Docket #11240 Date Filed: 5/8/2013

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 Nos. 11212, 11213 & 11217**
	:	**Hearing Date: May 23, 2013 at 10:30 a.m. (ET)**
	:	**Response Deadline: May 8, 2013 at 4:00 p.m. (ET)**

WMI LIQUIDATING TRUST'S LIMITED OMNIBUS OBJECTION TO CERTAIN EMPLOYEE CLAIMANTS' MOTIONS TO AMEND

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") to the following motions (collectively, the "Motions"):

(a) *Motion of Certain Providian Employee Claimants for Leave To Amend Claims To Include Additional Vested SERAP Benefits and To Plead Additional Theories of Recovery in Light of WMI Liquidating Trust's Fifth, Sixth, Seventy-Ninth and Eightieth Omnibus (Substantive) Objections to Claims*, dated April 17, 2013 [D.I. 11212], filed by Mary Beth Davis ("Davis"), Michele Grau-Iversen ("Grau-Iversen"), Robert Hill ("Hill"), Michael Rapaport ("Rapaport"), David Tomlinson ("Tomlinson"), and Stephen Whittaker ("Whittaker");

(b) *Motion of Anthony Vuoto for an Order (1) Granting Amendment to Proofs of Claim Regarding Additional Theories of Recovery Based Upon the Wamu Executive Officer Severance Plan, and the WMI Executive Target Retirement Income Plan and (2) Reinstating Claim No. 159 and Vacating Order Disallowing Claim*, dated April 18, 2013 [D.I. 11213], filed by Anthony Vuoto ("Vuoto"); and

(c) *Motion of Richard Strauch, Laura Rogers-Rodrigues, Luis Rodriguez, Robert Boxberger, Kathy Yeu, Robert Merritt, John Webber, Daniel Shanks and Jose' Tagunicar*

[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.

0812229130508000000000002

for Leave to Amend Claims (1) To Include Additional Vested SERAP Benefits, (2) To Plead Additional Theories of Recovery in Light of WMI Liquidating Trust's Eighteenth and Eighty-First Omnibus (Substantive) Objections to Claims and (3) To Restate Claims To Include Additional Contractual Benefits Under Their Respective Agreements, dated April 19, 2013 [D.I. 11217], filed by Robert Boxberger ("Boxberger"), Robert Merritt ("Merritt"), Laura Rogers-Rodrigues ("Rogers-Rodrigues"), Luis Rodriguez ("Rodriguez"), Daniel Shanks ("Shanks"), Richard Strauch ("Strauch"), Jose' Tagunicar ("Tagunicar"), John Webber ("Webber"), and Kathy Yeu ("Yeu" and together with Davis, Grau-Iversen, Hill, Rapaport, Tomlinson, Whittaker, Vuoto, Boxberger, Merritt, Rogers-Rodrigues, Rodriguez, Shanks, Strauch, Tagunicar, and Webber, the "Claimants");

and, in support of the Limited Objection, respectfully represents as follows:

JURISDICTION AND VENUE

1. 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

2. 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.

The Bar Date

3. 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.

4. 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].

5. On or before the Bar Date, the Claimants filed their respective proofs of claims (the "Original Claims") as follows:

Name of Claimant	Omnibus Objection	Original Proof of Claim Number(s)	Date Original Proof of Claim Filed	Original Proof of Claim Amount	Original Claim Components
[D.I. 11212]					
Mary Beth Davis	80th	844	02/13/2009	$915,958.00	WMB CIC Agreement WMB Retention Bonus Agreement 2008 Leadership Bonus SERAP
Michele Grau-Iversen	80th	117[2]	12/17/2008	$9,651.66	SERAP
	5th, 79th	610	01/26/2009	$221,000.00	WMB Retention Bonus Agreement
	5th, 79th	613	01/26/2009	$1,486,352.00	WMB CIC Agreement
	80th	617	01/26/2009	$100,000.00	2008 Leadership Bonus
Robert Hill	80th	636	01/22/2009	$1,103,250.00	WMB CIC Agreement WMB Retention Bonus Agreement 2008 Leadership Bonus
Michael Rapaport	80th	629	01/23/2009	$292,742.00	Providian Agreement SERAP
David Tomlinson	79th	1390	03/06/2009	$1,815,402.65	WMB CIC Agreement WMB Retention Bonus Agreement SERAP
Stephen Whittaker	6th, 79th	2832	03/31/2009	$1,185,852.00	WMB CIC Agreement
	N/A	3457	03/31/2009	$8,122.72	SERAP
	6th, 79th	3458	03/31/2009	$1,233,000.00	WMB Retention Bonus Agreement
	80th	3459	03/31/2009	$155,325.00	2008 Leadership Bonus
[D.I. 11213]					
Anthony Vuoto[3]	52nd	159[4]	12/11/08	$36,614.26	SERAP
	84th	985	02/26/09	$650,000.00	WMI Retention Bonus Agreement
	84th	997	02/26/09	$3,538,629.00	WMI CIC Agreement
[D.I. 11217]					
Robert Boxberger	80th	2363	03/30/2009	$1,093,615.99	Providian Agreement
Robert Merritt	80th	2351	03/30/2009	$319,049.12	Providian Agreement

[2] Grau-Iversen's proof of claim number 117 was reclassified from a priority claim to a general unsecured claim pursuant to this Court's *Order Granting Debtors' Sixty-First Omnibus (Substantive) Objection to Claims*, dated January 19, 2011 [D.I. 6581].

[3] Vuoto also filed proof of claim numbers 484 and 729, both of which were disallowed as duplicate claims pursuant to this Court's *Order Granting Debtors' Fourth Omnibus (Non-Substantive) Objection to Claims*, dated August 10, 2009 [D.I. 1465].

[4] Vuoto's proof of claim number 159 was previously disallowed by this Court's *Order Granting Debtors' Fifty-Second Omnibus (Substantive) Objection to Claims*, dated November 9, 2010 [D.I. 5818].

