and on different alleged conduct by defendant and, therefore, amounted to separate interactions between the plaintiff and defendant. *Id.* The fact that all of the claims related to the former employment relationship between the plaintiff and defendant did not amount to a common transaction under Rule 15. *Id.*

32. Further, the Eleventh Circuit of the United States Court of Appeals has held that a claim for retroactive overtime pay did not arise out of the same transaction or occurrence as a breach of contract claim under plaintiff's employment contract with defendant. In *Forzley v. AVCO Corp. Electronics Division*, 826 F.2d 974, 982 (11th Cir. 1987), the plaintiff's original claim was based solely on the ground that the plaintiff's employment agreement was terminated before the expiration of the enumerated two-year term in his contract without contractual justification. Plaintiff then filed an amended complaint to assert a claim for pre-termination overtime pay. *Id.* at 982. The court held that the original complaint did not apprise defendant that it could expect to defend a claim for retroactive overtime pay that preceded the termination. *Id.* Accordingly, the court held that the claim for retroactive overtime pay did not arise out of the transaction or occurrence of the original complaint. *Id.* Both the original and the amended claim arose out of the "employment relationship," and yet, the Eleventh Circuit did not find that plaintiff's amended claim related back. *Id.* Similarly, Sharma's new RBA Claim arises from a separate agreement than those that formed the

foundation and basis of the Original Claim. Accordingly, Sharma has failed to meet his burden under Rule 15.

Sharma Has Failed to Establish Excusable Neglect Under *Pioneer* and the New RBA Claim Should Be Disallowed

33. As the Court has previously noted, Sharma's late-filed new RBA Claim may only be permitted post-bar date under Federal Rule of Bankruptcy Procedure 9006(b)(1) if, on motion, the Court determines that Sharma's failure to comply with the Bar Date was the result of "excusable neglect." Fed. R. Bankr. P. 9006 (b)(1); *see Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 382–83 (1993); *In re Flyi, Inc.*, No. 05-20011 (MFW), 2008 WL 170555, at *3 (Bankr. D. Del. Jan. 16, 2008). "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." *In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 613 (Bankr. D. Del. 2006).

34. As the statute and case law make clear, neglect alone is insufficient for the Court to permit a claimant to assert new claims after expiration of the Bar Date. Rather, the neglect must be "excusable." *See Pioneer*, 507 U.S. at 395 (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.").

35. Indeed, in *Pioneer*, the Supreme Court developed a two-step test for determining whether the court should permit a late-filed claim as a result of the movant's 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: (1) the danger of prejudice to the debtor; (2) the length of the delay and whether or not it would impact the case; (3) the reason for the delay; in particular, whether the delay was within the control of the movant; and (4) whether the movant acted in good faith. *Id.* at 395.

36. Moreover, in *In re O'Brien Environmental Energy, Inc.*, 188 F.3d 116, 126 (3d Cir. 1999), the Third Circuit provided several factors that courts should consider in analyzing *Pioneer*'s first factor, prejudice, including: (a) the adverse impact on the judicial administration of the case; (b) whether the plan was filed or confirmed with knowledge of the existence of the claim; (c) the disruptive effect that the late filing would have on the plan or upon the economic model upon which the plan was based; (d) the size of the new claim; and (e) whether allowing the claim would open the floodgates to other similar claims.

37. Courts generally focus on the third factor—the reason for the delay—as the predominant factor in a *Pioneer* analysis. *Williams v. KFC Nat'l Mgmt. Co.*, 391 F.3d 411, 415-16 (2d Cir. 2004); *see United States v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004) ("fault in the delay [is] perhaps the most important single factor in determining whether neglect is excusable"); *Silivanch v. Celebrity Cruises, Inc.,* 333 F.3d 355, 366 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004) ("We and other circuits have focused on the third factor: the

reason for the delay, including whether it was within the reasonable control of the movant.'") (quoting *Pioneer,* 507 U.S. at 395); *Graphic Commc'ns Int'l Union Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001) (reason for delay always a critical factor); *Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994); *see In re Kmart Corp.*, 381 F.3d 709, 715 (7th Cir. 2004) (noting rule in several sister circuits that "fault in the delay is the preeminent factor"). Importantly, "[w]hile belated *amendments* will ordinarily be 'freely allowed' where other parties will not be prejudiced, belated new claims will ordinarily be denied, even absent prejudice, unless the reason for the delay is compelling." *In re Flyi, Inc.*, 2008 WL 170555, at *4 (internal quotation marks omitted) (quoting *In re Enron Corp*, 419 F.3d at 133-34) (emphasis added).

38. Balancing the foregoing *Pioneer* factors demonstrates that, based on the totality of the facts and circumstances, Sharma cannot carry the burden of establishing "excusable neglect" by a preponderance of the evidence. First, the Motion only vaguely asserts that Sharma was not represented by counsel when he filed the Original Claim and inadvertently failed to include the RBA Claim. Upon information and belief, Sharma received actual notice of the Bar Date, which among other things, established the Bar Date, explained that the Bar Date was "the deadline for each person . . . to file a proof of claim . . . against any of the Debtors that arose on or prior to September 26, 2008," and provided that "*a claimant should consult an attorney* if the claimant has any questions, including whether to file a proof of claim." *See* D.I. 0875. Although courts must make "reasonable accommodations to protect the rights of pro se litigants, they are not exempt from compliance with relevant rules of procedural and substantive law." *See, e.g.*, *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).

