

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

**RESPONSE OF
MICHAEL R. ZARRO TO WMI LIQUIDATING TRUST'S
SIXTH OMNIBUS (SUBSTANTIVE) OBJECTION TO CLAIMS AND
SEVENTY-NINTH OMNIBUS (SUBSTANTIVE) OBJECTION TO CLAIMS**

Michael R. Zarro ("Mr. Zarro"), by and through his undersigned counsel, hereby responds and objects to the Sixth Omnibus (Substantive) Objection to Claims (the "6th Objection") and the Seventy-Ninth Omnibus (Substantive) Objection to Claims (the "79th Objection," and together with the 6th Objection, the "Objections") filed by the Debtor and WMI Liquidating Trust ("WMILT"), respectively, and in support thereof avers as follows:²

BACKGROUND RELATING TO MR. ZARRO'S CLAIM

1. On March 17, 2009, Mr. Zarro filed a proof of claim (#1743) in the amount of \$224,000.00 (the "Zarro Claim"). A true and correct copy of the Zarro Claim is attached hereto as Exhibit "A".³

2. The basis for the Zarro Claim is monies owed to Mr. Zarro from the retention bonus agreement offered to and accepted by Mr. Zarro by letter dated April 11, 2008 (the

¹The Debtors in these cases are: Washington Mutual, Inc. and WMI Investment Corp.

² On September 24, 2010, the Official Committee of Unsecured Creditors filed a complaint against Mr. Zarro initiating adversary proceeding no. 10-53143 (MFW) (the "Zarro Adversary Proceeding") relating to the Zarro Claim (as defined herein) and the employment agreement between Mr. Zarro and WMB (as defined herein), under which the Zarro Claim arose. This Response to WMILT's Objections in no way impacts or compromises Mr. Zarro's defenses in the Zarro Adversary Proceeding.

³ It is Mr. Zarro's intention to file a motion with this Court for leave to file an amendment to the Zarro Claim.



“Retention Bonus Agreement”) in the amount of \$224,000.00, which was never paid to Mr. Zarro. Attached to the Zarro Claim is documentation for the amount of the Zarro Claim.

3. In both Objections, WMILT objects to the allowance of the \$224,000.00 Zarro Claim. The Retention Bonus Agreement provides, in relevant part, that Mr. Zarro would earn his base salary and bonus through April 1, 2009 (defined as the “Retention Date”) “even if your last day of work comes before the retention date” plus a “Retention Bonus in the gross amount of \$224,00,” provided that he remained an employee until the Retention Date, unless “WaMu terminates your employment prior to the Retention Date and the termination is not related to a violation of WaMu policy of its Code of Conduct. *See* Retention Bonus Agreement at

4. Mr. Zarro fulfilled the requirements set out in the Retention Bonus Agreement.

**WMILT’S OBJECTIONS TO THE
ZARRO CLAIM SHOULD BE OVERRULED**

5. This Honorable Court should overrule WMILT’s Objections to the Zarro Claim for the following reasons:

a. contrary to WMILT’s assertion that that Washington Mutual Bank (“WMB”), not Washington Mutual, Inc. (“WMI”), is the party to the Retention Bonus Agreement and WMILT’s misleading characterization (in the 79th Objection) of the Retention Bonus Agreement as a “WMB Retention Bonus Agreement,” WMB is not a party to the Retention Bonus Agreement. The words “Washington Mutual Bank” do not appear anywhere in the Retention Bonus Agreement. Rather, the Retention Bonus Agreement is a memo from David Schneider, President, Home Loans to Mr. Zarro on “WaMu” letterhead. Every reference in the Retention Bonus Letter is to “WaMu.” There are no references to WMB or WMI.

b. Under Washington law, WMI is the party responsible for the payments under the Retention Bonus Agreement;

c. the contractual requirements set forth in the Retention Bonus Agreement were fulfilled upon the occurrence of the seizure of WMB by the FDIC on September 25, 2008; and

d. the allowed amount of the Zarro Claim is not subject to the cap under §502(b)(7) of the Bankruptcy Code because the Zarro Claim is for compensation earned prior to the Debtors' Commencement Date;⁴ thus, the Zarro Claim is not a claim for damages resulting from the post-petition termination of the Retention Bonus Agreement.⁵

6. In banking circles and among WMI's employees, it was well known in the Fall of 2007 and Spring of 2008 that WMB was experiencing serious deterioration in asset quality and financial performance and that WMI was serving as a source of financial strength to WMB. These facts are documented by WMI's own pleadings in this bankruptcy case.⁶

7. Given its announced lay off of thousands of its employees and billions of dollars of financial losses, WMI was concerned about its ability to retain key employees. In early 2008, WMI adopted strategies to address its concerns. In publicly disclosed comments concerning long-term equity incentive awards made to its named executive officers in 2008, WMI stated: "Due to the current unprecedented challenges in the mortgage and credit markets, retaining executives, officers and key employees, including the named executives, also was a primary compensation objective for the awards." *See* WMI's Proxy Statement for its 2008 Annual

⁴ All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Objections.