Name of Claimant	Omnibus Objection	Original Proof of Claim Number(s)	Date Original Proof of Claim Filed	Original Proof of Claim Amount	Original Claim Components
Laura Rogers-Rodrigues	80th	2673	03/30/2009	$1,174,150.70	WMB CIC Agreement Providian Agreement
Luis Rodriguez	80th	2149	03/30/2009	$1,105,130.50	WMB CIC Agreement Providian Agreement
Daniel Shanks	80th	2360	03/30/2009	$222,734.58	Providian Agreement
Richard Strauch	80th	2420	03/30/2009	$2,668,335.73	WMB CIC Agreement Providian CIC Agreement SERAP WMB Retention Bonus Agreement Cash LTI Award
Jose Tagunicar	80th	2367	03/30/2009	$343,545.77	Providian Agreement
John Webber	80th	2348	03/30/2009	$885,141.66	Providian Agreement
Kathy Yeu	81st	2354	03/30/2009	$1,338,225.18	Providian Agreement WMI Pension Plan

6. The Claimants' Original Claims consist of claims under one or more of the following components: (i) a WMB Change in Control Agreement ("WMB CIC Agreement"), (ii) a WMI Change in Control Agreement ("WMI CIC Agreement"); (iii) the WMI Supplemental Executive Retirement Accumulation Plan (the "SERAP"), (iv) a WMB "Special Opportunity Bonus" Agreement ("WMB Retention Bonus Agreement"); (v) a WMI "Special Opportunity Bonus" Agreement ("WMI Retention Bonus Agreement"); (vi) a Cash Long-Term Incentive Agreement ("Cash LTI"); (vii) a 2008 Leadership Bonus Agreement ("2008 Leadership Bonus"); (viii) a Providian employment agreement ("Providian Agreement"); or (ix) the WMI Pension Plan ("WMI Pension Plan," and collectively, together with the WMB CIC Agreement, WMI CIC Agreement, SERAP, WMB Retention Bonus Agreement, WMI Retention Bonus Agreement, Cash LTI, 2008 Leadership Bonus, and Providian Agreement, the "Original Claim Components").

Seventh Amended Plan and Confirmation Order

7. 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").[5]

8. 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.

9. 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.

Omnibus Objections, Scheduling Orders, and Related Employee Claims Hearing

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"), both of which objected to certain employee claims, among others, on the basis that the claims were wrongly filed against WMI, which was not a party to the underlying agreements ("Wrong Party Claims"). WMILT objected to Grau-Iversen's Original Claim Nos. 610 and 613 in the Fifth Omnibus Objection and Whittaker's Original Claim Nos. 2832 and 3458 in the Sixth

[5] Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed thereto in the Plan.

Omnibus Objection.

11. On October 8, 2010, the Debtors filed the *Debtors' Fifty-Second Omnibus (Substantive) Objection to Claims* [D.I. 5578] (the "Fifty-Second Omnibus Objection"), which objected to certain employee claims, including on the basis that, among other things, the Debtors' books and records did not indicate a corresponding obligation for the underlying claims because they were based upon unvested account balances in the SERAP, including Vuoto's Original Claim No. 159.

12. On November 4, 2010, the Debtors filed the *Certification of Counsel Regarding Debtors' Fifty-Second Omnibus (Substantive) Objection to Claims* [D.I. 5771] (the "Certification of Counsel") seeking to, among other things, disallow unvested SERAP claims in their entirety and delete such claims from the official claims register in these chapter 11 cases.

13. On November 4, 2010, the Debtors' noticing agent caused the Certification of Counsel to be served on Vuoto at the address set forth in his Original Claim No. 159. *See* Affidavit of Service, [D.I. 6408], annexed hereto, in relevant part, as **Exhibit 1**.

14. By order, dated November 8, 2010, the Court entered the *Order Granting Debtors' Fifty-Second Omnibus (Substantive) Objection to Claims* [D.I. 5818] (the "November 2010 Order"), disallowing, among others, SERAP claims objected to in the Fifty-Second Omnibus Objection for which the Debtors' books and records indicated an unvested balance, including Vuoto's Original Claim No. 159.

15. On November 9, 2010, the Debtors' noticing agent caused the November 2010 Order to be served on Vuoto at the address set forth in Original Claim No. 159. *See* Affidavit of Service [D.I. 6412], annexed hereto, in relevant part, as **Exhibit 2**.

16. On December 21, 2010, the Debtors filed the *Debtors' Sixty-First*

Omnibus (Substantive) Objection to Claims [D.I. 6388] (the "Sixty-First Omnibus Objection"), which objected to certain employee claims, including on the basis that, among other things, the claims were incorrectly asserted as priority claims and should be reclassified as general unsecured claims, including Grau-Iversen's Original Claim No. 117.

17. By order, dated January 18, 2011, the Court entered the *Order Granting Debtors' Sixty-First Omnibus (Substantive) Objection to Claims* [D.I. 6581], reclassifying certain employee claims that were asserted as priority claims as general unsecured claims, including Grau-Iversen's Original Claim No. 117.

18. On August 15, 2012, WMILT filed (i) *WMI Liquidating Trust's Seventy-Ninth Omnibus (Substantive) Objection to Claims* [D.I. 10504] (the "Seventy-Ninth Omnibus Objection"), which objected to certain employee claims on the basis that, among other things, WMI was not a party to the underlying agreements and no "Change in Control," as defined in the applicable agreements, occurred ("Change in Control Claims"), and (ii) additional objections to certain other employee claims, including *WMI Liquidating Trust's Eightieth Omnibus (Substantive) Objection to Claims* [D.I. 10505] (the "Eightieth Omnibus Objection"), *WMI Liquidating Trust's Eighty-First Omnibus (Substantive) Objection to Claims* [D.I. 10506] (the "Eighty-First Omnibus Objection"), and *WMI Liquidating Trust's Eighty-Second Omnibus (Substantive) Objections to Change in Control Claims* [D.I. 10507] (the "Eighty-Second Omnibus Objection"). WMILT objected to (i) Grau-Iversen's Original Claim Nos. 610 and 613, Tomlinson's Original Claim and Whittaker's Original Claim Nos. 2832 and 3458[6] in the Seventy-Ninth Omnibus Objection; (ii) Grau-Iversen's Original Claim No. 617, Whittaker's

[6] Grau-Iversen's Original Claim Nos. 610 and 613 were objected to in the Fifth Omnibus Objection, and Whittaker's Original Claim Nos. 2832 and 3458 were objected to in the Sixth Omnibus Objection. Each such claim was also objected to in the Seventy-Ninth Omnibus Objection to allow the Court to hear all arguments related to Change in Control Claims and Wrong Party Claims in a single hearing with all other similarly situated claimants.