39. Second, contrary to Sharma's assertions, permitting Sharma to assert his new RBA Claim at this juncture will cause prejudice to WMILT. WMILT established March 31, 2009 as the Bar Date. The Motion was filed on February 1, 2013. Therefore, the delay at issue here is a period of almost four years, more than one year after the Plan was confirmed and consummated, and more than four months into the discovery process for the upcoming Employee Claims Hearing. As noted by another court in the Third Circuit, "[r]egardless of the reason, a delay of four years is undoubtedly significant." *In re W.R. Grace & Co.*, CIV.A. 07-536, 2008 WL 687357, at *4 (D. Del. Mar. 11, 2008). In fact, courts have refused to find excusable neglect in cases with much shorter periods of delay. *See, e.g.*, *New Century TRS Holdings, Inc*., 465 B.R. at 52 (noting that even a delay as short as two months may be significant if the debtor proceeds expeditiously to resolve outstanding claims); *In re Trump Taj Mahal Assocs.,* 156 B.R. 928 (Bankr. D.N.J. 1993) (finding that late claimants failed to establish excusable neglect after delay of one year). In contrast, the delay in cases where late claimants have established excusable neglect are significantly shorter than the delay at issue here. *See, e.g.*, *Pioneer,* 507 U.S. at 384 (delay of twenty days); *In re O'Brien,* 188 F.3d at 130 (delay of two months).

40. In particular, WMILT was not previously aware of the RBA Claim when it filed the Omnibus Objections. Thus, WMILT may not rely on those objections as asserting all legal theories relevant to the RBA Claim. Instead, WMILT will be required to amend its

objections. Subject to WMILT's amendments, Sharma and WMILT may require additional discovery. Thus, contrary to Sharma's assertions, allowing any new claims this late in the discovery process does not guarantee that further discovery will not be required.

41. Moreover, permitting the new RBA Claim this late in the discovery process does not provide any of the parties with any assurance that a continuation of the currently scheduled discovery dates will not be required. Should the new RBA Claim be allowed, WMILT's amendments to its objections to address the new claim can be filed no sooner than after the Hearing on the Motions on March 7, 2013, which is mere days before the March 11, 2013 deadline for responses to interrogatories and document requests pursuant to the Amended Scheduling Order. A tremendous amount of resources have already been expended in order to comply with the Amended Scheduling Order and proceed with the Employee Claims Hearing as soon as possible. In fact, WMILT has had teams of attorneys working on responding to interrogatories and requests for production over the course of several months. To date, WMILT has reviewed in excess of 360,000 documents, responded to several of the Remaining Claimants' requests for production, and served all of the Remaining Claimants' with interrogatories and requests for production. Given the magnitude of resources required to comply with the Amended Scheduling Order and proceed with the Employee Claims Litigation as soon as possible, allowing any new claims this late in the discovery process would not guarantee that a continuation of the currently scheduled dates will not be required.

42. Furthermore, allowing the new RBA Claim now would undermine WMILT's reliance on the finality of previous and future orders entered by the Court and would open the door for the rest of the Remaining Claimants to assert belated new claims. *See In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 614 (Bankr. D. Del. 2006) (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."). Granting the Motion would signal to the rest of the Remaining Claimants, all of which have asserted claims similar to the Original Claim, that they too may prevail on filing belated new claims pursuant to entirely separate and distinct agreements which were neither referenced in, provided in, nor formed the basis of, their original proofs of claim. Opening the floodgates to a continuous influx of additional new claims by the rest of the Remaining Claimants would only increase the adverse effect that new claims would have on the administration of the case, amplifying the need for finality.

43. Importantly, a finding of prejudice is not barred simply because Sharma is not requesting that WMILT reserve additional amounts for the new RBA Claim. The Third Circuit has recognized that *Pioneer* requires a "more detailed analysis of prejudice . . . than whether the Plan set aside money to pay the claim at issue," because "[o]therwise, virtually all

late filings would be condemned by this factor." *In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 126 (3d Cir. 1999).

Even if the Court Determines that Sharma is Asserting an Amendment Rather Than a New Claim, the Equities Weigh in Favor of WMILT and the Amendment Should be Denied

44. In order to permit an amendment, under the two-prong test discussed above, the court must find that the equities balance in the movants favor. *See generally In re Enron Corp.*, 419 F.3d 115. Under the first prong, the court must determine whether the purported "amendment" relates back to a timely filed proof of claim and is actually an amendment rather than a new claim. *Id.* at 133. Under the second prong, the court must weigh the following five equitable factors in determining whether to permit the amendment: (1) undue prejudice to the opposing party; (2) bad faith or dilatory behavior on the part of the claimant; (3) whether other creditors would receive a windfall were the amendment *not* allowed; (4) whether other claimants might be harmed or prejudiced; and (5) the justification for the inability to file the amended claim at the time the original claim was filed. *See In re Enron Corp.*, 298 B.R. 513, 524 (Bankr. S.D.N.Y. 2003); *see also In re Enron Corp.*, 419 F.3d at 133; *cf. In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1434 (3d Cir. 1997) (among the grounds justifying denial of leave to amend a federal complaint are undue delay, bad faith, dilatory motive, prejudice, and futility); *In re SemCrude, L.P.*, 443 B.R. 472, 476 (Bankr. D. Del. 2011) (same).

45. Even if the Court were to determine that Sharma is asserting an amendment and not a new claim, an analysis of the five foregoing equitable factors demonstrates that the balance of the equities weighs in WMILT's favor and the amendment should be denied.

