Docket #11280 Date Filed: 6/13/2013

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)**
	:	**Hearing Date: June 24, 2013 at 10:30 a.m. (ET)**
	:	**Response Deadline: June 13, 2013 at 4:00 p.m. (ET)**

WMI LIQUIDATING TRUST'S LIMITED OBJECTION TO MOTION OF SUSAN ALLISON FOR AN ORDER GRANTING LEAVE TO FILE AMENDMENT TO PROOF OF CLAIM OR, IN THE ALTERNATIVE, ALLOWING CLAIMANT TO ASSERT ALTERNATE ARGUMENT REGARDING CLAIM BASED ON WAMU SEVERANCE PLAN

WMI Liquidating Trust ("WMILT"), as successor in interest to Washington Mutual, Inc. ("WMI") and WMI Investment Corp., formerly debtors and debtors in possession (collectively, the "Debtors"), files this limited objection (the "Limited Objection") to the *Motion for an Order Granting Leave To File Amendment to Proof of Claim or, in the Alternative, Allowing Claimant To Assert Alternate Argument Regarding Claim Based on WaMu Severance Plan* (the "Motion"), dated May 3, 2013 [D.I. 11234], filed by Susan Allison (the "Claimant") 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.

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The principal offices of WMILT, as defined herein, are located at 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.

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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 Claimant filed proof of claim number 3222 (the "Original Claim") in the amount of $593,126. The Original Claim consists of claims pursuant to Claimant's WMB Change in Control Agreement ("WMB CIC Agreement Claim Component") and the WMI Supplemental Executive Retirement Accumulation Plan (Amended and Restated, effective January 1, 2004) (together with the WMB CIC Agreement Claim Component, the "Original Claim Components").

Seventh Amended Plan and Confirmation Order

6. On December 12, 2011, the Debtors filed their *Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [D.I. 9178] (as modified, the "Plan").[2]

7. 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.

8. 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.

Seventy-Ninth Omnibus Objection, Scheduling Orders, and Related Employee Claims Hearing

9. On August 15, 2012, WMILT filed *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, including the Original Claim, 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.

10. Following the filing of the Seventy-Ninth Omnibus Objection, certain claimants filed responses to such objection.

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

11. On September 19, 2012, the Court entered an order granting the Seventy-Ninth Omnibus Objection with respect to the non-responding employee claimants. *See* D.I. 10692.

12. 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, (i) the consolidation of the litigation with respect to various omnibus objections related to employee claims, including the Seventy-Ninth Omnibus Objection (the "Employee Claims Hearing" or "Employee Claims Litigation"), (ii) a schedule of deadlines related to the Employee Claims Litigation, (iii) discovery protocols to be followed by the parties, and (iv) defined the more than eighty (80) remaining employee claimants (the "Remaining Claimants").

13. 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.

14. 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.

15. 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,[3] 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.

16. 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.

17. On April 18, 2013, the Court held a hearing with respect to the Motion to Mediate and granted the relief requested. However, at a telephonic hearing held on May 8, 2013 to discuss the entry of the order granting the Motion to Mediate, the Court ruled that, due to issues associated with regulatory approval of any settlements, mediation would be deferred and all discovery associated with the various omnibus objections relating to the Employee Claims

[3] The Motion to Amend is now scheduled to be heard on June 24, 2013.

Litigation and any subsequent trial would be suspended pending regulatory action. The Court affirmed its ruling at a status conference held on June 3, 2013.

18. On May 3, 2013, the Claimant filed the Motion.

THE MOTION

19. The amendments sought in the Motion fall into three categories: (1) an Alternate WSP Claim (as defined below); (2) a new claim under the Cash Long-Term Incentive Award program; and (3) an increased WMB CIC Agreement Claim Component (collectively, the "Amended Claim Components"). Specifically, the Claimant requests permission to amend her Original Claim to assert an alternate claim under the Wamu Severance Plan (the "Alternate WSP Claim"), to the extent that the Court determines that a "change of control" did not occur and the Claimant is not entitled to "change in control" payments pursuant to the WMB CIC Agreement, or WMILT is found not to be the responsible party for obligations under the WMB CIC Agreement. The Claimant also requests permission to amend the Original Claim to include a claim, in the amount of $41,666.66, pursuant to the Cash Long-Term Incentive Award program (the "Cash LTI Claim"). Finally, the Claimant requests that the amount owed under her WMB CIC Agreement be increased by $41,966.26 for an undisclosed reason (the "CIC Miscalculation Claim"). [4]

LIMITED OBJECTION

20. WMILT does not object to the Motion to the extent the Claimant intends to assert Alternate WSP Claims or the CIC Miscalculation Claim, provided that WMILT be allowed to amend its objections to the amended proof of claim, be able to assert additional adversary proceedings related to such amendments, and take additional discovery on the

[4] Although the Claimant does not explicitly state in her Motion that she is seeking to amend her Original Claim to increase her Original Claim amount pursuant to her WMB CIC Agreement, she provides an increased claim amount pursuant to such agreement in the draft amended proof of claim attached to the Motion as Exhibit A.

additional components.

21. The Cash LTI Claim, 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 Motion (i) baldly asserts a new claim under the guise of an amendment;[5] and (ii) the Claimant fails 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 Cash LTI Claim relates back to the Original Claim and is actually an amendment and not a new claim, the Motion should still be denied because the balance of the equities weighs in WMILT's favor and against permitting the amendment.

The Claimant Is Asserting a New Claim, Not A True Amendment

22. 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

[5] In making this argument, 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.

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

23. 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).

24. 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)).

25. 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.").

26. 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.