Original Claim No. 3459, and the Original Claims of Hill, Davis, Rapaport, Strauch, Rogers-Rodrigues, Rodriguez, Boxberger, Merritt, Webber, Shanks and Tagunicar in the Eightieth Omnibus Objection; and (iii) Yeu's Original Claim in the Eighty-First Omnibus Objection.

19. 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] (the "Eighty-Fourth Omnibus Objection"), *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, Sixth, Seventy-Ninth, Eightieth, and Eighty-First Omnibus Objections, the "Omnibus Objections"). WMILT objected to Vuoto's Original Claim Nos. 985 and 997 in the Eighty-Fourth Omnibus Objection.

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

21. On May 16, 2012, the Court entered an order granting the Fifth Omnibus Objection [D.I. 10179, as corrected by D.I. 10225] and the Sixth Omnibus Objection [D.I. 10181, as corrected by, D.I. 10226] with respect to the non-responding employee claimants.

22. 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.

23. 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 (the "Employee Claims Hearing" or "Employee Claims Litigation"), a schedule of deadlines related to the Employee Claims Litigation, discovery protocols to be followed by the parties, and defined the more than eighty (80) remaining employee claimants (the "Remaining Claimants").

24. Thereafter, WMILT and certain of the Remaining Claimants began the discovery process and realized that, based upon the discovery propounded, additional time would be required to complete such process and prepare for the Employee Claims Hearing. Consequently, 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.

25. In early February, 2013, eighteen (18) Responding Claimants filed motions to amend their proofs of claim [D.I. 11009, 11010, 11011, 11012, 11013, 11014, 11015, 11016, 11017, 11018, 11019, 11020, and 11026]. All of the motions to amend sought, at minimum, alternate claims pursuant to either the WaMu Severance Plan or the Executive Officer Severance Plan (the "Alternate Claims").

26. On February 26, 2013, WMILT filed, among other things, a limited objection to the motions to amend insofar as they requested leave of the Court to assert the Alternate Claims (the "February Limited Objection"). *See* D.I. 11039. In the February Limited Objection, WMILT did not object to the motions to amend to assert the Alternate Claims.

Rather, WMILT requested sixty (60) days to file renewed omnibus objections based on the amendments, permission to bring additional adversary proceedings it may have against the claims and, to the extent necessary, to propound additional discovery related to the Alternate Claims should the Court grant the motions.

27. A hearing was held on March 7, 2013 to consider the various motions to amend. The Court granted the motions [D.I. 11136, 11063, 11062, and 11061].

28. On February 19, 2013, WMILT filed *WMI Liquidating Trust's Motion for Leave to Amend the Fifth, Sixth, Seventy-Ninth, Eightieth, Eighty-First, Eighty-Second, Eighty-Fourth, Eighty-Fifth, and Eighty-Eighth Omnibus Objections to Claims* [D.I. 11032] (the "Motion to Amend"). The Motion to Amend was originally scheduled to be heard on March 25, 2013.

29. On March 25, 2013, the Court held a hearing (the "March 25 Hearing") where WMILT and certain of the claimants, through their counsel, announced the parties' desire to (i) continue WMILT's Motion to Amend, without prejudice, to June 3, 2013, and (ii) suspend the current Scheduling Orders, without prejudice, with respect to all actions, obligations, deadlines, and dates set forth therein while settlement discussions (including mediation) are ongoing, subject to certain limited exceptions.

30. On March 29, 2013, and at the suggestion of counsel to certain Remaining Claimants, WMILT filed the *Motion of WMI Liquidating Trust for an Order Appointing a Mediator with Respect to Employee Claims and Pending Omnibus Objections* [D.I. 11185] (the "Motion to Mediate"), requesting the entry of an order appointing a mediator to the extent WMILT and the Claimant could not resolve the claims on, or before, April 15, 2013. In connection therewith, WMILT reported that it had commenced settlement discussions with all of

the Remaining Claimants, and had resolved or was near resolution of claims representing over twenty percent (20%) of the Remaining Claimants and over $60 million of the $133 million reserved in connection therewith.

31. On April 18, 2013, the Court held a hearing with respect to the Motion to Mediate and granted the relief requested. However, at the telephonic hearing held on May 8, 2013, the Court ruled that, due to issues associated with regulatory approval of any settlements, mediation would be deferred and all discovery associated with the Omnibus Objections and any subsequent trial would be suspended pending regulatory action. The parties continue to negotiate the form of order related to the Motion to Mediate and whether they wish to go forward with mediation.

32. On April 17-19, 2013, the Claimants filed the Motions.

THE MOTIONS

33. The relief sought in the Motions fall into five categories: (1) Alternate Claims; (2) Claims for Attorneys' Fees and Expenses; (3) Claims for Additional SERAP and ETRIP Benefits; (4) Increased WMB CIC Agreement Claims; and (5) Reinstatement and Amendment of Vuoto's Original Claim No. 159.

Alternate Claims

34. Grau-Iversen, Hill, Tomlinson, Davis and Whittaker request permission to amend their Original Claims to assert an alternate claim (the "Alternate Providian Claim") under their respective Providian Agreements, to the extent that the Court determines that WMI were not liable for obligations under their respective WMB Retention Bonus Agreements. In this regard, the Motions assert that the WMB Retention Bonus Agreements superseded the Providian Agreements, thus demonstrating that their WMB Retention Bonus Agreements were designed to provide the Claimants with an incentive to remain employed and forego their contractual rights

pursuant to their Providian Agreements.

35. Grau-Iversen, Hill, Tomlinson, Davis and Whittaker also request permission to amend their Original Claims to assert an alternate claim under the Wamu Severance Plan (Amended and Restated, effective January 1, 2008) (the "Alternate WSP Claim"), and, with respect to Vuoto, to amend his Original Claim No. 997 to assert an alternate clam under the Executive Officer Severance Plan (the "Alternate EOSP Claim"), to the extent that the Court determines that a "change of control" did not occur and the claimants are not entitled to "change in control" payments pursuant to their respective WMB or WMI CIC Agreements, or WMILT is found not to be the responsible party for obligations under their respective WMB CIC Agreements.

