

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

	X	
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In re	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC, <u>et al.</u> , <sup>1</sup>	:	Case No. 08-12229 (MFW)
	:	Jointly Administered
Debtors.	:	
	:	<b>Requested Hearing Date: TBD</b>
	:	<b>Requested Obj. Deadline: TBD</b>
	:	<b>Related Docket No. 7930</b>
	X	

**MOTION TO COMPEL AURELIUS CAPITAL MANAGEMENT LP  
AND CENTERBRIDGE PARTNERS, LP TO PRODUCE DOCUMENTS**

Scoggin Capital Management, VR Global Partners, L.P., The Visium Funds, Black Horse Capital, Paige Capital Management LLC, and Greywolf Capital Management LP (collectively, “the Trust Preferred Holders”), by and through their undersigned counsel, hereby move, (i) pursuant to Federal Rules of Civil Procedure 26 and 34 as made applicable to these proceedings by Rules 7026 and 7034 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for an order compelling Aurelius Capital Management LP (“Aurelius”) and Centerbridge Partners, LP (“Centerbridge”) to produce discovery (the “Motion to Compel”). In support thereof, the Trust Preferred Holders respectfully represent as follows:

**PRELIMINARY STATEMENT**

1. This motion seeks two extremely narrow categories of communications that were specifically referenced in the depositions of representatives of Aurelius and Centerbridge. First, representatives of both firms testified that they had communicated with counsel concerning their respective trading activities, and suggested that they had each received legal advice that the firm was not in possession of material non public information while they were trading in the debtor’s

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<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.



securities. Aurelius and Centerbridge cannot be permitted to use the attorney-client privilege as both a sword and a shield. Having selectively disclosed their alleged reliance on outside counsel to determine whether they were in possession of material non-public information while trading in the Debtors' securities, Aurelius and Centerbridge cannot now insulate that advice from further scrutiny.

2. Second, this motion seeks communications concerning settlement negotiations with outside counsel during the critical period from December 30, 2009, through March 12, 2010. Both representatives admitted that their respective firms traded during this period, but suggested that they did not receive updates from outside counsel concerning settlement negotiations, notwithstanding the fact that their counsel was integrally involved in such negotiations. Based on this testimony, such communications are clearly relevant and indeed critical to the cross examination of these witnesses.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction over these matters pursuant to 28 U.S.C. §§ 157(b) and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

### **BACKGROUND**

4. As previously noted in our motion to compel (Docket # 7930), on or about June 1, 2011, the Trust Preferred Holders retained Arkin Kaplan Rice LLP ("AKR") to investigate the allegations of inappropriate trading activities by the Settlement Noteholders<sup>2</sup> and to take whatever actions necessary (together with the Equity Committee, if appropriate) to protect the Trust Preferred Holders' interests. The Trust Preferred Holders' retained AKR shortly after it was announced that the Official Committee of Equity Security Holders ("Equity Committee")

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<sup>2</sup> The Settlement Noteholders are defined herein as Aurelius, Centerbridge, Owl Creek Asset Management, L.P. ("Owl Creek") and Appaloosa Management, L.P. ("Appaloosa").

was in discussions with the Debtors regarding a potential settlement the Trust Preferred Holders understood not to be in their best interests. That potential settlement made clear the interests of the Trust Preferred Holders and those of the Equity Committee were not necessarily aligned in certain material respects.

5. On June 16, 2011, the Trust Preferred Holders served a First Request for Production of Documents to the Settlement Noteholders, which is attached hereto as Exhibit A. This request included communications concerning information that the Settlement Noteholders were in possession of while trading in the Debtors' securities and communications concerning settlement negotiations with outside counsel. Aurelius and Centerbridge did not object to these requests.