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

28. Indeed, with respect to the Cash LTI Claim, the Motion ***does not*** plead new theories of recovery on the same "conduct, transaction or occurrence set out—or attempted to be set out—in [the Claimant's] original pleading" under Rule 15. The proposed "amendment," is based on an entirely new agreement or benefit plan rather than the WMB CIC Agreement Claim Component or the SERAP Claim Component included in, and that formed the basis of, the Original Claim. Thus, the Original Claim did not "evidenc[e] an intention to hold [WMILT] liable" for the Cash LTI Claim and the Claimant's proposed amendment fails to relate back to the Original Claim.[6] *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).

[6] Despite the Motion's assertion that the Cash LTI Claim was mentioned in the Original Claim, *see* Motion ¶ 28, a mere reference of the Cash Long Term Incentive Award program in the Original Claim does not satisfactorily put WMILT on notice of its liability for such a claim. In fact, contrary to exemplifying an intention to hold the estate liable, the Original Claim states that the Claimant's rights to an award pursuant to such program were ***unvested***. *See* Original Claim, *Claim Itemization* ("Cash long term inventive award – unvested amounts").

The Claimant Has Failed to Establish Excusable Neglect under *Pioneer* and the New Claim Should Be Disallowed

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

30. As the Bankruptcy Rule 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.").

31. 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.

32. 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.

33. 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).

34. Balancing the foregoing *Pioneer* factors demonstrates that, based on the totality of the facts and circumstances, the Claimant cannot carry the burden of establishing "excusable neglect" by a preponderance of the evidence. Upon information and belief, the Claimant 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. 875. 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). Here, the Cash LTI Claim was known to the Claimant at the time of the Bar Date. The Claimant has not presented any evidence that suggests a legitimate reason for the lack of presentation of the Cash LTI Claim when she filed the Original Claim.

35. Second, contrary to the Claimant's assertions, permitting the Claimant to assert her Cash LTI Claim at this juncture will cause prejudice to WMILT. WMILT established March 31, 2009 as the Bar Date. The Motion was filed in May, 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).

36. In particular, WMILT was not previously aware of the Cash LTI Claim when it filed the Seventy-Ninth Omnibus Objection. Thus, WMILT may not rely on that objection as asserting all legal theories relevant to the Cash LTI Claim. Instead, WMILT will be

required to amend its objection. Subject to WMILT's amendments, the Claimant and WMILT may require additional discovery not previously contemplated by WMILT with respect to the Claimant.

37. Furthermore, allowing the Cash LTI Claim now would undermine WMILT's reliance on the finality of previous and future orders entered by the Court and would open the door for the rest of the Remaining Claimants to assert belated new claims. *See In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 614 (Bankr. D. Del. 2006) (listing "whether allowance of the claim would open the floodgates to other future claims" as one of the "[r]elevant factors that may be considered when determining whether there is danger of prejudice to the debtors"); *cf. In re Keene Corp.*, 188 B.R. 903, 913 (Bankr. S.D.N.Y. 1995) (finding that movant failed to demonstrate excusable neglect and considering, among other things, that allowing the movant's late-filed claim "could adversely affect the administration of the case by possibly opening the floodgates to many similar claims"); *In re Hill Stores Co.*, 167 B.R. 348, 352 (Bankr. S.D.N.Y. 1994) (declining to allow a late-filed ballot on the basis of excusable neglect and noting that allowing the ballot "could lead to litigation commenced by any of the 51 others who similarly did not timely remit their class 6 election ballots but have so far chosen not to litigate the issue"); *In re Specialty Equip. Cos.*, 159 B.R. 236, 239 (Bankr. N.D. Ill. 1993) ("Allowance of [movant's late-filed] claim would set a precedent that is an invitation to havoc.").

38. 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). Indeed, the Motion is the

nineteenth (19) motion filed this year requesting to amend proofs of claims. The June 24 hearing will be the fourth (4) hearing relating to employee claim amendments. And, even more telling of this trend to rush to the court to amend claims, to date, thirty-six (36) other employee claimants have requested that the court permit them to amend their claims. It is evident that, granting the Motion would further signal to the rest of the unresolved Remaining Claimants, all of which have asserted claims similar to the Original Claim, that they too may prevail on filing belated new claims pursuant to entirely separate and distinct agreements 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.

39. Importantly, a finding of prejudice is not barred simply because the Claimant is not requesting that WMILT reserve additional amounts for related to the Amended Claim Components. 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 Claimant Is Asserting an Amendment Rather Than a New Claim, the Equities Weigh in Favor of WMILT and the Amendment Should be Denied

40. 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).

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

42. For the reasons already discussed at length above, contrary to the Claimant's assertions, permitting the Claimant to assert her Cash LTI Claim 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.

43. Moreover, the Claimant's justifications plainly do not demonstrate an *inability* to file the Cash LTI Claim at the same time as the Original Claim. The Claimant only states that she inadvertently failed to include the Cash LTI Claim. Accordingly, the Claimant

does not cite a valid reason why she *could not* include the Cash LTI Claim along with the Original Claim, let alone a compelling reason as required for post-confirmation amendments.[7] 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.").

44. Finally, creditors of WMILT would be unduly prejudiced by granting the Motion by potentially reducing the amount of funds available for distributions. If the Motion were granted, WMILT will have to expend funds to amend its substantive objections and will likely have to propound and provide additional discovery to the Claimant. All amounts

[7] As stated above, *see supra* ¶ 37, *pro se* claimants are generally not exempt from compliance with relevant rules of procedure or substantive law simply because of their lack of representation.

expended to defend against the Claimant's alleged amendment serve no purpose but to decrease the amount available to deserving creditors.

RESERVATION OF RIGHTS

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

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

Dated: Wilmington, Delaware
June 13, 2013

/s/ Amanda R. Steele

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