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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| IN RE WASHINGTON MUTUAL, INC. SECURITIES & ERISA LITIGATION |) | No. 2:08-md-1919 MJP |
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| IN RE WASHINGTON MUTUAL, INC. SECURITIES LITIGATION |) | Lead Case No. C08-387 MJP |
| |) | |
| This Document Relates to: ALL CASES |) | PLC-22 |
| |) | LEAD PLAINTIFF’S MOTION FOR APPROVAL OF PLAN OF ALLOCATION |
| |) | |
| |) | NOTE ON MOTION CALENDAR (Settlement Hearing Date): November 4, 2011 at 9:00 a.m. |
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STATUTES

15 U.S.C. § 77a2, 6

1 Lead Plaintiff Ontario Teachers' Pension Plan Board ("Ontario Teachers") respectfully
2 submits this motion for approval of the Plan of Allocation of the Net Settlement Funds.

3 Lead Plaintiff is simultaneously submitting herewith the Declaration of Hannah Ross in
4 Support of Lead Plaintiff's Motions for Final Approval of Class Action Settlements and
5 Approval of Plan of Allocation and Lead Counsel's Motion for Approval of Attorneys' Fees and
6 Expenses (the "Ross Declaration" or "Ross Decl."). The Ross Declaration is an integral part of
7 this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed
8 description of the history of the Action through the submission of the Settlements to the Court;
9 the nature of the claims asserted in the Action; and the terms of the proposed plan of allocation
10 (the "Plan of Allocation"). Lead Plaintiff is also submitting simultaneously herewith a
11 declaration from its damages expert, Chad Coffman in support of the Plan of Allocation (the
12 "Coffman Declaration" or "Coffman Decl."), attached as Exhibit 5 to the Ross Declaration.¹

13 **I. PRELIMINARY STATEMENT**

14 If approved by the Court, the proposed Plan of Allocation will determine how the net
15 proceeds of the Settlements will be distributed to the members of the Class who submit timely
16 and valid Proof of Claim Forms that are approved for payment (the "Authorized Claimants").
17 The objective of a plan of allocation is to fairly and equitably distribute the proceeds of a
18 settlement or settlements by determining the positions of class members in relation to other class
19 members. The proposed Plan of Allocation achieves that objective here in clear and reasonable
20 ways.

21 The terms of the Plan of Allocation were developed by Lead Counsel in consultation with
22 Lead Plaintiff's damages expert Chad Coffman. Under the Plan of Allocation, the proceeds of
23 the Net Settlement Funds will be allocated among Class Members pursuant to Recognized Loss
24 Amount calculations. For WaMu common stock and Capital Trust Unit Preferred, the
25 Recognized Loss calculations will be based upon changes in the amount of estimated artificial

26 _____
27 ¹ Unless otherwise noted, capitalized terms used herein shall have the meaning set out in the
28 Ross Declaration or in the Stipulations of Settlement (ECF Nos. 874-1, 874-2 and 874-3).

1 inflation in the security between the date of purchase and the date of sale of the security. For the
2 other WMI Class Securities – the Series R Stock, Floating Rate Notes and 7.250% Notes – the
3 Recognized Loss calculations will be based on the statutory measure of damages set forth in
4 Section 11 of the Securities Act of 1933 (the “Securities Act”).

5 The Plan of Allocation is set forth at pages 7-12 of the Notice of (I) Pendency of Class
6 Action and Proposed Settlements, (II) Settlement Fairness Hearing and (III) Motion for an
7 Award of Attorneys’ Fees and Reimbursement of Litigation Expenses (the “Notice”), which has
8 been mailed to over 950,000 potential Class Members. See Affidavit of Jennifer M. Keough
9 Regarding (A) Mailing of the Notice and the Proof of Claim and Release; (B) Publication of
10 Summary Notice; and (C) Report on Requests for Exclusion (“Keough Aff.”), attached as
11 Exhibit 3 to the Ross Declaration, at ¶ 7 and Keough Aff. Ex. A, at 7-12. To date, there have
12 been no objections to the Plan of Allocation. See Ross Decl. ¶ 20.

13 For the reasons set forth herein, in the Ross Declaration, and in the Coffman Declaration,
14 Lead Plaintiff and Lead Counsel respectfully submit that the Plan of Allocation provides a fair
15 and reasonable method to efficiently and equitably distribute the Net Settlement Funds to Class
16 Members and, therefore, warrants approval by the Court.