46. First, contrary to Sharma's assertions, permitting Sharma to assert his new RBA Claim at this juncture will cause prejudice to WMILT. In particular, WMILT was not

previously aware of the RBA Claim when it filed the Omnibus Objections. Thus, WMILT may not rely on the filed Omnibus Objections as asserting all legal theories relevant to the RBA Claim. Instead WMILT will be required to amend its objections. Subject to WMILT's amendments, Sharma and WMILT may require additional discovery. Thus, contrary to Sharma's assertions, allowing any new claims this late in the discovery process does not guarantee that further discovery will not be required.

47. Moreover, permitting the new RBA Claim this late in the discovery process also does not provide any of the parties with any assurance that a continuation of the currently scheduled discovery dates will not be required. Should the new RBA Claim be allowed, WMILT's amendments to its objections to address the new claim can be filed no sooner than after the Hearing on the Motions on March 7, 2013, which is mere days before the March 11, 2013 deadline for responses to interrogatories and document requests pursuant to the Amended Scheduling Order. A tremendous amount of resources have already been expended in order to comply with the Amended Scheduling Order and proceed with the Employee Claims Hearing as soon as possible. In fact, WMILT has had teams of attorneys working on responding to interrogatories and requests for production over the course of several months. To date, WMILT has reviewed in excess of 360,000 documents, responded to several of the Remaining Claimants' requests for production, and served all of the Remaining Claimants' with interrogatories and requests for production. Given the magnitude of resources required to comply with the Amended Scheduling Order and proceed with the Employee Claims Litigation as soon as possible, allowing any new claims this late in the discovery process would not guarantee that a continuation of the currently scheduled dates will not be required.

48. Furthermore, allowing the new RBA Claim now would undermine WMILT's reliance on the finality of previous and future orders entered by the Court and would open the door for any of the rest of the Remaining Claimants to assert belated new claims. *See In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 614 (Bankr. D. Del. 2006) (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."). Granting the Motion would signal to the rest of the Remaining Claimants, all of which have asserted claims similar to the Original Claim, that they too may prevail on filing belated new claims pursuant to entirely separate and distinct agreements which were neither referenced in, provided in, or formed the basis of their original proofs of claim. Opening the floodgates to a continuous influx of additional new claims by the rest of the Remaining Claimants would only exponentially increase the adverse effect that new claims would have on the administration of the case, amplifying the need for finality.

49. Second, Sharma's justification plainly does not demonstrate an *inability* to file the RBA Claim at the same time as the Original Claim. Sharma only states that he "inadvertently failed to include" the RBA Claim with the Original Claim. Sharma Motion ¶ 2. Accordingly, Sharma does not cite a valid reason why he *could not* include the RBA Claim along with the Original Claim, let alone a compelling reason as required for post-confirmation amendments. Indeed, the United States Court of Appeals for the Seventh Circuit has held that "[l]eave to amend should be freely granted *early* in a case, but passing milestones in the litigation make amendment less appropriate. . . Confirmation of the plan of reorganization is a . . . milestone. Once that milestone has been reached further changes should be allowed only for compelling reasons." *Holstein v. Brill,* 987 F.2d 1268, 1270 (7th Cir. 1993) (citing *Foman v. Davis*, 371 U.S. 178 (1962) (emphasis added) (denying motion by former employee to amend and increase wage claim against chapter 11 debtor post-confirmation absent a compelling reason)); *In re Winn-Dixie Stores, Inc.*, 639 F.3d 1053, 1056 (11th Cir. 2011) (following the Seventh Circuit and holding that *res judicata* precludes post-confirmation amendments absent some "compelling reason"); *In re NextMedia Group Inc.*, No. 09–14463 (PJW), 2011 WL 4711997, at *3 (D. Del. Oct. 6, 2011) (applying the law of the Seventh and Eleventh Circuits and holding that absent a compelling reason, post-confirmation amendments should be denied); *see also In re Kaiser Group International, Inc.,* 289 B.R. 597, 607 n.8 (Bankr. D. Del. 2003) (recognizing that claims may only be amended before confirmation of a plan of reorganization); *In re New River Shipyard, Inc.*, 355 B.R. 894, 909 (Bankr. S.D. Fla. 2006) ("[A] post-confirmation amendment of a claim should only be allowed for compelling reasons.").

50. Third, denying Sharma's amendment would not cause other creditors to receive a windfall were the amendment *not* allowed. Sharma is asserting the RBA Claim as an alternate claim, which will neither increase the Original Claim amount nor require WMILT to increase its reserves.

51. Fourth, Sharma's dilatory behavior is evidence by the almost *four years* that he waited to amend the Original Claim after expiration of the Bar Date, long after WMILT filed its Omnibus Objections and long after WMILT began discovery relating to the Employee Claims Hearing.

52. Finally, creditors of WMILT would be unduly prejudiced by granting the Motion by potentially reducing the amount of funds available for distributions. If the Motion is granted, WMILT will have to expend funds to amend its substantive objections and will likely have to propound and provide additional discovery relating to the amendment. All amounts expended to defend against Sharma's alleged amendment serves no purpose but to decrease the amount available to deserving creditors.

RESERVATION OF RIGHTS

53. To the extent the Court grants the Motion in its entirety, WMILT reserves the right to include any additional objections or bring additional adversary proceedings it may have related to the claims, and to the extent WMILT determines it needs additional discovery, to propound additional discovery related to the claims.

CONCLUSION

54. WMILT submits that there is no basis on which the Court should grant the relief requested in the Motion with respect to Sharma's RBA Claim, but otherwise does not object to Sharma's amendment to assert the Alternate WSP Claim.