Claims for Attorneys' Fees and Expenses

36. Strauch requests permission to amend his Original Claim to assert a claim for attorneys' fees and costs pursuant to his WMB CIC Agreement if he is the prevailing party in his dispute with WMILT arising out of his WMB CIC Agreement. Boxberger, Merritt, Rogers-Rodrigues, Rodriguez, Shanks, Strauch, Tagunicar, Webber and Yeu and request permission to amend their Original Claims to assert a claim for attorneys' fees and costs pursuant to their Providian Agreements, which provide for payment of legal fees and expenses by the "Corporation" (as defined therein), which the Claimants may reasonably incur in good faith as a result of any contest by the Corporation, the Claimants, or others, of the validity or enforceability of the Providian Agreement. Vuoto requests permission to amend his Original Claim No. 997 to assert a claim for attorneys' fees and costs pursuant his WMI CIC Agreement if he is the prevailing party in his dispute with WMILT arising out of his WMI CIC Agreement.

Claims for Additional SERAP and ETRIP Benefits

37. Davis, Grau-Iversen, Hill, Rapaport, Tomlinson, Whittaker, Vuoto, Boxberger, Strauch and Yeu each request to amend their SERAP claims to include additional service rendered pursuant to Amendment No. 1 to the SERAP.

38. Davis, Rappaport, Tomlinson, and Strauch included a SERAP component, as one of several components, in their Original Claims. Litigation of these Original Claims is still outstanding (the "SERAP Amendments"). Importantly, the SERAP components of these Responding Claimants' Original Claims have already been paid and none of these Responding Claimants objected to the amounts that they were paid pursuant to such SERAP components. Now, pursuant to the Motions, they seek additional amounts.

39. In contrast, Grau-Iversen, Whittaker and Vuoto filed separate proofs of claim for their SERAP components, which did not include any additional claims pursuant to any other Original Components. Such claims were either allowed and paid in these estates, or disallowed pursuant to a Court order (the "Resolved SERAP Claims").

40. Yet other claimants, Hill, Boxberger and Yeu, did not include a SERAP component in any of their Original Claims (the "New SERAP Claims"). Thus, WMILT has never had an opportunity to assess the validity or lodge an objection to the New SERAP Claims.

41. Similarly, Vuoto asserts a new claim under the Executive Target Retirement Income Plan (the "New ETRIP Claim"). None of Vuoto's Original Claims included an ETRIP component. Thus, WMILT has never had an opportunity to assess the validity or lodge an objection to the New ETRIP Claim.

Increased WMB CIC Agreement Claims

42. Davis, Grau-Iversen, Hill, Tomlinson, Whittaker, Vuoto, Rogers-Rodrigues, Rodriguez and Strauch each request that the amount owed under their WMB CIC Agreement or WMI CIC Agreement, as applicable, be increased by an undisclosed amount, because, they claim, that they miscalculated their annual compensation in determining the amounts allegedly owed to them pursuant to their respective agreements (the "CIC Miscalculation Claim"). The claimants fail to disclose what the calculation error is, or what the amount of the amendment would be once the "correct" calculation is completed.

Reinstatement and Amendment of Vuoto's Original Claim No. 159

43. Vuoto, prior to asserting an amendment to his Original Claim No. 159 to include additional service rendered pursuant to Amendment No. 1 to the SERAP, requests that the Court vacate the November 2010 Order disallowing Claim No. 159.

LIMITED OBJECTION

44. WMILT does not object to (i) the amendments, as described in the Motions, sought by Merritt, Shanks, Tagunicar, and Webber, or (ii) the amendments, to the extent they intend to assert Alternate WSP Claims or the Alternate EOSP Claims, provided that WMILT be allowed to amend its objections to such claimants' amended proofs of claim, be able to assert additional adversary proceedings related to such amendments, and take additional discovery on the additional components. With respect to the CIC Miscalculation Claim, WMILT does not have enough information based on the Motions to determine whether it opposes such amendment. The Motions do not describe the nature, source, or magnitude of the Claimants' miscalculation. Rather, as noted above, the Motions merely assert that "the Amended Claims would correct the amount of their respective claims under the WaMu CIC Agreement to the

extent certain components of compensation were inadvertently omitted or improperly calculated in the Original Claims filed by these Claimants." *See, e.g.*, D.I. 11212 ¶ 6.

45. The Alternate Providian Claims, Resolved SERAP Claims, New SERAP Claims and New ETRIP Claim sought in the Motions (collectively, the "New Claims"), filed more than four years after the Bar Date and more than one year after confirmation of the Plan, should, however, be denied because the Motions (i) baldly assert new claims under the guise of amendments;[7] and (ii) the Claimants fail to satisfy the "excusable neglect" standard in *Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380 (1993). Alternatively, should the Court find that the New Claims relate-back to the Original Claims and are actually amendments and not new claims, the Motions should still be denied because the balance of the equities weighs in WMILT's favor and against permitting the amendments.

46. Importantly, the New Claims are distinguishable from the Wamu Severance Plan and Executive Officer Severance Plan amendments sought by claimants in February to which WMILT did not object. Specifically, in all prior motions to amend, the claimants had already filed proofs of claim for amounts pursuant to their respective change in control agreements, which put WMILT on notice that such agreements were in dispute and may give rise to claims for those particular claimants. In seeking leave to amend, those claimants were simply adding an alternate claim to the change in control agreement, which formed the basis of their original claims, pursuant to the Wamu Severance Plan or Executive Officer Severance Plan, should the Court determine that a "change in control" did not occur or WMI is found not to be the responsible party for the obligations under those agreements. Thus, the prior

[7] In making these arguments, WMILT is not ignoring the Court's previous ruling on employee claim amendment issues. WMILT continues to believe that the Court's ruling, mainly that amendments should be allowed with respect to employee claims because the amendments generally relate to the employment relationship, is too broad. Rather, the proper inquiry should be whether the specific agreements and components in the original claim relate to the amendment being sought and give proper notice of such amendment.

Wamu Severance Plan and Executive Officer Severance Plan amendments were true alternate claims to original components already included in the claimants' original timely-filed proofs of claims. Here, the Claimants did not include their New Claims in their Original Claims. Instead, the Claimants are seeking to amend their Original Claims to add components that have already been satisfied by these estates or have no bearing on the Original Claims.

47. Additionally, WMILT objects to the reinstatement of Vuoto's Original Claim No. 159. Vuoto does not state a valid basis to reinstate his claim and, thus, fails to satisfy the "excusable neglect" standard in *Pioneer*.

The Claimants Are Asserting New Claims, Not True Amendments

48. 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).