17 **II. THE PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED**

18 **A. The General Standards For Approving A Plan Of Allocation**

19 Approval of a plan of allocation for the proceeds of a class action settlement rests in the
20 sound discretion of the Court. See *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284-85 (9th Cir.
21 1992). To warrant approval, a plan of allocation must meet the same standards applicable to
22 approval of the settlement as a whole – it must be fair, adequate, and reasonable. See *Class*
23 *Plaintiffs*, 955 F.2d at 1284-85; *Atlas v. Accredited Home Lenders Holding Co.*, 2009 WL
24 3698393, at *4 (S.D. Cal. Nov. 4, 2009); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036,
25 1045 (N.D. Cal. 2008).

26 To satisfy this standard, the “allocation formula need only have a reasonable, rational
27 basis, particularly if recommended by experienced and competent counsel.” *In re Heritage Bond*

1 *Litig.*, 2005 WL 1594403, at *11 (C.D. Cal. June 10, 2005) (quoting *Maley v. Del Global Techs.*
2 *Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002)); *see also In re PaineWebber Ltd. P'ships*
3 *Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997) (“in the case of a large class action the
4 apportionment of a settlement can never be tailored to the rights of each plaintiff with
5 mathematical precision”), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

6 Generally, a plan of allocation is reasonable if it reimburses class members based on the
7 type and extent of their injuries and the strength of their legal claims. *See Omnivision*, 559 F.
8 Supp. 2d at 1045 (“It is reasonable to allocate the settlement funds to class members based on the
9 extent of their injuries or the strength of their claims on the merits.”); *In re Immune Response*
10 *Sec. Litig.*, 497 F. Supp. 2d 1166, 1173 (S.D. Cal. 2007) (“it is fair to allocate settlement
11 proceeds according to the relative strengths and weaknesses of the various claims.”); *Heritage*
12 *Bond Litig.*, 2005 WL 1594403, at *11 (a reasonable plan of allocation may “sensibly make[]
13 interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class
14 members’ individual claims and the timing of purchases of the securities at issue”).

15 In assessing whether a proposed plan of allocation is fair and reasonable, courts have
16 given considerable weight to the opinion of experienced counsel. *See Heritage Bond*, 2005 WL
17 1594403, at *11 (“The fact that the plan of allocation is recommended by experienced and
18 competent counsel further cuts in favor of approving the [plan of allocation]”); *In re the Exxon*
19 *Valdez*, 1996 WL 384623, at *5 (D. Alaska June 11, 1996) (“The opinion of counsel is entitled to
20 considerable weight in evaluating a settlement. Here, the Plan of Allocation was formulated by
21 highly experienced counsel who are particularly competent with regard to complex class action
22 litigation.”) (citations omitted); *see also Aramburu v. Healthcare Fin. Servs., Inc.*, 2009 WL
23 1086938, at *5 (E.D.N.Y. Apr. 22, 2009) (“In determining whether a plan of allocation is fair,
24 courts look primarily to the opinion of counsel.”). The proposed Plan of Allocation in this case
25 is recommended by experienced counsel fully informed of the relevant legal and factual issues,
26 and should be approved by the Court.

1 **B. The Proposed Plan Of Allocation Is Fair**
2 **And Reasonable And Warrants Approval By The Court**

3 **1. The Structure Of The Plan Of Allocation**

4 Lead Counsel developed the Plan of Allocation after extensive consultation with Lead
5 Plaintiff’s damages expert, Chad Coffman. The goal of the Plan of Allocation is to fairly and
6 equitably allocate the net proceeds of the Settlements to Authorized Claimants. However, the
7 Plan of Allocation is not a formal damages analysis and the calculations made pursuant to the
8 Plan are not intended to be estimates of, nor indicative of, the amounts that Class Members might
9 have been able to recover after trial. See Notice ¶ 46. The computations under the Plan of
10 Allocation are only a method to weigh the claims of Authorized Claimants against one another
11 for the purposes of making *pro rata* allocations of the Net Settlement Funds.