WHEREFORE WMILT respectfully requests that the Court add the requested relief to the order approving the Motion and grant WMILT such other and further relief as is just.

Dated: Wilmington, Delaware
February 26, 2013

/s/ Amanda R. Steele

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Attorneys to WMI Liquidating Trust

EXHIBIT 1

#2539

United States Bankruptcy Court District of Delaware

PROOF OF CLAIM

Name of Debtor *(check only one)*:

☑ Washington Mutual, Inc. 08-12229 (MFW) ☐ WMI Investment Corp. 08-12228 (MFW)

Name and address of Creditor (and name and address where notices should be sent if different from Creditor): Name ID: 5431422 Pack No. 18016

CHANDAN SHARMA
5876 NW LAC LEMAN DR
ISSAQUAH, WA 98027
USA

Telephone number: 425 746 0080 Email Address: sharma_chandan@live.com

Name and address where payment should be sent (if different from above)

Telephone number: Email Address:

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number: _____ *(If known)*

Filed on: _____

☐ 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.

☐ Check this box if you are the debtor or trustee in this case.

Your Claim Is Scheduled as Follows:

The Debtor has listed your claim as Contingent, Unliquidated, and Disputed on Schedule F as a General Unsecured claim.

You have a claim scheduled against the Debtor listed above in the amount and priority set forth above. (This scheduled amount may be an amendment to a previously scheduled amount.) If you agree that you have a claim against the Debtor listed above and in the amount and priority set forth above and you have no other claim against that Debtor, you do not need to file this proof of claim form, EXCEPT AS FOLLOWS: If the amount shown is DISPUTED, UNLIQUIDATED or CONTINGENT, a proof of claim MUST be filed in order to receive any distribution in respect of your claim. If you have already filed a proof of claim in accordance with the attached instructions, you need not file again.

1. Type of Claim:

☑ Claim existing as of the date case was filed. **Amount of Claim as of Date Case Filed:** $ 581,627.55

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.

If all or part of your claim is entitled to priority (other than under 11 U.S.C. § 507(a)(2)), complete Item 5.

☐ Check this box if claim is filed by a governmental unit.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of interest or additional charges.

2. Basis for Claim: Change Control, SERAP, and Cash Incentive Vestment Per change of control
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: 3725 (Tax Id. #)

3a. Debtor may have scheduled account as: See basis of claim. Debtor scheduled $0, which is incorrect.
(See instruction #3a on reverse side.)

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.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other

Describe: _____

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: $**_____

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.

Specify the priority of the claim:

☐ Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

☐ 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 under 11 U.S.C. § 507(a)(4).

☐ Contributions to an employee benefit plan under 11 U.S.C. § 507(a)(5).

☐ Up to $2,425 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use under 11 U.S.C. § 507(a)(7).

☐ Taxes or penalties owed to governmental units under 11 U.S.C. § 507(a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. § 507(a)(_____).

Amount entitled to priority:

$_____

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. *(See definition of "redacted" on reverse side.)* **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.

CHANDAN SHARMA

FOR COURT USE ONLY

RECEIVED
MAR 27 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.

08122290902021854540024 30

WMI Claim - Chandan Sharma

Annual Compensation	$ 186,844.00
Bonus Target	35%

Change Control	$ 504,478.80
SERAP	$ 3,815.42
Accelrated Vestment	
08 Cash Incentive	$ 73,333.33
TOTAL	$ 581,627.55

COPY

CHANGE IN CONTROL AGREEMENT

This Change in Control Agreement (the "Agreement") is between the Subsidiary (as defined below) of Washington Mutual, Inc. (the "Company") by which the undersigned employee is currently employed ("Washington Mutual") and the undersigned employee of Washington Mutual ("Employee"). The parties agree as follows:

1. Employment. Washington Mutual hereby employs Employee, and Employee hereby accepts employment, on the terms in this Agreement.

2. Duties. Employee shall perform such duties as Washington Mutual may from time to time direct.

3. Compensation & Benefits. Employee's compensation and benefits shall be as determined by Washington Mutual from time to time.

4. Performance of Duties. Employee agrees that during his or her employment with Washington Mutual: (a) Employee will faithfully perform the duties of such office or offices as he or she may occupy, which duties shall be such as may be assigned to him or her by Washington Mutual; (b) Employee will devote to the performance of his or her duties all such time and attention as Washington Mutual shall reasonably require, taking, however, from time to time, such reasonable vacations as are consistent with his or her duties and Washington Mutual policy; and (c) Employee will not, without Washington Mutual's express consent, become actively associated with or engaged in any business or activity during the term of this Agreement other than that of Washington Mutual (excepting customary family and personal activities, which may include management of personal investments so long as it does not entail active involvement in a business enterprise) and Employee will do nothing inconsistent with his or her duties to Washington Mutual.

5. Termination.

(a) Either Washington Mutual or Employee may terminate Employee's employment at any time in its sole discretion, with or without advance notice. Except as expressly provided in this Agreement or under any employee benefit plan maintained by the Company or its Subsidiaries, upon termination of employment, Washington Mutual shall have no liability to pay any further compensation or any other benefit or sum whatsoever to Employee. Notwithstanding any other provision of this Agreement, this Agreement shall terminate and no further amounts or benefits shall be payable under this Agreement if, at least 120 days prior to a Change in Control (as defined below), Employee transfers to another Washington Mutual position and, under Washington Mutual's policies then in effect, persons occupying that position or a similar position are not eligible to receive a change in control agreement.

(b) Upon termination of employment, Employee's rights under all employee pension plans, employee welfare benefit plans, bonus plans and stock option and restricted stock plans shall be determined under the terms of the plans and grants themselves except as otherwise specifically provided in this Agreement.