49. 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).

50. 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)).

51. 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. 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.").

52. Moreover, "to be within the scope of a permissible amendment, the second claim should not only be of the same nature as the first but also reasonably within the amount to which the first claim provided notice." *In re Integrated Res., Inc.* 157 B.R. at 72 (internal quotation marks omitted). "In fact, when an amended claim increases a claim by a material amount it is, in effect, a new claim not entitled to be freely allowed." *In re Uvino*, 09-15225 BRL, 2012 WL 892501, at *3-4 (Bankr. S.D.N.Y. Mar. 14, 2012) (internal quotation marks omitted) (citing *In re Stavriotis*, 977 F.2d 1202, 1205 (7th Cir. 1992) (upholding bankruptcy court's disallowance of an amendment to a claim because of the "dramatic increase in the claim amount which came as an unfair surprise to other creditors, and perhaps to the debtors")). The party asserting the relation-back bears the burden of proof on this issue. *In re Enron Corp.*, 2007 WL 610404, at *5.

53. 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 Motions rely on entirely new facts in asserting the New Claims as alleged amendments and, therefore, the Claimants do not meet their burden on this threshold inquiry.

54. More importantly, the Motions *do not* plead new theories of recovery on the same "conduct, transaction or occurrence set out—or attempted to be set out—in [the Claimants'] original pleading[s]" under Rule 15. The proposed "amendments," namely, the Alternative Providian Claims,[8] Resolved SERAP Claims, New SERAP Claims and New ETRIP Claim, are based on entirely new agreements or benefit plans rather than any of those included in or that formed the basis of, the Original Claims. Thus, the Original Claims did not "evidenc[e] an intention to hold [WMILT] liable" under the Original Claim components and the Claimants' proposed amendments fail to relate back to the Original Claims. *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).

The Claimants Have Failed to Establish Excusable Neglect under *Pioneer* and the New Claims Should Be Disallowed

55. As the Court has previously noted, the Claimants' late-filed New Claims may only be permitted post-bar date under Federal Rule of Bankruptcy Procedure 9006(b)(1) if,

[8] In most cases the WMB Retention Bonus Agreement explicitly supersedes the Alternate Providian Claims, thus, overriding any reason to litigate the Alternate Providian Claims. Moreover, the fact that the WMB Retention Bonus Agreement overrides the Alternative Providian Claims means that there is no reason to believe that, upon the filing of the Original Claim, WMILT was on notice that the Alternate Providian Claim existed.

on motion, the Court determines that the Claimants' 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).

56. 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.").

57. 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.

58. 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.

59. 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).

60. Balancing the foregoing *Pioneer* factors demonstrates that, based on the totality of the facts and circumstances, the Claimants cannot carry the burden of establishing "excusable neglect" by a preponderance of the evidence. Upon information and belief, the Claimants received 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). Notably, Boxberger, Merritt, Rogers-Rodrigues, Rodriguez, Shanks, Strauch, Tagunicar, Webber and Yeu were all represented by counsel when they filed their Original Claims in March, 2009. Moreover, the rest

of the Claimants, Davis, Grau-Iversen, Hill, Rapaport, Tomlinson, Whittaker and Vuoto, were represented by counsel by October, 2012, over seven months ago. Some of the Claimants are even attorneys themselves.

61. Second, contrary to the Claimants' assertions, permitting the Claimants to assert their New Claims at this juncture will cause prejudice to WMILT. WMILT established March 31, 2009 as the Bar Date. The Motions were filed in April, 2013. Therefore, the delay at issue here is a period of more than four years, more than one year after the Plan was confirmed and consummated, and more than six 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).

62. In particular, WMILT was not previously aware of the New Claims when it filed the Omnibus Objections. Thus, WMILT may not rely on those objections as asserting all legal theories relevant to the New Claims. Instead, WMILT will be required to amend its objections. Subject to WMILT's amendments, the Claimants and WMILT may require

additional discovery not previously contemplated by WMILT with respect to these specific Claimants. All of the foregoing will undoubtedly disrupt the current settlement and future mediation efforts by WMILT and the Remaining Claimants.

63. Furthermore, allowing the New Claims 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.").

64. Unlike cases where there is "no evidence that other claimants will rush to th[e] Court seeking to amend their claims," a glance at the Court's recent docket clearly reveals a rush to amend claims in these cases. *Cf. McLean Indus., Inc.*, 121 B.R. 704, 709 (Bankr. S.D.N.Y. 1990) (finding the Trust's floodgate argument unpersuasive where there was "no evidence that other claimants will rush" to amend their claims). Granting the Motions would

signal to the rest of the unresolved Remaining Claimants, all of which have asserted claims similar to the Original Claims, that they too may prevail on filing belated new claims pursuant to entirely separate and distinct agreements and/or benefit plans 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 at this juncture would only increase the adverse effect that new claims would have on the administration of the case and the current settlement and future mediation efforts by WMILT and the Remaining Claimants, amplifying the need for finality.

65. Importantly, a finding of prejudice is not barred simply because the Claimants are not requesting that WMILT reserve additional amounts for the New Claims. 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 the Claimants Are Asserting Amendments Rather Than New Claims, the Equities Weigh in Favor of WMILT and the Amendments Should be Denied

66. 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).

67. Even if the Court were to determine that the Claimants are asserting amendments and not new claims, an analysis of the five foregoing equitable factors demonstrates that the balance of the equities weighs in WMILT's favor and the amendments should be denied.

68. For the reasons already discussed at length above, contrary to the Claimants' assertions, permitting the Claimants to assert their New Claims at this juncture will cause prejudice to WMILT by (1) disrupting the current settlement and future mediation efforts by WMILT and the Remaining Claimants, and (2) undermining WMILT's reliance on the finality of previous and future orders entered by the Court by opening the door for the rest of the Remaining Claimants to assert belated new claims. *See supra* ¶¶ 61-64.

69. Moreover, the Claimants' justifications plainly do not demonstrate an *inability* to file the New Claims at the same time as the Original Claims. The Claimants only state that they inadvertently failed to include the New Claims. Accordingly, the Claimants do not cite a valid reason why they *could not* include the New Claims along with the Original Claims, 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.").

70. Finally, creditors of WMILT would be unduly prejudiced by granting the Motions by potentially reducing the amount of funds available for distributions. If the Motions are 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 Claimants. All amounts expended to defend against the Claimants' alleged amendments serve no purpose but to decrease the amount available to deserving creditors.