12 To do so, the Plan of Allocation first provides that the Net Settlement Funds will be
13 divided into two funds: (i) an Exchange Act Fund that will consist of the Net Settlement Fund
14 created by the D&O/WaMu Settlement (\$105 million less Taxes, Notice and Administration
15 Costs, and Court-awarded attorneys’ fees and litigation expenses) and will be allocated to
16 Authorized Claimants based on their claims with respect to WaMu common stock and Capital
17 Trust Unit Preferred; and (ii) a Securities Act Fund that will be comprised of the Net Settlement
18 Funds created by the Settlements with the Underwriter Defendants and Deloitte (\$103.5 million
19 less Taxes, Notice and Administration Costs, and Court-awarded attorneys’ fees and litigation
20 expenses) and will be allocated to Authorized Claimants based on their claims with respect to
21 Series R Stock, Floating Rate Notes and 7.250% Notes. See Notice ¶ 48.² This division of the
22 Net Settlement Funds recognizes the fact that the Underwriter Defendants and Deloitte only
23 faced claims brought under the Securities Act and that these Securities Act claims could be
24 brought only by the members of the Class who purchased the WMI Class Securities offered to
25 the public during the Class Period – the Series R Stock, Floating Rate Notes and 7.250% Notes.

26 ² If the amount available in the Exchange Act Fund or Securities Act Fund exceeds the amount
27 of all recognized losses of the Authorized Claimants from that fund, the excess amount in that
28 fund will be made available to claimants from the other fund. See Notice ¶ 60.

1 While the Individual Defendants faced claims with respect to all WMI Class Securities and under
2 both the Securities Act and Exchange Act, the Plan of Allocation appropriately takes into account
3 the fact that the purchasers of WMI Class Securities with only Exchange Act claims – the
4 common stock and Capital Trust Unit Preferred – suffered the overwhelming majority of
5 damages as a result of the claims alleged against the Individual Defendants. *See* Ross Decl.
6 ¶ 113.

7 The Exchange Act Fund and Securities Act Fund will be allocated to Authorized
8 Claimants on a *pro rata* basis based on each Authorized Claimant’s Recognized Loss Amount for
9 that category of securities. The Recognized Loss Amounts for Exchange Act claims and
10 Securities Act claims will be calculated separately, as discussed below.

11 2. Exchange Act Claims

12 Recognized Loss Amounts calculated with respect to purchases of WaMu common stock
13 and the Capital Trust Unit Preferred during the Class Period will be based on changes in the
14 amount of artificial inflation in the security between the date of purchase and the date of sale.
15 *See* Coffman Decl. ¶ 20. The amount of artificial inflation per share was determined through Mr.
16 Coffman’s expert analysis, which entailed studying the market reaction to the public disclosures
17 that revealed or described the alleged misrepresentations or their effects, and calculating the
18 reasonable dollar amount of artificial inflation present at different periods during the Class
19 Period that was attributable to the alleged wrongdoing. The price decline associated with each of
20 the six alleged corrective disclosures was adjusted to eliminate the effects attributable to general
21 market or industry factors. *See id.* ¶¶ 10-19. In addition, the price declines following each
22 disclosure were adjusted based on the probability that a portion or all of a specific price decline
23 might have been found to relate to timely information rather than correction of the alleged
24 misstatements. *See id.* ¶ 22. Mr. Coffman generated a table, based on this analysis, setting forth
25 the amount of estimated inflation per share in the common stock and Capital Trust Unit Preferred
26 at different periods during the Class Period. *See* Notice Table A at p. 17.

1 The formula for calculating the Recognized Loss Amount on eligible transactions in
2 WaMu common stock and in Capital Trust Unit Preferred is set forth in the Plan of Allocation
3 and is based upon the purchase date and purchase price of the security, the sales date and sales
4 price of the security, and the differences in the level of artificial inflation on the date of purchase
5 and the date of sale. *See* Notice ¶ 55. Claimants who purchased and then sold one of these
6 securities prior to first alleged corrective disclosure, which occurred after the close of trading on
7 October 17, 2007, are not eligible to recover on those transactions because their losses (if any)
8 were not attributable to the alleged fraud. *See* Notice ¶ 51. Similarly, any common stock or
9 Capital Trust Unit Preferred purchased after any partial corrective disclosure must be held until
10 after the date of another corrective disclosure to be eligible under the Plan. *See id.*

