

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

<i>In re</i>	:	Chapter 11
WASHINGTON MUTUAL, INC., <u>et al.</u> ,	:	Case No. 08-12229 (MFW)
	:	(Jointly Administered)
Debtors.	:	
	:	Re: D.I. 6696, 6964, 7038, 7040, and 8344

**POST-CONFIRMATION
HEARING WRITTEN SUBMISSION
OF LAW DEBENTURE TRUST COMPANY
OF NEW YORK IN SUPPORT OF THE MODIFIED
SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS
PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

Law Debenture Trust Company of New York (“Law Debenture”), as successor indenture trustee under that certain indenture, dated as of April 4, 2000, between Washington Mutual, Inc. (“WMI,” and, together with WMI Investment Corp., the “Debtors”), and The Bank of New York, as successor to Harris Trust and Savings Bank (as supplemented by that certain First Supplemental Indenture and Second Supplemental Indenture, dated as of August 1, 2002 and March 16, 2004, respectively, the “Senior Subordinated Notes Indenture”), hereby submits this Post-Confirmation Hearing Written Submission in support of the *Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, filed on February 7, 2011, as modified on March 16, 2011, and March 25, 2011 [Dkt. Nos. 6696, 6964, 7038, and 7040] (the “Plan”):¹

1. On July 8, 2011, Law Debenture filed the *Statement of Law Debenture Trust Company of New York in Support of the Modified Sixth Amended Joint Plan of Affiliated*

¹ Capitalized terms used herein but not defined have the meanings given to them in the Plan.

Debtors Pursuant to Chapter 11 of the Bankruptcy Code and in Response to Certain Objections [Dkt. No. 8101] (the “Plan Statement”). Law Debenture incorporates the Plan Statement into this Post-Confirmation Hearing Written Submission as if fully set forth herein. The Plan Statement addressed Plan objections asserted by certain holders of Senior Notes Claims, certain holders of PIERS Claims, and the PIERS Trustee. The Plan Statement demonstrated why the Plan and its Subordination Model correctly enforce the relative rights and priorities of holders of the various classes of funded debt claims against the Debtors. None of the evidence admitted during the confirmation hearing (the “Confirmation Hearing”) provides grounds for this Court to alter the Subordination Model. Specifically:

A. **Post-Petition Inter-Creditor Interest.** *See Plan Statement, ¶¶ 1-8.*

2. Normandy Hill Capital L.P. (“Normandy Hill”) and the PIERS Trustee [Dkt. Nos. 7475 and 7939] assert that holders of senior funded debt claims should not be entitled to recover post-petition interest at the contract rate from the holders of PIERS Claims if the Court determines that the federal judgment rate should be used to calculate the post-petition interest payable by the Debtors’ estates. But these objectors are not entitled to an advisory opinion regarding the appropriate rate of inter-creditor interest that would apply if the Debtors (or some other party) sought confirmation of a plan of reorganization that provided for payment of post-petition interest by the Debtors’ estates at the federal judgment rate.

3. Even if this issue were ripe for adjudication, the plain language of the Junior Subordinated Notes Indenture – which requires subordination or pay-over of post-petition interest “whether or not a claim for post-petition interest is allowable as a claim in any [bankruptcy] proceeding” – compels the result dictated by the Subordination Model. *See Junior*

Subordinated Notes Indenture, §§ 1.1(f) and 6.1(a).² This provision of the Junior Subordinated Notes Indenture requires the holders of PIERS Claims to forego (or pay over) post-petition interest to more senior creditors at the contract rate even if the Debtors could not pay any post-petition interest to any creditor.³ But if Normandy Hill and the PIERS Trustee are correct that the rate of interest paid by the estate should dictate the rate of inter-creditor interest, then it would follow that the holders of PIERS Claims would not be required to pay over *any* post-petition interest to more senior creditors of an insolvent debtor, when the debtor's estate would not be paying post-petition interest. Such a result would be contrary to the express terms of the Junior Subordinated Notes Indenture and demonstrates why the PIERS Trustee's argument concerning inter-creditor interest lacks merit.

4. The language of the Junior Subordinated Notes Indenture with respect to the subordination of post-petition interest at the contract rate would likely satisfy the requirements of the "rule of explicitness." But that rule has only ever been invoked to answer the binary question of whether or not a junior creditor has agreed to subordinate its right to receive post-petition interest from a solvent debtor. Normandy Hill and the PIERS Trustee do not assert that the PIERS Claims holders are entitled to retain post-petition interest in light of the clear language in the Junior Subordinated Notes Indenture. Instead, they offer the novel

² The First Supplemental Indenture, dated as of April 30, 2001, between WMI and The Bank of New York, which superseded the original Junior Subordinated Notes Debenture, dated as of April 30, 2001, between WMI and The Bank of New York, is attached as Exhibit A.