(c) If (i) Employee's employment is terminated by Washington Mutual or its successor without "cause" (as defined below) upon or within two years after a Change in Control or (ii) Employee resigns for "good reason" (as defined below) upon or within two years after a Change in

Control and no reason for Washington Mutual to terminate Employee for "cause" exists, then Employee shall be entitled to receive, within five business days after the effective date of such termination or resignation, from Washington Mutual or its successor, a lump sum equal to two times Employee's annual compensation. Notwithstanding the preceding, the amount paid to employee under this Section 5(c) shall be offset by any payment received by Employee from Washington Mutual 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.

(d) Upon a Change in Control, the lapse of the restrictions on Employee's restricted stock, restricted stock units, stock options and other equity awards shall automatically be accelerated (and, to the extent applicable, the option or other award shall be fully exercisable) unless the applicable award agreement provides otherwise.

(e) For purposes of Section 5(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 Washington Mutual 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 or its Subsidiaries' 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 5(e), 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.

(f) Notwithstanding the foregoing, if any payment described in Section 5(c) and the value of any lapse of restrictions under Section 5(d), together with any other payments or transfers of property, would constitute a "parachute payment" under Section 280G of the Code, or any successor statute then in effect, the aggregate payments by Washington Mutual or its successor pursuant to Section 5(c) shall be reduced to an amount that, when combined with the value of any lapse of restrictions under Section 5(d) and any other payments or transfers of property taken into account under Section 280G, is one dollar less than the smallest sum that would be considered to be a "parachute" payment.

(g) For purposes of this Agreement, "Change in Control" shall mean:

1. The acquisition of ownership, directly or indirectly, beneficially or of record, by any Person (as defined below) or group (within the meaning of the Securities Exchange Act of 1934 and the rules of the Securities and Exchange Commission thereunder as in effect on the date of this

Agreement), other than the Company, a Subsidiary or any employee benefit plan of the Company, or its Subsidiaries, of shares representing more than 25% of (i) the common stock of the Company, (ii) the aggregate voting power of the Company's voting securities or (iii) the total market value of the Company's voting securities;

2. During any period of 25 consecutive calendar months, a majority of the Board of Directors of the Company (the "Board") ceasing to be composed of individuals (i) who were members of the Board on the first day of such period, (ii) whose election or nomination to the Board was approved by individuals referred to in clause (i) above constituting at the time of such election or nomination at least a majority of the Board or (iii) whose election or nomination to the Board was approved by individuals referred to in clauses (i) and (ii) above constituting at the time of such election or nomination at least a majority of the Board; provided that, any director appointed or elected to the Board to avoid or settle a threatened or actual proxy contest shall in no event be deemed to be an individual referred to in clauses (i), (ii) or (iii) above;

3. The good-faith determination by the Board that any Person or group (other than a Subsidiary or any employee benefit plan of the Company or a Subsidiary) has acquired direct or indirect possession of the power to direct or cause to direct the management or policies of the Company, whether through the ability to exercise voting power, by contract or otherwise;

4. The merger, consolidation, share exchange or similar transaction between the Company and another Person (other than a Subsidiary), other than a merger in which the stockholders of Washington Mutual immediately before such merger, consolidation or transaction own, directly or indirectly, immediately following such merger, consolidation or transaction, at least seventy-five percent (75%) of the combined voting power of the surviving entity in such merger, consolidation or transaction in substantially the same proportion as their ownership immediately before such merger, consolidation or transaction; or

5. The sale or transfer (in one transaction or a series of related 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.

(h) For purposes of this Agreement:

1. "Person" shall mean any individual, corporation, company, voluntary association, partnership, limited liability company, joint venture, trust, unincorporated organization or government (or any agency, instrumentality or political subdivision thereof).

2. "Subsidiary" shall mean a corporation that is wholly owned by the Company, either directly or through one or more corporations that are wholly owned by the Company.

3. "Related Company" shall mean any entity that is directly or indirectly controlled by the Company or any entity in which the Company has a significant equity interest, as determined by the Human Resources Committee of the Board.

(i) For purposes of this Agreement, Washington Mutual shall have "cause" to terminate Employee's employment if:

1. Employee violates the Company's or Washington Mutual's policies regarding drug or alcohol use on a recurring basis;

2. Employee is convicted of any felony or of a misdemeanor involving moral turpitude (including forgery, fraud, theft or embezzlement) or enters into a pretrial diversion or similar program in connection with the prosecution for an offense involving dishonesty, breach of trust or money laundering; or

3. Employee has engaged in: (a) dishonesty or fraud, (b) destruction or theft of property of the Company or a Subsidiary, (c) physical attack on another employee, (d) willful malfeasance or gross negligence in the performance of Employee's duties, or (e) misconduct materially injurious to the Company or a Subsidiary.

(j) For purposes of this Agreement, "good reason" for Employee to resign shall mean the occurrence of any of the following events without Employee's consent, provided that the Employee in all events shall have resigned within two years after the Change in Control:

1. The assignment of duties to Employee which (a) are materially different from Employee's duties immediately prior to the Change in Control, or (b) result in Employee having significantly less authority and/or responsibility than Employee had prior to the Change in Control.

2. A reduction of Employee's total pay opportunity from that in effect on the date of the Change in Control. Changes in the allocation of Employee's compensation between salary and incentive compensation, and changes to the criteria or method for determining incentive compensation amounts actually earned, shall not constitute "good reason" for Employee to resign. "Total pay opportunity" means base salary plus target incentive compensation, provided that in the case of incentive compensation for which a "target" is not defined (such as some sales commissions), the incentive component of the pay opportunity shall be the average incentive compensation of Employee during the 24 months preceding the Change in Control.