11 **3. Securities Act Claims**

12 In order to calculate losses with respect to purchases of the Series R Stock, Floating Rate
13 Notes and 7.250% Notes, the Plan of Allocation applies the statutory measure of damages under
14 Section 11 of the Securities Act. Lead Counsel, in consultation with Mr. Coffman, decided that
15 that most reasonable approach to calculating losses for these securities was to use the statutory
16 damages formula without any offset for “negative causation.” An offset for negative causation is
17 not necessary because the Plan of Allocation is only used to determine the relative position of
18 Class Members. *See* Coffman Decl. ¶ 29. The amount and method for calculating any negative
19 causation, which would have been defendants’ burden to prove, would be complex and subject to
20 dispute and adopting any particular negative causation model would be speculative. *See id.*

21 **4. Other Provisions Of The Plan Of Allocation**

22 The Distribution Amount that will be paid to an Authorized Claimant will be the sum of
23 his, her or its *pro rata* share of the Exchange Act Fund and his, her or its *pro rata* share of the
24 Securities Act Fund.

25 In the interests of fairness, the Plan of Allocation provides that, to the extent a Claimant
26 had an overall market gain with respect to his, her or its Class Period purchases and acquisitions
27 of WMI Class Securities, that person or entity will not be eligible for a distribution from the Net

1 Settlement Funds. See Notice ¶ 60; *In re Merrill Lynch & Co. Research Reports Sec. Litig.* 246
2 F.R.D. 156, 169 (S.D.N.Y. 2007) (“it is not inequitable for a plan of allocation to provide for
3 distribution of the proceeds of a settlement fund only to claimants who suffered out-of-pocket
4 losses as a result of the defendants’ alleged fraudulent conduct”); *In re Aetna Inc. Sec. Litig.*,
5 2001 WL 20928, at *13 (E.D. Pa. Jan. 4, 2001) (“it is fair that claimants who reaped a profit on
6 their sales of Aetna stock during the Class Period receive no share of the settlement”).

7 In addition, if an Authorized Claimant’s Distribution Amount calculates to less than \$20,
8 no distribution will be made to that Authorized Claimant. See Notice ¶ 61. In light of the
9 administrative costs involved in making distributions, this *de minimis* threshold is fair and
10 reasonable. Courts routinely approve allocation plans that require a class member’s payment to
11 exceed a minimum threshold in order to recover from a settlement fund. See, e.g., *In re Merrill*
12 *Lynch & Co. Research Reports Sec. Litig.*, 2007 WL 4526593, at *12 (S.D.N.Y. Dec. 20, 2007)
13 (approving a plan of allocation providing for a \$50 minimum distribution amount and noting that
14 “courts have approved minimum payouts in class action settlements in order to foster the
15 efficient administration of the settlement.”).

16 **C. The Reaction Of The Class To Date**
17 **Supports Approval Of The Plan of Allocation**

18 As of September 18, 2011, more than 950,000 copies of the Notice, which contains the
19 proposed Plan of Allocation, and advises Class Members of their right to object to the Plan of
20 Allocation, had been sent to potential Class Members. See Keough Aff., attached as Exhibit 3 to
21 the Ross Declaration, at ¶ 7. To date, not a single objection to the Plan of Allocation has been
22 received, a factor that weighs in favor of approval of the proposed Plan. See *Heritage Bond*,
23 2005 WL 1594403, at *11 (“The fact that there have been no objections to this plan of allocation
24 favors approval”); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 430
25 (S.D.N.Y. 2001) (“the lack of any objections suggests that approval of the Plan of Allocation is
26 warranted”). The deadline for submitting objections to the Plan of Allocation is October 10,
27 2011. Should any objections to the Plan of Allocation be received, they will be addressed in

1 Lead Plaintiff's reply papers.

2 **III. CONCLUSION**

3 In sum, the Plan of Allocation, developed in consultation with Lead Plaintiff's damages
4 expert, was designed to fairly and rationally allocate the proceeds of the Net Settlement Funds
5 among Class Members based on the types of claims asserted and damages suffered.
6 Accordingly, Lead Plaintiff respectfully submits that the Plan of Allocation is fair and reasonable
7 and should be approved

8 Dated: September 25, 2011

Respectfully submitted,

9 BERNSTEIN LITOWITZ BERGER &
10 GROSSMANN LLP

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Liaison Counsel for the Class

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 25, 2011, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-
4 mail addresses on the Court's Electronic Mail Notice list.

5
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