³ By contrast, the post-petition interest subordination language in the Junior Subordinated Notes Indenture does not appear in the Senior Subordinated Notes Indenture. See Section C, below (discussing the "rule of explicitness" as it applies to the relationship between the holders of Senior Notes and the holders of Senior Subordinated Notes); see also Plan Statement, Exh. A and Art. 15.2(a) of the Senior Subordinated Notes Indenture, attached as Exhibit B. The inclusion of this language in the Junior Subordinated Notes Indenture, and its absence from the Senior Subordinated Notes Indenture, explains why the Subordination Model provides for subordination of post-petition interest received by holders of PIERS Claims but does not subordinate the post-petition interest due on account of the Senior Subordinated Notes Claims.

proposition that the *rate* of post-petition interest is subject to the rule of explicitness. The Court should reject their efforts to extend the rule in this unprecedented way.

B. **Subrogation Rights of PIERS Claims Holders.** *See Plan Statement, ¶ 9.*

5. The PIERS Trustee's contention that the Plan abrogates the subrogation rights of the holders of PIERS Claims is wrong. The PIERS Trustee protests that if the holders of PIERS Claims subordinate at a higher rate than that awarded by the Court, then such holders can never be compensated for the full amount they pay over to contractually-senior creditors. But, if the Debtors were insolvent, the subrogation rights of the holders of the PIERS Claims vis-à-vis the Debtors would be limited in the same manner as such rights are limited under the Plan: the holders of PIERS Claims would not be entitled to recover the full amount paid over to contractually-senior creditors. This is not inequitable or unusual; it is the bargain that sophisticated parties struck when negotiating the Junior Subordinated Notes Indenture and that investors who purchased the securities accepted.

C. **Subordination of Post-Petition Interest.** *See Plan Statement, ¶¶ 10-16; Exh. A.*

6. Three different Circuit Courts of Appeal, despite having employed different approaches, have concluded that a contractually-junior creditor must explicitly agree to subordinate its claim to the post-petition interest claim of a contractually-senior creditor (*i.e.*, that a simple requirement for "payment in full," without more, is insufficient to evidence a junior creditor's intention to give up its entitlement to post-petition interest in favor of a senior creditor). *See Plan Statement, ¶¶ 11-12 and Exh. A thereto.* None of the evidence admitted at the Confirmation Hearing suggests that the holders of Senior Subordinated Notes intended to forego their collective right to receive post-petition interest from the Debtors' estates. The Subordination Model gets it exactly right: with respect to principal and pre-petition interest due on the Senior Notes, the holders of Senior Notes are senior to the holders of Senior Subordinated

Notes. However, with respect to post-petition interest payable by the Debtors' estates, the two classes of creditors must be treated *pari passu*.

D. **Allocation of Payments to Senior Notes.** *See Plan Statement, ¶¶ 17-18.*

7. The Washington Mutual, Inc. Noteholders Group (the "WMI Noteholders") [Dkt. No. 7919] argues that the Debtors should include the amounts already paid to holders of Senior Notes in "tranche 1" of the Subordination Model on account of their principal and pre-petition interest claims when determining the allocation of post-petition interest payments in "tranche 2." But to include those previously-satisfied claims in calculating the denominator in "tranche 2" would unfairly and artificially enlarge the share of post-Effective Date distributions to be paid to holders of Senior Notes. This outcome would be inconsistent with the requirement discussed above that, absent explicit language to the contrary in the Senior Subordinated Notes Indenture, the post-petition interest claims of the holders of the Senior Notes must be treated *pari passu* with the claims of the holders of the Senior Subordinated Notes.

8. The WMI Noteholders also argue that certain series of the Senior Notes that accrue interest at a variable rate (the "Senior Floating Rate Notes") should receive interest at the federal judgment rate if this Court confirms the Plan (thereby awarding post-petition interest at the contract rate) because the contract rate for these holders would be lower than the federal judgment rate and the federal judgment rate is the minimum rate required to be paid by a solvent estate. Depending upon how the Court rules on certain intercreditor issues (including issues relating to subordination of post-petition interest), an award of the federal judgment rate to the holders of Senior Floating Rate Notes might negatively impact the holders of Senior Subordinated Notes. Therefore, Law Debenture reserves all rights, including the right to assert, on behalf of all holders of Senior Subordinated Notes, that: (a) payment of interest to holders of Senior Floating Rate Notes at the federal judgment rate represents a payment in excess of their

respective contractual entitlements that must be paid over for the benefit of the holders of the Senior Subordinated Notes, and (b) the holders of the Senior Subordinated Notes are subrogated to the rights of the holders of Senior Notes and, therefore, it is the holders of Senior Subordinated Notes who should receive the benefit of any payment above the contract rate until such holders are paid in full. See Senior Subordinated Notes Indenture, §§ 15.3-15.4.

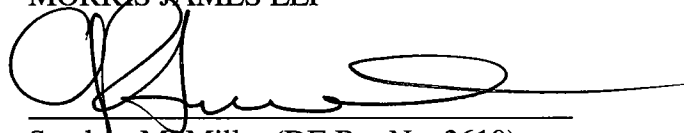
RESERVATION OF RIGHTS AND JOINDER

9. Law Debenture hereby joins in any other submission in support of confirmation of the Plan that is not inconsistent with this Post-Confirmation Hearing Written Submission and reserves the right to appear and be heard at the continued Confirmation Hearing.

Dated: Wilmington, Delaware
August 10, 2011

Respectfully submitted,

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