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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE
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DISTRICT OF DELAWARE

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UNITED STATES BANKRUPTCY COURT DISTRICT OF DELAWARE

In re:

WASHINGTON MUTUAL, INC., et al., Debtors.

Chapter 11

Case No. 08-12229 (MFW)
Jointly administered

Hearing Date: 3/25/13 at 10:30 am ET
Response Deadline: 3/18/13 at 4:00 pm ET

Debtors: WMI Liquidating Trust (WMILT), as a successor in interest to Washington Mutual, Inc (WMI) and WMI Investment Corp. (WMI Investment).

Claimant: Gennadiy Darakhovskiy. Name ID 5430194. Pack No. 18032

UNITED STATES BANKRUPTCY COURT DISTRICT OF DELAWARE Proof of claim #2571

Response to WMI LIQUIDATING TRUST'S EIGHTY-SECOND OMNIBUS (SUBSTANTIVE)
OBJECTION TO CHANGE IN CONTROL CLAIMS



Description of the claims: Unpaid Compensation and Retirement Benefits from WMI due to WAMU seizure and WMI bankruptcy

I. Background:

1. Pursuant to the Chapter 11 bankruptcy, the claimant filed the above referenced claim No 2571 with supporting documentation. Detail of the claim as follows.

Based on the **"Change in Control Agreement"** Washington Mutual, Inc is required to pay 2 times annual compensation to Gennadiy Darakhovskiy. Annual compensation is defined as salary along with the highest of actual and target bonus. Based on **"Personal Profile"** Gennady Darakhovskiy's annual salary was \$199,718; with bonus target of 170%, which equals to 339,520.60. Total annual compensation is equal to 539,238.60. Total value of the payment based on **"Change in Control Agreement"** is twice total annual compensation and is equal to **\$1,078,477.20**.

Based on **"Retirement Savings Statement"** and **"Supplemental Executive Retirement Accumulation Plan (SERAP)"** plan description WAMU is required to pay the vested portion of SERAP balance in the amount of **\$26,373.40**. The SERP amount on the statement was paid, the SERAP was not paid.

In January of 2008 Gennadiy Darakhovskiy has received a **"Restricted Cash Award"** in the amount of **\$115,000**. The amount is shown on **"Leadership Scorecard"**. This amount was supposed to be paid over three years. This award became vested immediately in the event of the **"Change in Control"**. This award was a part of total of \$230,000 Long-term Incentive for year 2008. The other 50% or \$115,000 was in the form of restricted stock.

Thus, Washington Mutual, Inc owes to Gennadiy Darakhovskiy \$1,078,477.20, \$26,373.40 and \$115,000 for the total of **\$1,219,850.60**.

The SERAP amount is not a subject of this response as it WMI has agreed to pay this liability. This response is for amount of **\$1,193,477.20**

2. On August 22, 2012, claimant recived WMI Liquidating Trust's ("WMILT") eighty-second omnibus (substantive) objection to change of control claims ("the Notice")
3. In the documentation provided in the Notice, claimant's claim is referenced in Exhibit A as a claim dissalowed (as referenced above the SERAP portion of the claim was allowed as stated in Exhibit B).
4. Claimant is disputing the categorisation with this response to the Notice regarding the dissalowed amount of \$1,193,477.20.

Claimant Response

- II. Claimant submitted numerous responses. All reaffirms all prior responses submitted.
- III. Claimant also joins any and all other responses filed by other Claimants with regard to the 82nd Omnibus Objections

IV. WMI and WMB were run as a single organization:

- 5. Preamble to the Wamu Severance Plan agreement specifies that Washington Mutual Inc. has established the agreement. Both the Wamu Severance Plan and the Change of Control Agreement are signed by the Executive Vice President, Human Resources Washington Mutual Inc..
- 6. Change of Control Agreement is specifies Washington Mutual not WMB, "employee employed by Washington Mutual"
- 7. **Alter Ego.** WMI and WMB for all intents and purposes have functioned as a single organization managed by the same management team with the same goals and objectives. I have been in multiple management meetings where WMI, WMB along with WMB FA and WMB FSB business was discussed. Limited numbers of employees were WMI employees largely limited to Executive Committee members. Thus WMI on a consistent basis was "borrowing" employees from WMB, or in other words from a business prospective both organizations were run as a single company.