6. On June 23 and June 24, 2011, AKR attended the Rule 30(b)(6) depositions of corporate representatives of Centerbridge, Owl Creek Asset Management, L.P. ("Owl Creek"), and Appaloosa Management, L.P. ("Appaloosa"). AKR did not ask any questions or otherwise participate in these depositions because, despite repeated requests, AKR was denied access to all documents previously produced by these funds. A Rule 30(b)(6) deposition of Aurelius occurred before AKR was retained.

7. On June 29, 2011, the Court heard argument on the Trust Preferred Holders' motion for an order, pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1, to compel discovery from the Settlement Noteholders. At the conclusion of the parties' presentations, the Court granted the Trust Preferred Holders' motion and ordered the Equity Committee to provide to counsel for the Trust Preferred Holders all documents and other information produced by the Settlement Noteholders to the Equity Committee, as well as copies of transcripts of depositions of the Settlement Noteholders' representatives and exhibits thereto.

8. Later that day, counsel to the Trust Preferred Holders sent an acknowledgment pursuant to which AKR agreed to abide by all terms and conditions of the confidentiality agreement negotiated among the Equity Committee, the Settlement Noteholders and certain other parties.

9. On Friday, July 1, 2011, the Trust Preferred Holders finally obtained access to documents and other information produced by Owl Creek and Appaloosa (but not documents produced by Aurelius and Centerbridge), as well as copies of transcripts of depositions of the Settlement Noteholders' representatives and exhibits thereto.

10. The Aurelius representative, Daniel Gropper, testified, among other things, that Aurelius relied on outside counsel to determine whether it was in possession of material, non-public information. (*See, e.g.*, Gropper Tr. at 78:18-81:2; *id.* at 131:16-32:4; *id.* at 147:6-14.) In particular, Mr. Gropper testified that Aurelius gave "strict instructions" to outside counsel not to convey to Aurelius any material, non-public information obtained during settlement negotiations so that Aurelius would not be restricted from trading after expiration of the confidentiality agreement. (*Id.* at 80:9-81:2; *id.* at 82:11-25; *id.* at 129:22-132:4; *id.* at 269:9-22.) Mr. Gropper also testified that Aurelius did not receive any settlement updates from its outside counsel. (*Id.* at 266:3-271:15.)

11. Centerbridge's corporate designee, Vivek Melwani, similarly testified that Centerbridge relied on outside counsel to determine whether Centerbridge was in possession of material, non-public information. (*See, e.g.*, Melwani Tr. at 236:21-237:8; *id.* at 103:23-106:9.) In particular, Mr. Melwani testified that he recalled reviewing emails in which outside counsel purportedly "confirmed" with the Debtors that certain information was neither material nor non-public. (*Id.* at 105:18-106:4.) In addition, Mr. Melwani testified that Centerbridge did not receive any settlement updates from its outside counsel. (*Id.* at 81:8-84:11; *id.* at 93:3-23.)

12. On Tuesday, July 5, 2011, counsel to the Trust Preferred Holders finally obtained access to documents and other information produced by Aurelius and Centerbridge, which had been produced on encrypted disks that required passwords. Upon completion of their review of these materials, which total approximately 31,000 pages, counsel to the Trust Preferred Holders discovered that Aurelius and Centerbridge did not produce any communications with their outside counsel regarding determinations as to whether Aurelius and Centerbridge were in possession of material, non-public information concerning Washington Mutual, Inc. In fact, aside from a few email communications to Aurelius and Centerbridge in which outside counsel forwarded information from third parties, Aurelius' and Centerbridge's productions also lacked communications with their outside counsel concerning information obtained during settlement negotiations.

13. On July 7, 2011, counsel for the Trust Preferred Holders informed counsel to Aurelius and Centerbridge that their productions are incomplete and requested that Aurelius and Centerbridge produce communications with outside counsel during the relevant period concerning (i) trading issues, including whether Aurelius and Centerbridge possessed material non-public information, and (ii) information forwarded by counsel during settlement negotiations. (Exhibits B & C) Given that the confirmation hearing is to commence next Wednesday, counsel for the Trust Preferred Holders requested that Aurelius and Centerbridge produce these documents as soon as practicable. In addition, counsel for the Trust Preferred Holders requested that Aurelius and Centerbridge produce privilege logs if they claimed any such communications were privileged.