⁵ As discussed more fully below, alternatively, if the Zarro Claim is subject to a cap, the cap should be increased by the amount of the Zarro Claim.

⁶ E.g., in its answer filed in Adversary Proceeding No. 09-50551, WMI asserted: "Since at least December 2007 until it was ultimately seized and placed into receivership by the FDIC, WMB was under liquidity pressure. During this time WMI down-streamed billions of dollars without recompense and made significant preferential transfers to WMB on account of antecedent debts". Debtors' Answer and Counterclaims in Response to Complaint of JPMorgan Chase Bank, N.A. at ¶2. WMI also stated: "On December 10, 2007, WMI announced a loss for the fourth quarter because of a \$1.6 billion charge to write down the value of its home-loan business, and its plans to lay off approximately 3,150 employees." *Id.* at ¶16.

Meeting of Shareholders dated March 14, 2008 (Schedule 14A) filed with the Securities & Exchange Commission (“SEC”) at p. 32.

8. WMI also made long term cash incentive awards beginning in early 2008 pursuant to a standard form agreement (the “WMI Cash LTI Award Agreement”), a copy of which WMI filed with the SEC.⁷ This standard form agreement bore the “W Logo,” the “WaMu” mark and the date “February 1, 2008” on the first page, and bore the signature block “Washington Mutual, Inc.” on the last page. The first sentence of the agreement explained the reason for the award, stating: “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 \$XX.XX as a reward for your continued service to Washington Mutual (the “Company” or “WaMu”).

9. During this period of time, members of WMI’s executive committee (WMI’s most senior executive officers) began offering special retention bonuses to a limited number of key employees in their respective divisions and operations. WMI used a variety of standard form agreements, including a standard form “retention bonus agreement” that had, upon information and belief, been prepared by WMI’s human resources department, which was to be signed by the applicable executive committee member⁸ and counter-signed by the key employee to whom the retention bonus opportunity was made. Similar to the WMI Cash Long Term Incentive Award Agreement, the standard form retention bonus opportunity agreement also bore the “W logo” and the “WaMu” mark on the first page and the first sentence used the same words to explain the reason for the bonus offer: “As you know, WaMu is restructuring certain areas of the business, including Home Loans. We are uncertain about the details of the restructuring that may take

⁷ See Exhibit 10.3 to WMI’s 2007 Annual Report on Form 10-K, filed with the SEC on February 29, 2008.

⁸ The following individuals were the members of WMI’s executive committee during this period of time: Kerry K. Killinger, Todd H. Baker, Melissa J. Ballanger, Alfred R. Brooks, Thomas W. Casey, Ronald J. Cathcart, James B. Corcoran, Daryl D. David, Debora D. Horvath, Stewart M. Landefeld, Stephen J. Rotella, **David C. Schneider**, and Anthony F. Vuoto. See WMI’s 2007 Annual Report on Form 10-K, filed with the SEC on February 29, 2008, at p. 7.

place. Because we consider you [Mr. Zarro] to be a highly talented member of our team, we would like to offer you a position in the company consistent with your talents and the company needs . . . we are pleased to offer you an arrangement that demonstrates our sincere desire to keep you on board as a continuing member of our team during this transition and that encourages you to do so.” *See* Retention Bonus Agreement from David Schneider, President, Home Loans to Michael Zarro, Division Exec – Home Loan Operations Strategy dated April 18, 2008.

10. In order for Mr. Zarro to earn his base salary and bonus arrangement under the Retention Bonus Agreement, the Retention Bonus Agreement required that Mr. Zarro satisfies certain conditions, all of which were, in fact, satisfied by Mr. Zarro.

11. Mr. David Schneider, a member of WMI’s executive committee, signed Mr. Zarro’s Retention Bonus Agreement. Mr. Zarro counter-signed and accepted the Retention Bonus Agreement. Mr. Zarro remained an employee through the occurrence of the bank seizure by the FDIC. Having done so, Mr. Zarro earned his retention bonus, in the amount set out in the Zarro Claim, prior to the Commencement Date of the Debtors’ bankruptcy cases.

