

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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In re : **Chapter 11**
 :
WASHINGTON MUTUAL, INC., et al.,¹ : **Case No. 08-12229 (MFW)**
 :
 Debtors. : **(Jointly Administered)**
 :
 : **Re: Docket No. 5934**
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**DEBTORS' RESPONSE TO THE MOTION OF TRICADIA CAPITAL
MANAGEMENT, LLC PURSUANT TO SECTIONS 105(a) AND 362
OF THE BANKRUPTCY CODE FOR ORDER ESTABLISHING NOTICE
AND HEARING PROCEDURES FOR TRADING IN CCB GUARANTEE CLAIMS**

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), as and for their response to the motion, dated November 16, 2010 [D.I. 5934] (the "Trading Motion"), of Tricadia Capital Management, LLC ("Tricadia") for an order establishing notice and hearing procedures for trading in CCB Guarantee Claims, pursuant to sections 105(a) and 362 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 3001 and 3002 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), respectfully represent as follows:

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.

PRELIMINARY STATEMENT²

1. On the eve of the Confirmation Hearing, Tricadia's Trading Motion requests that the Debtors establish restrictive notice and hearing procedures with respect to the trading of CCB Guarantee Claims to protect the potential value of certain net operating loss carryforwards (the "NOLs") and certain other tax attributes, and seeks relief on an expedited basis to be considered on November 23, 2010.³ The Debtors respectfully request that consideration of the Trading Motion be postponed until after the Confirmation Hearing as confirmation of the Plan, would moot Tricadia's request. An adjournment will spare the Debtors' and the Court's resources in addressing the motion, pending the outcome of the Confirmation Hearing, without undermining the relief sought by Tricadia because Tricadia has provided notice of its motion to, among others, the respective trustees of the respective CCB trusts and their counsel, and the Trading Motion seeks *nunc pro tunc* relief that may be granted (if appropriate) at a later hearing on the Trading Motion.

2. Furthermore, Tricadia misstates and misconstrues the size and practical value of the NOLs. Nevertheless, the Debtors have no general objection to considering some form of trading order in the event that the Plan is not confirmed, and are willing to discuss any such order with Tricadia (with the input of the official committee of unsecured creditors) at such time.

RESPONSE

Tricadia's Motion & NOL Limitations

² Defined terms used but not otherwise defined shall have the meanings ascribed to them in the Trading Motion or the *Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated October 6, 2010, as it has been and may be amended (the "Plan").

³ On November 17, 2010, the Court entered an order shortening the applicable notice period so that the Trading Motion may be heard on November 23, 2010.

3. The Trading Motion requests that the Debtors immediately establish procedures to monitor and restrict the trading of CCB Guarantee Claims to protect the potential value of certain NOLs and other tax attributes of the Debtors under an altered or different formulation of a chapter 11 plan. As Tricadia recognizes, however, the relief requested in the Trading Motion has no import under the Plan, as proposed.

4. The relief sought by Tricadia is aimed at maintaining the CCB Guarantee Claims as a class that could receive all or substantially all of the stock of a reorganized WMI in order to qualify for what Tricadia refers to as the “Section 382(1)(5) safe harbor.” Tricadia would have the Court believe, however, that this is the only way to preserve the potential value of the Debtors’ NOLs and other tax attributes. That is not the case. Nor should the value of the NOLs be considered in a vacuum, such as without considering the practical ability to generate the taxable income necessary to use the NOLs, when such taxable income would be generated, and any other potential impediments to the NOLs (legal as well as factual).

5. Section 382 of the Internal Revenue Code (the “IRC”) generally limits a corporation’s ability to utilize its NOLs to offset future taxable income in the event of an “ownership change,” as defined by the IRC, to an annual amount. However, in the context of an NOL generated in a taxable year in which the ownership change occurs, a pro-rata portion (based on a daily proration) of such NOL can generally be allocated to the period *after* the ownership change, free of such annual limitation. The Plan seeks to benefit from this proration rule (in addition to the basic annual allowance).

6. IRC Section 382(1)(5) allows a debtor corporation to avoid the annual limitation of IRC Section 382 if, pursuant to its chapter 11 plan, the debtor’s “Qualified Creditors” will own at least fifty percent (50%) of the total value and voting power of the debtor’s stock

immediately after the consummation of the chapter 11 plan. As Tricadia acknowledges, under the Plan, because a significant portion of value and voting power of the stock of Reorganized WMI will likely be distributed to the holders of Senior Subordinated Notes and/or PIERS Claims, IRC Section 382(l)(5) is likely to be inapplicable. (See Trading Motion ¶ 14.)

7. Tricadia contends that it's seeking to preserve "flexibility" in the event that (i) the Plan is not confirmed as proposed, but rather amended in some significant manner so as to provide at least fifty percent (50%) of the ownership of Reorganized WMI to the portion of the CCB Guarantee Claims that are held by Qualified Creditors, after taking into account all shares acquired pursuant to the Rights Offering,⁴ or (ii) an entirely new Plan has to be proposed. Tricadia asserts that, absent the relief sought, there is a strong likelihood that a reorganized WMI would be unable to qualify under IRC Section 382(l)(5). (Trading Motion ¶ 28.) As discussed below, any value provided by an increased availability of NOL over and above that expected under the present Plan is speculative at best. Moreover, an adjournment would preserve the Court's time and avoid unnecessary estate expense in the event the Plan is confirmed, without undermining the relief and flexibility sought by Tricadia.