Vuoto's Original Claim No. 159 Should Not Be Reinstated

71. The Motion to reinstate Vuoto's Original Claim No. 159 does not state a valid basis to reinstate the claim and the relief requested should be denied. Bankruptcy Rule

3008, which implements section 502(j) of the Bankruptcy Code, grants the Court discretion to reconsider a claim that has been previously allowed or disallowed after an objection. *See* Bankruptcy Rule 3008, Advisory Committee Note (1983) ("Reconsideration of a claim that has been previously allowed or disallowed after objection is discretionary with the court."). A claimant seeking reconsideration of allowance or disallowance of a claim "has the burden of proving its entitlement to the relief sought, and that begins with a demonstration of cause. Absent cause, a motion for reconsideration under § 502(j) should not be granted." *In re Morning Star*, 433 B.R. 714, 717 (Bankr. N.D. Ind. 2010) (internal citations omitted). Neither the Bankruptcy Code nor the applicable rules of procedure define "cause" for the reconsideration of a claim. Accordingly, where a motion for reconsideration is filed beyond ten (10) days after entry of the order, courts look to the standard in Rule 60, incorporated into bankruptcy cases by Bankruptcy Rule 9024. *See VFB LLC v. Campbell Soup Co.*, 336 B.R. 81, 86 (D. Del. 2005) ("[A] motion for reconsideration under Bankruptcy Rule 3008 that is filed beyond the 10-day deadline should be treated as a motion under Bankruptcy Rule 9024, which incorporates Civil Rule 60."); *Morningstar*, 433 B.R. at 717 (explaining that, in the absence of a definition of "cause", "[t]he most commonly used standard, and the one adopted by the majority of courts, is that found in Rule 60(b)"); *Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 227 (B.A.P. 9th Cir. 1995) (collecting cases that have looked to Rule 60(b) to define "cause" under section 502(j) of the Bankruptcy Code). Rule 60(b)(1) provides:

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

Fed. R. Civ. P. 60(b)(1). "The moving party bears a heavy burden because Rule 60 provides extraordinary relief and is, therefore, generally viewed with disfavor." *In re Barquet Group,*

Inc., 477 B.R. 454, 460-61 (Bankr. S.D.N.Y. 2012) (citing *Bowman v. Jack Bond (In re Bowman)*, 253 B.R. 233, 240 (8th Cir. B.A.P. 2000)); *see In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 613 (Bankr. D. Del. 2006) ("As the party seeking relief, the creditor seeking to file a late proof of claim bears the burden of proving excusable neglect by a preponderance of the evidence.").

72. Vuoto presumably seeks relief under Rule 60(b)(1) for excusable neglect. But, as the statute and case law make clear, satisfaction of the "excusable neglect" standard requires some form of excuse; neglect alone is insufficient for the Court to vacate the November 2010 Order disallowing Original Claim No. 159. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993) (discussing the meaning of "neglect" and subsequently noting that "[t]his leaves, of course, [Bankruptcy Rule 9006's] requirement that the party's neglect of the bar date be 'excusable'"); *Global Inds. 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.").

73. Indeed, in *Pioneer*, as noted earlier, the Supreme Court developed a two-step test for determining whether a party's failure to act by a certain date was due to excusable neglect. *See generally* 507 U.S. 380. A movant first must show that its failure to timely respond to a notice or order constituted neglect, which is normally associated with a movant's inadvertence, mistake, or carelessness. *Id.* at 387-88. After establishing neglect, the movant

must show, by a preponderance of the evidence, that the neglect was excusable, which is determined by balancing the following factors: (a) the danger of prejudice to the debtor; (b) the length of the delay and whether or not it would impact the case; (c) the reason for the delay; in particular, whether the delay was within the control of the movant; and (d) whether the movant acted in good faith. *Id.* at 395. Balancing the foregoing factors, it is clear that, based on the totality of the facts and circumstances here, vacatur of the November 2010 Order with respect to Vuoto's Original Claim No. 159 is inappropriate.

74. First, Vuoto's Motion fails to offer any justification for his failure to respond to the Fifty-Second Omnibus Objection. Notably, Vuoto has not alleged, nor presented a shred of evidence to demonstrate, that he failed to receive notice of the Fifty-Second Omnibus Objection or the related pleadings or orders. The affidavits of service here make clear that Vuoto was served with all relevant documents at the current address of record (which was set forth in Vuoto's Original Claim No. 159), including the Fifty-Second Omnibus Objection, and the November 2010 Order. Therefore, Vuoto is presumed to have received notice. Vuoto could have taken action on the Fifty-Second Omnibus Objection upon receiving notice of any of the foregoing documents, and he must bear the consequences for his failure to timely respond, which was entirely within his control. The facts and circumstances surrounding Vuoto's failure to respond to the Fifty-Second Omnibus Objection does not present a particularly compelling or sympathetic case for "excusable neglect" like the other employee claimants whose claims WMILT agreed to reinstate. *See, e.g.*, D.I. 10988 (stipulation between claimant Genevieve Smith and WMILT reinstating her claim after Smith alleged excusable neglect in failing to respond to the Sixth Omnibus Objection because her husband was suffering from cancer, which understandably prevented her from directing her full attention to the bankruptcy cases). Rather,

Vuoto's Motion[9] alleges facts similar to, if not the same as, previous motions to reinstate that this Court has denied. *See, e.g.*, D.I. 10844, *Order Denying Motion of Peter Struck to Reconsider and Vacate Order Disallowing and Expunging Certain Claims (Re: Sixth Omnibus Objection (Substantive) to Claims), Solely as it Relates to Claim No. 2748*.

75. Second, vacating the November 2010 Order with respect to Original Claim No. 159 will prejudice WMILT who, in reliance on the November 2010 Order, released amounts reserved on account of Original Claim No. 159 and distributed such funds to other creditors on the Effective Date. *See Cable & Wireless*, 338 B.R. at 614 ("In applying the *Pioneer* test, courts place the greatest weight on whether any prejudice to the other parties will occur by allowing a late claim.") (internal quotation marks omitted); *In re Contessa Liquidating Co.*, No. 2:11-bk-13454-PC, 2012 WL 2153271, at * 6 (Bankr. C.D. Cal. June 13, 2012) (explaining that the prejudice factor requires the court to "examine the adverse effect, if any, that granting [the claimant's] [m]otion will have on the debtor and the administration of the case"). Should Original Claim No. 159 be reinstated, Creditors holding Allowed Claims and entitled to distributions will be prejudiced because, in violation of the express provisions of the Plan, WMILT would be forced to reserve distributions that would otherwise be made to such Creditors until such time as the Court determines whether Original Claim No. 159, if reinstated as a Disputed Claim, is an Allowed Claim. *See Cable & Wireless*, 338 B.R. at 614-15.