LEGAL ARGUMENTS

The Retention Bonus Agreement

12. WMILT asserts that all retention bonus agreements and “change in control” agreements were entered into between the respective claimants and WMB, not WMI. *See* 79th Objection at I. This is simply not true. WMB is not a party to the Mr. Zarro’s Retention Bonus Agreement. The words “Washington Mutual Bank” do not appear anywhere in the Retention Bonus Agreement. In fact, nothing about the Retention Bonus Agreement indicates that WMB is a party to it.

13. Such is not the case with respect to WMI. As previously described, the special bonus agreements were standard form agreements that bore the “W logo” and “WaMu” mark, both of which are trademarks that WMI has asserted were owned by WMI. The Retention Bonus Agreement states: “As you know, **WaMu** is restructuring certain areas of the business, including Home Loans . . . we would like to offer you a position in the **company** consistent with your talents and company needs. *See* Retention Bonus Agreement (emphasis added). The rationale for the retention bonus is virtually the same rationale that WMI used for making the long term cash incentive awards pursuant to the standard form WMI Cash LTI Award Agreement.

14. The retention bonus agreements were drafted by WMI, were disseminated and signed by members of WMI’s Executive Committee, and were implemented to address WMI’s publicly-stated concern regarding the retention of key employees. The continuous service of key employees receiving retention bonus agreements provided a benefit to both WMI and WMB during a period of time in which WMB was in severe financial distress.

15. Such is not the case with respect to WMI. As previously described, the retention bonus agreements were standard form agreements that bore the “W logo” and “WaMu” mark, both of which are trademarks that WMI has asserted were owned by WMI. Throughout the Retention Bonus Agreement, there are **no references to WMB or Washington Mutual Bank**. Rather, every reference is to either “WaMu” or “the company.”

16. For these reasons, Mr. Zarro, along with the other employees who were offered retention bonus agreements, reasonably concluded that **WMI** was the making the retention bonus offer and entering into the Retention Bonus Agreement with him.

17. Under Washington law, any ambiguity regarding WMI’s liability under the Retention Bonus Agreement is to be resolved against WMI and in favor of Mr. Zarro. *See Felt v.*

McCarthy, 130 Wn.2d 203, 922 F.2d 90, 93 (1996)(“In choosing among reasonable meanings of a[n] . . . agreement . . . , that meaning is generally preferred which operates against the party who supplies the words” (quoting *Restatement (Second) of Contracts* §206 (1979))).

18. A fundamental principle of contract interpretation is that the objective intent of the parties controls.⁹ Given the circumstances surrounding the retention bonus opportunities offers to certain employees and Mr. Zarro’s Retention Bonus Agreement, it was clearly the intent of the parties that Mr. Zarro, having been induced to remain an employee of Washington Mutual, would be entitled to receive the retention bonus in connection with a job loss upon the demise of WMB. The Retention Bonus Agreement was a standard form agreement drafted by WMI and provided to the Washington Mutual employees to be accepted on a “take or leave it” basis. These were not negotiated agreements. As such, this Court should resolve each ambiguity in this agreement against WMI.¹⁰

19. Importantly, WMILT does not argue that a claimant, and particularly Mr. Zarro, failed to satisfy his obligations under his Retention Bonus Agreement.

Rebuttal to WMILT’s Arguments under Section 502(b)(7) of the Bankruptcy Code

20. In paragraph 15 of the 79th Objection, WMILT argues that the allowed amount of the Zarro Claim pursuant to the Retention Bonus Agreement is subject to the cap in section

⁹ See *Berg v. Hudesman*, 115 Wn. 2d 657, 663, 510 P.2d 222 (1990)(“it is deceptively simple to state the purpose of a court in interpreting a contract. ‘The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties’”)(quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L. Quar. 161, 162 (1965) and citing 4 S. Williston, *Contract* §601 at 306 (3d ed. 1961)). See also *Restatement (Second) of Contract* §202(1) (1981).

¹⁰ See *Felt v. McCarthy*. See also *Berg v. Hudesman*, 115 Wn. 2d at 667 (“We determine the parties intent ‘by viewing the contract as a whole, the subject and objective of the contract, all the circumstances surrounding the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’”) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 810 P.2d 221 (1973)). See also *Restatement (Second) of Contracts* §211 (1981) (“Such a writing [referring to a standardized agreement] is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.”).