3. A relocation by more than 50 miles of Employee's principal place of employment as in effect on the date of the Change in Control, if the relocation increases the distance between Employee's principal residence and principal place of employment by more than 25 miles. Distances shall be measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route.

(k) For purposes of this Agreement, Employee shall be considered to have resigned for "good reason" only if Washington Mutual fails to cure within 15 days after receiving a written demand to cure that specifies the circumstances constituting "good reason." Also, Employee shall be considered to have resigned for "good reason" only if the effective date of Employee's resignation is within 60 days after the effective date of the occurrence that constitutes "good reason."

6. Death or Disability. If Employee should die or become disabled at any time during his or her employment hereunder, neither Employee nor anyone claiming by, through or under him or her shall be entitled to any further compensation or other sum under this Agreement (but shall be entitled to payments made by insurers under policies of life and disability insurance and any sums which may become available under any employee benefit plan).

7. Confidentiality. Employee agrees that information not generally known to the public to which Employee has been or will be exposed as a result of Employee's employment by Washington Mutual is confidential information that belongs to the Company or its Subsidiaries. This includes information developed by Employee, alone or with others, or entrusted to Employee, or entrusted to the

Company or its Subsidiaries by its customers or others. The Company's and its Subsidiaries' confidential information includes, without limitation, information relating to the Company's or its Subsidiaries' trade secrets, know-how, procedures, purchasing, accounting, marketing, sales, customers, clients, employees, business strategies and acquisition strategies. Employee will hold the Company's and its Subsidiaries' confidential information in strict confidence and will not disclose or use it except as authorized by Washington Mutual and for Washington Mutual's benefit.

8. Possession of Materials. Employee agrees that upon conclusion of employment or request by Washington Mutual, Employee shall turn over to Washington Mutual all documents, files, office supplies and any other material or work product in Employee's possession or control that were created pursuant to or derived from Employee's services for Washington Mutual.

9. Resolution of Disputes. Any dispute arising out of or relating to this Agreement or Employee's employment (or termination of employment) shall be submitted to and resolved by final and binding arbitration as provided in the Binding Arbitration Agreement attached as Exhibit A, whether the claimant is Employee or Washington Mutual. Employee and Washington Mutual also agree to exhaust all remedies available under the Washington Mutual, Inc. Dispute Resolution Process, as in effect from time to time, before initiating arbitration; provided that Employee shall not be required to use or follow the Dispute Resolution Process before initiating arbitration of any claim that arises upon or within two years after a Change in Control. In any dispute in arbitration or court arising out of or relating to this Agreement, the losing party shall pay the prevailing party's reasonable attorneys' fees, costs and expenses.

10. Agreement Not To Solicit Personnel. In consideration for the mutual undertakings of the parties under this Agreement and Employee's access as an employee of Washington Mutual to employees, contractors and consultants of the Company and Related Companies, Employee agrees that, during Employee's employment with Washington Mutual, and for a period of one year following termination of employment, Employee will not in any manner, directly or indirectly, solicit, encourage, induce, or recruit any person who is then an employee, contractor, or consultant of the Company or a Related Company, and whom Employee worked with, supervised, or had access to confidential information about while employed by Washington Mutual, to seek or accept employment or a contractual or consulting engagement with any business that competes with or provides services comparable to those provided by the Company or its subsidiaires.

11. Intellectual Property Ownership. In addition, in consideration of the mutual undertakings of the parties under this Agreement, Washington Mutual will own all rights to the results of Employee's work, including inventions and other intellectual property developed using Company or its subsidiaries' equipment, supplies, facilities or trade secret information. It will also own all rights to the results of any other effort of Employee (outside of Employee's performance of Washington Mutual work) that relate directly to Employee's work or to the Company's or its subsidiaries' business or actual or demonstrably anticipated research or development. Washington Mutual's rights extend to anything that is authored, conceived, invented, written, reduced to practice, improved or made by Employee, alone or jointly with others, during the period of Employee's employment by Washington Mutual. To the extent that the results of Employee's work or other effort constitute a "work made for hire" as defined under U.S. copyright law, the copyright shall belong solely to Washington Mutual. Otherwise, to the extent that such results are legally protectable, then Employee hereby irrevocably assigns all copyrights, patent rights, and other proprietary rights therein to Washington Mutual, and no further action by Employee is required to grant ownership to Washington Mutual. Employee will assist in preparing and executing documents, and will take any other steps requested by Washington Mutual, to vest, confirm or demonstrate its ownership rights, and Employee will not at any time contest the validity of such rights.

Employee understands that the termination of Employee's employment will not terminate or invalidate any of Employee's obligations, or Washington Mutual's rights, as described above.

Employee understands that the above commitments are in furtherance of the WaMu Intellectual Property Policy (a copy of which Employee has had an opportunity to review and is also found on wamu.net), which is incorporated herein but not set forth in full due to space limitations. If Employee lives or works in Washington, California, Illinois, or in any other state mentioned in the Invention Notice section of the policy, then the above assignment does not apply to inventions described in the Invention Notice for Employee's state.