14. Later that day, counsel for Aurelius informed counsel for the Trust Preferred Holders via email that Aurelius would not comply with the Trust Preferred Holders' discovery requests, and went on to threaten counsel for the Trust Preferred Holders with sanctions should

they move to compel production. (Exhibit D) On July 8, 2011, counsel for counsel for Centerbridge informed counsel for the Trust Preferred Holders that Centerbridge would not comply with the Trust Preferred Holders' discovery requests. (Exhibit E)

### **RELIEF REQUESTED**

15. Pursuant to Federal Rules of Civil Procedure 26 and 34 as made applicable to these proceedings by Bankruptcy Rules 7026 and 7034, "all relevant material is discoverable unless an applicable evidentiary privilege is asserted." *See, e.g., Pacitti v. Macy's*, 193 F.3d 766, 777-78 (3d Cir. 1999) ("[A]ll relevant material is discoverable unless an applicable evidentiary privilege is asserted."); *In re ML-Lee Acquisition Fund II, L.P.*, 151 F.R.D. 37, 39 (D. Del. 1993) ("[D]iscovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.") (internal quotation omitted).

16. The expedited discovery sought by the Trust Preferred Holders falls within the scope of these rules. Indeed, this Court already has compelled the Settlement Noteholders to produce the very discovery that the Trust Preferred Holders now seek on an expedited basis. In particular, the Court ordered the Settling Noteholders to produce any information they received "during settlement negotiations." (February 7, 2011, Transcript at 82:5-7.) The Court's order plainly encompasses communications with outside counsel concerning determinations as to whether Aurelius and Centerbridge obtained material, non-public information concerning Washington Mutual, Inc. during settlement negotiations and information that Aurelius and Centerbridge obtained during that time. As the Court observed, this discovery "is relevant to the confirmation hearing that I will be holding. It relates both to the interest issue and the valuation issue." February 8 Transcript at 81:12-18; *see also* Order at 69, 94. *A fortiori*, the scope of the

Trust Preferred Holders expedited discovery request is proper under Rule 2004 and Local Rule 2004-1.<sup>3</sup>

17. Aurelius and Centerbridge have put their reliance on counsel at issue in this proceeding. As noted above, corporate representatives of both Aurelius and Centerbridge have suggested that they relied on outside counsel to determine whether they were in possession of material, non-public information before trading with knowledge of the continuing settlement discussions. They cannot now exploit the privilege in order to deprive the Trust Preferred Holders of vital information required to test the merits of this defense – including what information was conveyed among Aurelius, Centerbridge, and their counsel; whether counsel was provided with all material facts in rendering their advice; whether counsel gave a well-informed opinion; and whether that advice was heeded by Aurelius and Centerbridge – prior to the confirmation hearing. To the extent that the attorney-client privilege ever attached to these communications, it now has been waived. *See Glenmede Trust Co., v. B. Ray Thompson, Jr.*, 56 F.3d 476, 486 (3d Cir. 1995) (stating that “[t]he attorney-client privilege may be waived by a client who asserts reliance on the advice of counsel as an affirmative defense” because “the party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice”); *In re ML-Lee Acquisition Fund II, L.P.*, 859 F. Supp. 765, 768 (D. Del. 1994) (holding that defendants waived the attorney-client privilege by raising reliance on the advice of counsel as a defense to plaintiffs’ allegations and that fairness requires defendants to produce those communications