76. Moreover, granting the relief sought in Vuoto's Motion here, where Vuoto has offered no excuse for his failure to respond, would open the door for any additional non-responding claimants to seek reinstatement of their previously disallowed claims. Illustrative of

[9] Vuoto alleges, as an excuse for his failure to respond to the Fifty-Second Omnibus Objection, that the Debtors misled him, but such an argument is more appropriate as a response to the Fifty-Second Omnibus Objection rather than to a motion to reinstate a claim.

this, just last month, three (3) additional claimants filed letters seeking reinstatement of their previously disallowed claims with absolutely no justification for their failure to respond. *See* D.I. 11205, 11206, 11207; *id.* at 614 (listing "whether allowance of the claim would open the floodgates to other future claims" as one of the "[r]elevant factors that may be considered when determining whether there is danger of prejudice to the debtors"); *cf. In re Keene Corp.*, 188 B.R. 903, 913 (Bankr. S.D.N.Y. 1995) (finding that movant failed to demonstrate excusable neglect and considering, among other things, that allowing the movant's late-filed claim "could adversely affect the administration of the case by possibly opening the floodgates to many similar claims"); *In re Hill Stores Co.*, 167 B.R. 348, 352 (Bankr. S.D.N.Y. 1994) (declining to allow a late-filed ballot on the basis of excusable neglect and noting that allowing the ballot "could lead to litigation commenced by any of the 51 others who similarly did not timely remit their class 6 election ballots but have so far chosen not to litigate the issue"); *In re Specialty Equip. Cos.*, 159 B.R. 236, 239 (Bankr. N.D. Ill. 1993) ("Allowance of [movant's late-filed] claim would set a precedent that is an invitation to havoc."). The risk that WMILT would have to generate reserves or ultimately, distributions, for such claims is highly prejudicial to Creditors holding Allowed Claims (not only because they would not receive distributions, but also through the incurrence of additional interest with respect to Allowed Claims), to WMILT and the administration of these chapter 11 cases, not to mention the hundreds of other claimants whose claims have been disallowed. Accordingly, Vuoto has not, and cannot, discharge his burden to show an absence of prejudice to Creditors, WMILT and its estate.

RESERVATION OF RIGHTS

77. To the extent the Court grants the Motions in their 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.

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

Dated: Wilmington, Delaware
May 8, 2013

/s/ Amanda R. Steele

Mark D. Collins (No. 2981)
Paul N. Heath (No. 3704)
Amanda R. Steele (No. 5530)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

– and –

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

Attorneys to WMI Liquidating Trust

EXHIBIT 1

(Fifty-Second Omnibus Objection Certification of Counsel Affidavit of Service)

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)

AFFIDAVIT OF SERVICE

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

On November 4, 2010, I caused to be served the following documents listed below upon the parties listed on **Exhibit A** via U.S. First Class mail:

- **Debtors' Response to WMB Noteholders' Request to Allow Claim for Voting Purposes Pursuant to Bankruptcy Rule 3018(a)** [Docket No. 5767]
- **Certification of Counsel Regarding Debtors' Fifty-First Omnibus (Non-Substantive) Objection to Claims** [Docket No. 5770]
- **Certification of Counsel Regarding Debtors' Fifty-Second Omnibus (Substantive) Objection to Claims** [Docket No. 5771]
- **Certification of Counsel Regarding Debtors' Fifty-Third Omnibus (Substantive) Objection to Claims** [Docket No. 5772]

In addition, on November 4, 2010, I caused to be served the following document listed below upon the parties listed on **Exhibit B** via U.S. First Class mail:

- **Certification of Counsel Regarding Debtors' Fifty-First Omnibus (Non-Substantive) Objection to Claims** [Docket No. 5770]

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

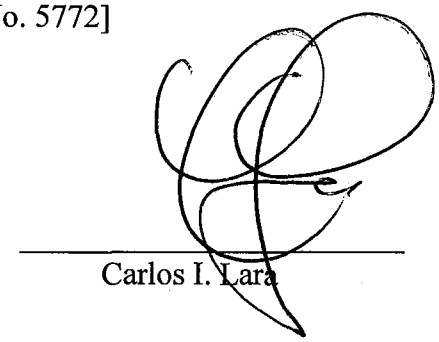
In addition, on November 4, 2010, I caused to be served the following document listed below upon the parties listed on **Exhibit C** via U.S. First Class mail:

- **Certification of Counsel Regarding Debtors' Fifty-Second Omnibus (Substantive) Objection to Claims** [Docket No. 5771]

In addition, on November 4, 2010, I caused to be served the following document listed below upon the parties listed on **Exhibit D** via U.S. First Class mail:

- **Certification of Counsel Regarding Debtors' Fifty-Third Omnibus (Substantive) Objection to Claims** [Docket No. 5772]

Dated: December 22, 2010



Carlos I. Lara

State of California
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on December 22, 2010, by Carlos I. Lara, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Signature: Michelle Cruz