The lack of separateness (Alter Ego) between WMI and WMB consisted of most if not all of the following determining factors:

- (a) common stock ownership, business departments, directors, and officers;
- (b) consolidated financial statements and tax returns;
- (c) financing of the subsidiary by the parent;
- (d) the parent paid some expenses and salaries of the subsidiary;
- (e) the subsidiary receives all business through the parent; and
- (f) a centralized cash management system

- 8. In the consideration of this case the determination was already made to allow WMI payments related to SERAP and ETRIP.
- 9. Furthermore, in other cases the determination was made that WMI will pay the WMB liabilities.

V. Change of Control has Occurred:

- 10. Multiple paragraphs in the Notice assert that change of control has not occurred. The following shows that the change of control event was triggered.
- 11. **a.** The ownership of substantially all assets of WMB (which from business prospective was managed as a single entity with WMI and other WMI subsidiaries) was transferred.
b. JP Morgan Chase acquired these assets.
c. WMI declared bankruptcy as most of the assets were transferred to JP Morgan Chase. The Amended Exhibit A to Voluntary Petition filed on September 30th, 2008 by the Debtor indicated WMI total assets in the size of \$32.896B with a footnote indicating that

this figure included Company's stock interest in WMB which was transferred to JPMC and WMI did not expect any recovery. The monthly operating report for WMI for the period of December 1, 2008 to December 31, 2008 filed on February 2, 2009 indicates \$7.7B asset size. The drop of the asset size from \$32.896B presumably reflects the asset transfer to JPMC. This is clearly a very substantial asset transfer.

12. The seizure of WAMU by FDIC and subsequent bankruptcy clearly meets change of control test as it constitutes a series of voluntary and involuntary transactions that resulted in the sale or transfer all or substantially all of the Company's assets. One could also assume that "in good faith" the board had to determine that WMAU has been acquired and JPMC had "direct or indirect position 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".
13. I was not offered a position with the acquiring entity.
14. WMI is a party to the Cash Long Term incentive agreement not WMB. The requirement of this agreement was fulfilled upon the FDIC seizure as it triggered the change of control event. The employment requirement was fulfilled on the employees part.
15. My Job was eliminated in an anticipation of a potential transaction to ensure savings for the potential acquirer, which is an intentional act of avoiding contractual responsibilities.
16. My severance agreement did not specify any Change of Control arrangements
17. The allowed amount of the claim is not subject to the cap under the section 502(b)(7) under the bankruptcy code as it is for compensation earned prior to the event not damages due to the event occurred.
18. The Change of Control agreement was designed by Washington Mutual and signed by employees. If indeed there is a cap on the payout - the agreement was intentionally misleading as it clearly states the payout in case of the Change of Control event.
19. There are indications that the WMI board has voted and affirmed the change of control occurred.

VI. Other Components:

20. There were multiple attempts made by the management of the WMI/WMB to sell the bank prior to FDIC/JPM transaction. In anticipation of this potential transaction WMI/WMB has acted irresponsibly by trying to avoid its responsibility to employees and reduce potential liability in case the transaction happens. It is similar to an insurance company canceling the policies in a particular geographical area when a hurricane with a significant potential damage is about to hit this geographical area.
21. Furthermore the decisions about which groups of people to let go and which group will stay were often driven by management's self-interest rather than the best interest of the business. One example of it is the area of Capital Markets (where I was an employee). The decision to let go substantially all Capital Markets Employees in Seattle office and keep Capital Markets employees in a satellite office in New York where costs were substantially higher and expertise was lower was clearly driven by the geographic location of the head of Capital Markets rather than the best interest of the company.

VII.

22. The original claim as filled included all supporting documentation applicable to my claim.

VI.

23. The WMILT must be required to address all objections to similar claims and issues at the same time to provide all claimants including Claimant an opportunity to respond to the objections and specifically address the issue of whether a "change in control" occurred. It is inappropriate for the Court to consider any factual or legal arguments on "change in control", severance, or capping of portions of Claimant's claim without the Claimant being provided an opportunity to be heard.
24. Claimant joins in any other responses filed by other Claimants with regard to the 82nd Omnibus Objections, and requests the entry of a joint scheduling order on all filed responses and with respect to the Proceeding.

VII.

25. Nothing in this Response constitutes a waiver of Claimants rights as it relates to the Change of Control and Cash Long Term Incentive agreements specified in the Proof of Claim submitted.

VII.

26. Based on the information provided above, I ask the court to deny the Debtors' objection and to reinstate my claim in the full amount due. The debtors have not put forth a valid argument as a basis of rejecting my claim.

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