The Trading Motion Should be Adjourned

⁴ Notably, the holders of the CCB Guarantees Claims cannot receive the majority of the Reorganized Common Stock as currently capitalized because of the size of their claims. Assuming that the value of Reorganized WMI is \$145 million (as set forth in the Disclosure Statement), due to the amount of CCB Guarantee Claims that Tricadia claims are held by holders of "old and cold" CCB Guarantee Claims, even if the Plan were amended to provide all Reorganized Common Stock to the holders of CCB Guarantee Claim, "old and cold" CCB Guarantee Claim holders would not hold 50% or more of the Reorganized Common Stock. Accordingly, the Reorganized Debtors would not qualify for the IRC Section 382(l)(5) exception.

8. While seemingly well-intentioned, the expedited relief sought in the Trading Motion is unnecessary if the Plan is confirmed and is inconsistent with the realistic value of the NOLs.

9. Pursuant to the Plan, the Debtors expect that any Reorganized Common Stock and Additional Common Stock issued pursuant to the Plan will constitute an ownership change for IRC Section 382 purposes. (Disclosure Statement, § IX.A.2.) As recognized by Tricadia, the Plan is not dependent on the application of IRC Section 382(l)(5), and the Disclosure Statement explicitly discloses that the Debtors do not anticipate that IRC Section 382(l)(5) will apply. *Id.* As such, if the Plan were confirmed in its present form or in a substantially similar form, the Trading Motion will be rendered moot.

10. Accordingly, the Debtors request that the Court deny Tricadia's request for expedited relief and adjourn consideration thereof until after the Confirmation Hearing (scheduled to commence on December 1, 2010). Adjournment of the Trading Motion will spare the Debtors' and this Court's resources in addressing the motion pending the outcome of the Confirmation Hearing, while preserving Tricadia's right to seek to implement the Trading Motion's proposed procedures in the event the Plan is not confirmed. Delayed consideration of the Trading Motion will not impair Tricadia's ability to obtain the relief it seeks should the Plan (as substantially proposed) not be confirmed, especially because the Trading Motion seeks relief retroactive to the date the motion was filed.⁵

⁵ The Trading Motion, having been sent to all interested parties (including the trustees for the CCB trusts and their counsel), has alerted interested parties that the relief sought has been requested *nunc pro tunc* to the filing date of the Trading Motion.

11. Moreover, Tricadia's request for relief does not take into account the realistic value of the NOL under the Plan, further warranting an adjournment until it is known whether the Plan will be confirmed.

12. First, Tricadia misstates the magnitude of the NOLs that could potentially be available to the Debtors. As described in the Disclosure Statement, the amount of NOL potentially available to Reorganized WMI is approximately \$5 billion (Disclosure Statement, § IX.A.) – and not a range of \$5 billion to \$18 billion (or higher), as suggested by Tricadia.

13. Second, notwithstanding the amount of the NOLs, the potential tax savings to be generated by the NOLs are substantially less than Tricadia contends. As set forth in the Disclosure Statement, the Debtors' financial projections and Blackstone's valuation assume that the Reorganized Debtors "would be able to take advantage of . . . [NOLs] sufficient to cover projected earnings streams (i.e., at least approximately \$75 to \$100 million of Reorganized WMI NOLs)." Disclosure Statement § VI.B.2.a.N (Financial Information and Projections); Ex. D (Valuation Analysis). In fact, the Debtors anticipate having at least such amount, based on the application of the "proration" rule and the abandonment by WMI of its stock interest in WMB prior to the Effective Date,⁶ as well as the amount of NOLs allowable under the IRC Section 382 annual limitation. If the Effective Date of the Plan occurs on or about December 22, 2010, the "proration" rule would yield an available NOL of at least approximately \$100 million, *in*

⁶ On November 12, 2010, the Debtors filed a *Motion Pursuant to Section 554(a) of the Bankruptcy Code for Authorization to Abandon WMI's Equity Interests in Washington Mutual Bank* [D.I. 5885], which motion is scheduled for hearing on December 17, 2010.

addition to the annual limitation. This amount would be significantly greater if the Plan becomes effective in 2011.⁷

14. An enormous NOL “cushion,” as Tricadia envisions, while theoretically appealing, is unnecessary as any alleged value to be derived from additional NOLs is purely speculative, at best. In his final report, the Examiner expressed agreement with the Debtors’ analysis with respect to the NOLs, by confirming that “[W]hatever the preserved amount [of NOLs] is after the Effective Date, such preserved losses can only create value for the post-Effective Date holders of the liquidating trust if, and to the extent that, future taxable income is generated by reorganized WMI. *Any such value is currently speculative.*” (emphasis added). (See Examiner Rep at 150-51; D.I. 5735).

⁷ If the Effective Date of the Plan occurs in January 2011, approximately \$4.6 billion of NOLs would (due to the proration of the NOL for the year of emergence) not be restricted by IRC Section 382, without regard to whether or not IRC Section 382(l)(5) applies.

WHEREFORE the Debtors request the Court defer consideration of the Trading Motion until after the Confirmation Hearing and grant the Debtors such other and further relief as is just.

Dated: November 22, 2010
Wilmington, Delaware



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