502(b)(7) of the Bankruptcy Code, suggesting that the Zarro Claim is for severance payments or “change in control” payments.

21. To the contrary. Mr. Zarro’s claim pursuant to his Retention Bonus Agreement constitutes earned compensation for services performed before the Commencement Date. The cap in §502(b)(7) does not apply to Mr. Zarro’s Claim.¹¹

22. As discussed above, the retention bonus agreements were offered to induce employees to remain employees of Washington Mutual through the specified bonus periods. This Court has described severance payments, including “change in control” payments, as “prospective compensation” paid on termination in lieu of compensation for periods subsequent to termination and not compensation for services already rendered. *See In re VeraSun Energy Corp.*, 467 B.R. 757 (Bankr. D. Del. 2012). Unlike a severance payment, in this instance, each key employee was to receive the retention bonus under a retention bonus agreement even if the employee remained an employee of Washington Mutual after the end of the bonus period. These were retention bonuses, not severance payments. Termination of employment was not a condition precedent to receiving the bonus. The fact that the bonus period was cut short and the employees lost their jobs as a result of the FDIC’s seizure of WMB should be of no consequence with respect to the interpretation of Mr. Zarro’s Retention Bonus Agreement. The FDIC seizure does not alter the character of his compensation. Mr. Zarro’s employment requirement was fulfilled pursuant to the terms of the Retention Bonus Agreement and his retention bonus was earned for services rendered during the bonus period, regardless of the duration of the bonus period.

¹¹ Alternatively, if this Court rules that cap under §502(b)(7) does apply to the Zarro Claim, the amount of the cap should be increased by the retention bonus as “unpaid compensation due under such contract” as of the Commencement Date. *See* §502(b)(7)(B).

WHEREFORE, for the reasons set forth herein, Michael R.. Zarro, by his undersigned counsel, respectfully requests that this Court (i) disallow WMILT's 6th and 79th Objections with respect to his Proof of Claim, Claim No. 1743; (ii) allow Proof of Claim No. 1743 in full as a post-petition administrative claim; and (iii) grants such other and further relief as is just.

Dated: March 19, 2013
Wilmington, DE

Respectfully submitted,

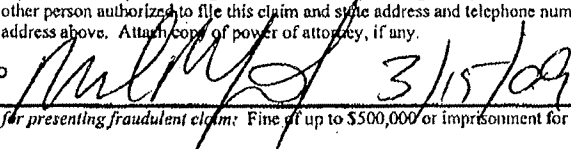
/s/ Kenneth E. Aaron
WEIR & PARTNERS LLP
Kenneth E. Aaron (No. 4043)
824 N. Market Street, Suite 800
Wilmington, DE 19801
(302) 652-8181
Email: kaaron@weirpartners.com

Abbe A. Miller, Esquire (admitted *pro hac vice*)
The Widener Building, Suite 500
1339 Chestnut Street
Philadelphia, PA 19107
(215) 241-7723
Email: abbe.miller@weirpartners.com
Counsel for Michael R. Zarro

EXHIBIT “A”

#1743

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

UNITED STATES BANKRUPTCY COURT District of Delaware		PROOF OF CLAIM
Name of Debtor: Washington Mutual, Inc., et al.		Case Number: 08-12229
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): Michael R. Zarro		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.
Name and address where notices should be sent: Michael R. Zarro 4735 225th Ave SE, Sammamish, WA 98075		Court Claim Number: _____ (If known)
Telephone number: (206) 500-4962		Filed on: _____
Name and address where payment should be sent (if different from above): Michael R. Zarro 4735 225th Ave SE, Sammamish, WA 98075		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
Telephone number: (206) 500-4962		<input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
1. Amount of Claim as of Date Case Filed: \$ 224,000.00		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.
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, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		
2. Basis for Claim: <u>Retention Bonus</u> (See instruction #2 on reverse side.)		<input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).
3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: <u>Zarro, Michael</u> (See instruction #3a on reverse side.)		<input checked="" type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507 (a)(4).
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: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> 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: \$ _____		<input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(____).
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		Amount entitled to priority: \$ 10,950.00
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 instruction 7 and 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:		*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.
Date: _____	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.	
/s/ Michael R. Zarro		

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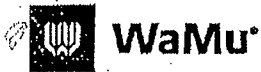
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KURTZMAN CARSON CONSULTANTS

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 132 and 3571.



081222909031700000000026



To: Michael Zarro, Division Exec – Home Loans Operations Strategy
From: David Schneider, President Home Loans
Date: April 11, 2008

As you know, WaMu is restructuring certain areas of the business, including Home Loans. We are uncertain about the details of the restructuring that may take place.