Exhibit C

Exhibit C
First Class Service List

Company	Contact	Address 1	Address 2	City	State	Zip
Anthony F Vuoto		1597 Via Di Salerno		Pleasanton	CA	94566
CAROL HARTLEY		11832 DARBY AVENUE		NORTHRIDGE	CA	91326
CATHARINE E KILLIEN		501 5TH AVE WEST		KIRKLAND	WA	98033
DELORIS STOTT		37913 VINTAGE COURT		PALMDALE	CA	93550
Douglas Levy		5521 142nd Ave SE		Bellevue	WA	98006
ELLEN M ROUSSIN		7221 CHESAPEAKE CIRCLE		BOYNTON BEACH	FL	33436
FRANK VELLA		15532 SE 79TH PLACE		NEWCASTLE	WA	98059
GEORGE BOA		1307 EAGLE BEND		SOUTHLAKE	TX	76092
JAMES H FUJINAGA		33482 WHIMBRELL RD		FREMONT	CA	94555
Keith O Fukui		2317 Winged Foot Rd		Half Moon Bay	CA	94019
Mark Thomas		9830 111th Ave NE		Kirkland	WA	98033
MARY F LARA		8826 LEMONWOOD DR		CORONA	CA	92883
MICHAEL A SIROTA		15229 SE 82ND COURT		NEWCASTLE	WA	98059
Michael A Wolf		3402 Scadlock Ln		Sherman Oaks	CA	91403
MIKE E BRANDEBERRY		5639 NE KESWICK DRIVE		SEATTLE	WA	98105
NIRMAL BAID		5669 TROWBRIDGE WAY		SAN JOSE	CA	95138-2358
Thomas E Allen		6 Viox Way		San Rafael	CA	94901
VIRGINIA J MAGUIRE		14805 137TH LANE NE		WOODINVILLE	WA	98072

EXHIBIT 2

(November 2010 Order Affidavit of Service)

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)

AFFIDAVIT OF SERVICE

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

On November 9, 2010, I caused to be served the following documents listed below upon the parties listed on **Exhibit A** via U.S. First Class mail:

- **Order Granting Debtors' Fiftieth Omnibus (Substantive) Objection to Claims** [Docket No. 5808]
- **Order Granting Relief Sought in Debtors' Response to WMB Noteholders' Request to Allow Claim for Voting Purposes Pursuant to Bankruptcy Rule 3018(a)** [Docket No. 5809]
- **Notice of Submission of Copies of Proofs of Claim Relating to Debtors' Fifty-Fifth Omnibus (Substantive) Objection to Claims** [Docket No. 5810]
- **Notice of Submission of Copies of Proofs of Claim Relating to Debtors' Fifty-Sixth Omnibus (Substantive) Objection to Claims** [Docket No. 5811]
- **Notice of Submission of Copies of Proofs of Claim Relating to Debtors' Fifty-Seventh Omnibus (Substantive) Objection to Claims** [Docket No. 5812]
- **Notice of Submission of Copies of Proofs of Claim Relating to Debtors' Debtors' Fifty-Eighth Omnibus (Substantive) Objection to Claims** [Docket No. 5813]
- **Notice of Submission of Copies of Proofs of Claim Relating to Debtors' Fifty-Ninth Omnibus (Substantive) Objection to Claims** [Docket No. 5814]

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

- **Notice of Submission of Copy of Proof of Claim Relating to Debtors' Objection to Proof of Claim Filed by U.S. Bank National Association (Claim No. 2843)** [Docket No. 5815]

- **Notice of Submission of Copy of Proof of Claim Relating to Debtors' Objection to Proof of Claim Filed by the San Joaquin County Tax Collector (Claim No. 3909)** [Docket No. 5816]

- **Order Granting Debtors' Fifty-First Omnibus (Non-Substantive) Objection to Claims** [Docket No. 5817]

- **Order Granting Debtors' Fifty-Second Omnibus (Non-Substantive) Objection to Claims** [Docket No. 5818]

- **Order Granting Debtors' Fifty-Third Omnibus (Non-Substantive) Objection to Claims** [Docket No. 5819]

In addition, on November 9, 2010, I caused to be served the following document listed below upon the parties listed on **Exhibit B** via U.S. First Class mail:

- **Order Granting Debtors' Fiftieth Omnibus (Substantive) Objection to Claims** [Docket No. 5808]

In addition, on November 9, 2010, I caused to be served the following document listed below upon the parties listed on **Exhibit C** via U.S. First Class mail:

- **Order Granting Debtors' Fifty-First Omnibus (Non-Substantive) Objection to Claims** [Docket No. 5817]

In addition, on November 9, 2010, I caused to be served the following document listed below upon the parties listed on **Exhibit D** via U.S. First Class mail:

- **Order Granting Debtors' Fifty-Second Omnibus (Non-Substantive) Objection to Claims** [Docket No. 5818]

In addition, on November 9, 2010, I caused to be served the following document listed below upon the parties listed on **Exhibit E** via U.S. First Class mail:

- **Order Granting Debtors' Fifty-Third Omnibus (Non-Substantive) Objection to Claims** [Docket No. 5819]

Dated: December 22, 2010

Carlos I. Lara

State of California
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on December 22, 2010, by Carlos I. Lara, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Signature: Michelle G

MICHELLE CRUZ
Commission # 1875517
Notary Public - California
Los Angeles County
My Comm. Expires Jan 2, 2014

Exhibit D

Exhibit D
First Class Service List

Company	Contact	Address 1	Address 2	City	State	Zip
Anthony F Vuoto		1597 Via Di Salerno		Pleasanton	CA	94566
CAROL HARTLEY		11832 DARBY AVENUE		NORTHRIDGE	CA	91326
CATHARINE E KILLIEN		501 5TH AVE WEST		KIRKLAND	WA	98033
DELORIS STOTT		37913 VINTAGE COURT		PALMDALE	CA	93550
Douglas Levy		5521 142nd Ave SE		Bellevue	WA	98006
ELLEN M ROUSSIN		7221 CHESAPEAKE CIRCLE		BOYNTON BEACH	FL	33436
FRANK VELLA		15532 SE 79TH PLACE		NEWCASTLE	WA	98059
GEORGE BOA		1307 EAGLE BEND		SOUTHLAKE	TX	76092
JAMES H FUJINAGA		33482 WHIMBRELL RD		FREMONT	CA	94555
Keith O Fukui		2317 Winged Foot Rd		Half Moon Bay	CA	94019
Mark Thomas		9830 111th Ave NE		Kirkland	WA	98033
MARY F LARA		8826 LEMONWOOD DR		CORONA	CA	92883
MICHAEL A SIROTA		15229 SE 82ND COURT		NEWCASTLE	WA	98059
Michael A Wolf		3402 Scadlock Ln		Sherman Oaks	CA	91403
MIKE E BRANDEBERRY		5639 NE KESWICK DRIVE		SEATTLE	WA	98105
NIRMAL BAID		5669 TROWBRIDGE WAY		SAN JOSE	CA	95138-2358
Thomas E Allen		6 Viox Way		San Rafael	CA	94901
VIRGINIA J MAGUIRE		14805 137TH LANE NE		WOODINVILLE	WA	98072