12. Remedies for Certain Breaches Related to Solicitation and Intellectual Property. Should Employee breach the agreements set forth in Section 10 or 11, in addition to any other remedy available to Washington Mutual, (a) the Employee shall immediately pay to Washington Mutual any payment made pursuant to Section 5(c); (b) pursuant to the relevant award agreements, any option that vested upon a Change in Control ("Option"), or portion of such Option, that remains unexercised shall terminate and cease to be exercisable; (c) pursuant to the relevant award agreements, for any Option, or portion of such Option, already exercised, Employee shall immediately pay to Washington Mutual any difference between the fair market value of the Option shares on the date of exercise and the exercise price of such Option shares; and (d) pursuant to the relevant award agreements, Employee will immediately pay to Washington Mutual the fair market value as of the Change in Control of any shares of restricted stock that vested upon a Change in Control. The parties agree that, to the extent the restrictions set forth in Sections 10 and 11 and this Section 12 are found to be unenforceable in any respect, this Section 12 shall be construed to be enforceable to the maximum extent permitted by law.

13. Miscellaneous.

(a) This Agreement is the entire agreement between the parties and may not be modified or abrogated orally or by course of dealing, but only by another instrument in writing duly executed by the parties. This Agreement replaces and supersedes all prior agreements on these subjects that Employee may have with the Company, or any Subsidiary, provided, however, that this Agreement shall supplement and shall not supersede any other agreement that Employee has signed in favor of the Company or any Subsidiary protecting the confidentiality of its confidential information or its interest in intellectual property. All such agreements remain in full force and effect. Employee acknowledges that Employee shall be entitled to change in control benefits, severance benefits or other employment separation benefits only as specifically provided in this Agreement (or, to the extent applicable according to its terms, as provided in the Washington Mutual, Inc. Special Severance Plan as in effect from time to time), notwithstanding the terms of any other representation, policy, severance plan, benefit plan or agreement.

(b) Notwithstanding any provision of this Agreement to the contrary, if, at the time of Employee's termination of employment with Washington Mutual, he or she is a "specified employee" as defined in Section 409A of the Code, and one or more of the payments or benefits received or to be received by Employee pursuant to this Agreement would constitute deferred compensation subject to Section 409A, no such payment or benefit will be provided under this Agreement until the earlier of (a) the date that is six (6) months following Employee's termination of employment with Washington Mutual, or (b) the Employee's death. The provisions of this Section 13(b) shall only apply to the extent required to avoid Employee's incurrence of any penalty tax or interest under Section 409A of the Code or any regulations or Treasury guidance promulgated thereunder. In addition, if any provision of this Agreement would cause Employee to incur any penalty tax or interest under Section 409A of the Code or any regulations or Treasury guidance promulgated thereunder, Washington Mutual may reform such

provision to maintain to the maximum extent practicable the original intent of the applicable provision without violating the provisions of Section 409A of the Code.

(c) This Agreement has been drafted in contemplation of and shall be construed in accordance with and governed by the law of the state of Employee's principal place of employment with Washington Mutual.

(d) Employee acknowledges that this Agreement has been drafted by counsel for Washington Mutual, and that Employee has not relied upon such counsel with respect to this Agreement.

(e) If a court or arbitrator of competent jurisdiction or governmental authority declares any term or provision hereof invalid, unenforceable or unacceptable, the remaining terms and provisions hereof shall be unimpaired and the invalid, unenforceable or unacceptable term or provision shall be replaced by a term or provision that is valid, enforceable and acceptable and that comes closest to expressing the intention of the invalid, unenforceable or unacceptable term or provision.

(f) Employee may not assign Employee's rights or delegate Employee's duties under this Agreement.

Washington Mutual may assign its rights and delegate its duties under this Agreement to the Company or any Subsidiary or to any purchaser of all or substantially all of Washington Mutual's assets. The transfer of Employee's employment from Washington Mutual to any other Subsidiary or to the purchaser of all or substantially all of the assets of Washington Mutual shall not be considered a termination of employment, but this Agreement shall run to the benefit of, and be binding upon, the new employer. In the event of a Change in Control, this Agreement shall bind, and run to the benefit of, the successor to Washington Mutual resulting from the Change in Control.

DATED effective as of the 17th of December 2007.

WASHINGTON MUTUAL: WASHINGTON MUTUAL BANK

By _____
Daryl D. David
Executive Vice President
Chief Human Resources Officer

EMPLOYEE: _____
Chandan Sharma

_____
DATE

Washington Mutual, Inc.

March 11, 2009

Chandan Sharma
5876 NW Lac Leman Dr.
Issaquah, WA 98027

RE: Washington Mutual, Inc. Supplemental Executive Retirement Accumulation Plan (the "Plan")

Dear Chandan:

According to our records, you are a participant in the above referenced Plan. As you know, Washington Mutual, Inc. ("WMI") filed a voluntary petition with the bankruptcy court on September 26, 2008, the day after its banking subsidiary, Washington Mutual Bank, was placed in receivership by federal regulators.

The information below is being provided for your reference and reflects the value of your account as of September 26, 2008 as computed by Fidelity.

Plan Name:	**Washington Mutual, Inc. Supplemental Executive Retirement Accumulation Plan**
Participant Name:	**Chandan Sharma**
Employee ID number:	**u189156**
09/26/2008 Balance:	**$3,815.42**

Please note that if you were a participant in another nonqualified plan sponsored by WMI, you will receive information regarding that plan under separate cover.

The above information is provided to you for informational purpose only.

WMI has not independently verified the accuracy of the amount of your account balance referenced above as computed by Fidelity and WMI reserves the right to correct or otherwise change the amounts provided herein in accordance with the terms of the Plan.

The information hereby provided to you does not constitute a promise to pay or confer any additional rights to the amount of your account balance referenced above in accordance with the terms of the Plan.