Because we consider you to be a highly-talented member of our team, we would like to offer you a position in the company consistent with your talents and company needs. However, we cannot do that until the full needs of the enterprise have been spelled out in detail, which we expect to happen soon. Accordingly, we are pleased to offer you an arrangement that demonstrates our sincere desire to keep you on board as a continuing member of our team during this transition and that encourages you to do so.

Provided that the conditions described below are satisfied, you will earn the following:

- ◇ **Base salary and bonus** through April 1, 2009 (the "Retention Date") ("Base Salary and Bonus Arrangement."), even if your last day of work comes before the retention date. These amounts to be paid in the normal course of your employment. If WaMu terminates your employment prior to the Retention Date and the termination is not related to a violation of WaMu policy or its Code of Conduct, these amounts will be paid in lump sum at time of termination.
- ◇ **Retention Bonus** in the gross amount of \$224,000, less withholdings, paid the earlier of April 1, 2009 or termination date.

Conditions for earning the Base Salary and Bonus Arrangement and Retention Bonus.

1. You must remain continuously employed with WaMu through the Retention Date. However, if WaMu terminates your employment prior to the Retention Date and the termination is not related to a violation of WaMu policy or its Code of Conduct, you will remain eligible for the Base Salary and Bonus arrangement and the Retention Bonus provided that all of the other conditions are satisfied. This means that if you resign before the Retention Date, you will not be eligible for the Base and Salary Arrangement or Retention Bonus.
3. You cooperate as requested by WaMu with the transition, including assisting in transitional roles as needed.
4. You comply with all contractual obligations that you have with WaMu, including obligations under agreements related to the grant of restricted stock.
5. Any amounts to which you may be entitled under the Worker Authorization and Retraining Notification Act and will be subtracted from amounts described above, except that nothing will be offset against base salary and bonus earned for time actually worked.

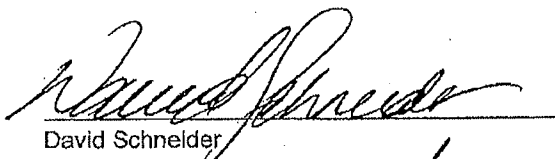


WaMu

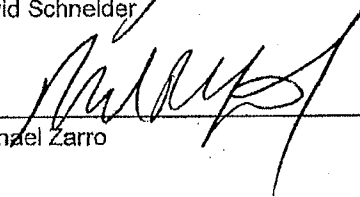
In addition to the above, if we do not provide you with an offer of another position and you qualify for benefits under our Severance Plan, you will be entitled to severance benefits in accordance with the terms and conditions of the Severance Plan.

As mentioned above, we hope we will be offering you a new position that will meet your needs and those of the company, but we cannot promise that this will be the case. What we do promise is that if all of the conditions described above are satisfied, you will earn and be paid the amounts described in this offer. This arrangement does not restrict or limit your at-will relationship with the company or any of your existing obligations under agreements with the company relating to employment, including your arbitration agreement.

Please sign below to acknowledge your acceptance of the terms of this offer and return it to me by April 18, 2008. Thanks again for being part of our team during this challenging time.



David Schneider



Michael Zarro

Date

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

CERTIFICATE OF SERVICE

I, Kenneth E. Aaron, Esquire, hereby certify that on this date I caused to be served true and correct copies of the **Response of Michael A. Zarro to WMI Liquidating Trust’s Sixth Omnibus (Substantive) Objection to Claims and Seventy-Ninth Omnibus (Substantive) Objection to Claims** via ECF notification and First Class postage prepaid, upon the following:

United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19889-0035

Amanda R. Steele, Esquire
Paul Noble Heath, Esquire
Richard Layton and Finger
920 N. King Street
Wilmington, DE 19801

Brian S. Rosen, Esquire
Lawrence J. Baer, Esquire
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Akin Gump Strauss Hauer & Feld LLP

Patrick M. Mott, Esquire
One Bryant Park
New York, NY 10036

Evelyn J. Meltzer, Esquire
Pepper Hamilton LLP
Hercules Plaza
1313 N. Market Street, Suite 5100
Wilmington, DE 19899

Scott Cousins, Esquire
Cousins Chipman & Brown, LLP
1007 North Orange Street
Suite 1110
Wilmington, DE 19801

Dated: March 19, 2013

/s/ Kenneth E. Aaron
Kenneth E. Aaron, Esquire