Sincerely,

Robert Williams
Washington Mutual, Inc.

Washington Mutual, Inc
Notice of Cash Long-Term Incentive Award

Date: February 6, 2008
To: Chandan Sharma
From: Leadership Rewards, Stock Administration

We are pleased to inform you that on January 22, 2008 you were awarded a Cash Long-Term Incentive Award ("Cash LTI Award") in the amount of $110,000 as a reward for your continued service to Washington Mutual (the "Company" or "WaMu"). The Cash LTI Award is subject to the terms and conditions of this agreement (the "Agreement").

Terms of Award

To earn the Cash LTI Award and receive a payment, you must remain continuously employed by the Company through each applicable anniversary date

If you fulfill these requirements the Cash LTI Award will be made in cash and will vest and become payable in three equal installments on the anniversary date of the Award over a three year period. Payment will be made in cash. You must be employed on each anniversary date in order to receive each portion of the Award. The installments are as follows:

Anniversary Date	Dollar Amount Payable
January 22, 2009	$36,666.66
January 22, 2010	$36,666.67
January 22, 2011	$36,666.67

Subject to your continued employment with the Company, the Cash LTI Award will be paid in accordance to the above schedule, less taxes and withholding, in the pay cycle immediately following the applicable anniversary date.

You will continue to be subject to all Company policies and management directives. Your employment will continue to be terminable by you or the company at will, without cause or advance notice. Nothing in this letter is intended to suggest any guaranteed period of continued employment or any guarantee that you will be paid the Cash LTI Award. This letter merely sets forth the terms of the Cash LTI Award that may be paid to you for achievement of the stated criteria.

EXHIBIT 2

WaMu

August 4, 2008

Chandan Sharma
U189156

Dear Chandan,

Re: Special Bonus Opportunity

I'm pleased to offer you this opportunity to earn a special bonus composed of two payments in the total amount of $74,737 as a reward for your continued service to Washington Mutual (the "Company" or "WaMu").

Terms of Offer

To receive the bonus, you must remain an employee of the Company (the "Employment Requirement"), have a current overall performance rating of Solid Contributor or better, and continue to perform your job duties as required and in accordance with Company policies and procedures through the target date for that payment. Additionally, as noted below, a condition to your entitlement to the special bonus is your compliance with your obligations under this agreement.

There are two situations in which the Employment Requirement is waived for purposes of this retention bonus. First, if your job is eliminated (as defined in the WaMu Severance Plan) you will be treated as having fulfilled the Employment Requirement as long as you remain employed through your Job End Date (as defined in the WaMu Severance Plan). Second, you will be treated as having fulfilled the Employment Requirement if, within two years after a change in control (as defined in Section 5 of your Change in Control ("CIC") Agreement), your employment is terminated by the Company or a successor for any reason other than for cause (as defined in Section 5 of your CIC Agreement) or you resign for good reason (as defined in Section 5 of your CIC Agreement) and no reason exists for the Company or a successor to terminate you for cause (as defined in Section 5 your CIC Agreement).

If you fulfill these requirements and also meet the other conditions in this letter, you will be entitled to:

$37,368 for service through the target date of December 1, 2008; and
$37,369 for service through the target date of August 1, 2009.

Each of the individual payments will be provided to you less taxes and withholding, in the pay cycle following the dates indicated above. These payments will be in addition to any other bonus for which you may normally be eligible.

You will continue to be subject to all Company policies and management directives. Your employment will continue to be terminable by you or the company at will, without cause or advance notice. Nothing in this letter is intended to suggest any guaranteed period of continued employment or any guarantee that you will be paid the special bonus. This letter merely sets forth the terms of a special bonus that may be paid to you for achievement of the stated criteria.

WaMu

Agreement Not to Solicit Personnel

As a condition of this offer, you agree that you will not solicit Washington Mutual personnel for a period of one year after your employment here ends. This means that, regardless of the reason for termination of your employment, you will not directly or indirectly solicit, encourage, induce, or enter into any arrangement with any person who is then a WaMu employee or a contractor or consultant whom you have worked with, supervised, or been exposed to confidential information about while associated with the Company to terminate or diminish his or her relationship with the company, or to seek or accept employment or a similar relationship with any other business or entity including, but not limited to, one that competes with or provides services comparable to those provided by WaMu. If you violate this obligation, you agree to return the bonus promptly, and agree that the Company shall also be entitled to pursue whatever other remedies are available to it.

Other Terms

Not all of your coworkers are being made such an offer. We expect that you will respect their feelings and keep the fact and terms of this bonus offer confidential.

This letter sets forth all of the terms and conditions upon which the special bonus may be paid to you, and it supersedes any other representations about this bonus opportunity. No one at the Company has the authority to make any promises to you that are different from those set forth in this letter on the subject of this special bonus except for personnel from Corporate Rewards who refer to this letter.

We are confident in your ability to make valuable contributions to the Company. On behalf of Washington Mutual, I would like to thank you not only for the service you have already rendered but also, in advance, for the important role that I trust you will continue to play. If you have any questions, please direct them to me or your HR Business Partner. In order to be eligible to receive this special bonus opportunity, you must sign this letter in the designated place below and return it to Beth Wright in Corporate Rewards & Benefits (Mailstop: WMC0705) by ~~August 13~~ September 30, 2008.

Sincerely,
Pia Jorgensen
Chief Technology Officer

Acknowledgement:

I understand and agree to all of the terms set forth in this agreement.

Signature: _____ Date: 9/3/2008
Chandan Sharma U189156