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<sup>3</sup> This discovery is well within that allowed under Bankruptcy Rule 2004 and Local Rule 2004-1. Pursuant to Bankruptcy Rule 2004(a), “[o]n motion of any party in interest, the court may order the examination of any entity.” As this Court has observed, “[t]he scope of a Rule 2004 examination is ‘unfettered and broad.’” *In re Washington Mutual, Inc.*, 408 B.R. 45, 49 (Bankr. D. Del. 2009) (citation omitted). The purpose of a Rule 2004 examination “is to enable the trustee to discover the nature and extent of the bankruptcy estate.” *Id.* at 50 (citing *In re Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 708 (Bankr. S.D.N.Y. 1991). Rule 2004 examinations are “legitimate[ly]” used in “determining whether wrongdoing has occurred,” *id.* (citing *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002), and uncovering fraudulent conduct, *In re Symington*, 209 B.R. 678, 684 (Bankr. D. Md. 1997).

upon which it has relied to assert its good faith based on the advice of counsel); *RCA Corp. v. Data General Corp.*, 1986 WL 15683, at \* 1 (D. Del. July 2, 1986) (ordering defendant to produce all documents which directly or indirectly relate to opinions of counsel because defendant waived the privilege “by asserting reliance upon advice of counsel as an essential element of his defense”).

18. Therefore, all documents in Aurelius’ and Centerbridge’s possession, custody or control that directly or indirectly relate communications with outside counsel during the critical period from December 30, 2009, through March 12, 2010, when both Mr. Gropper and Mr. Melwani asserted that Aurelius and Centerbridge had not received any settlement updates from their outside counsel during the period December 30, 2010, through March 12, 2011. Any such communications with outside counsel concerning settlement are plainly relevant to this testimony and should be produced. *See LML Patent Corp. v. Telecheck Servs., Inc. Electronic Clearing House, Inc.*, 2006 U.S. Dist. LEXIS 13498, at \* 2 (D. Del. March 28, 2006) (“Once a party has relied on the opinion of counsel, that party waives the privilege as to all documents in its possession, custody or control that have some relevance to the subject matter of the opinion.”); *RCA Corp.*, 1986 WL 15683, at \* 1 (requiring defendant to produce “all documents which directly or indirectly relate to opinions of counsel” on the contested issue).

19. This includes any documents in the possession of Aurelius’ and Centerbridge’s current or former attorneys. *See, e.g., In re Global Power Equip. Group Inc.*, 418 B.R. 833, 841 (Bankr. D. Del. 2009) (production includes what is under the responding party’s “control,” including “information reasonably available to [the responding party] from his employees, agents, or others subject to his control”) (citation and quotation marks omitted); *Afros SPA v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 128-30 (D. Del. 1986) (“If a party has control over or shares control of documents with a third person, then a court can order production by means of

its power over the party litigant.”) Thus, we respectfully request that Aurelius and Centerbridge be ordered to search the files of their current and former attorneys for such documents.

20. The two narrow categories of communications would likely result in very limited productions and cause no burden upon Aurelius or Centerbridge, which likely collected and reviewed these documents prior to the depositions of their corporate representatives. Indeed, Mr. Melwani testified during his deposition that he recalled reviewing such communications in preparation for his testimony even though they have not been produced. (Melwani Tr. at 105:18-106:4.) Moreover, counsel for the Trust Preferred Holders will be able to quickly review these materials and use them during the confirmation hearing even if they are produced at that hearing.

21. We respectfully request that Aurelius and Centerbridge be ordered to produce these documents or, at a minimum, produce privilege logs reflecting communications each contends are privileged.

#### **CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 2004-1**

22. Counsel for the Trust Preferred Holders have provided counsel for Aurelius and Centerbridge with a copy of Exhibit A hereto and counsel for Aurelius and Centerbridge did not object to this request. Counsel for the Trust Preferred Holders has requested expedited production of all communications with outside counsel concerning whether Aurelius and Centerbridge were in possession of material non-public information while trading in the Debtors' securities and communications concerning settlement negotiations with outside counsel during the relevant period. Counsel for Aurelius and Centerbridge have refused to comply with the Trust Preferred Holders' request. The Trust Preferred Holders accordingly hereby seek expedited production of such communications.

**NO PRIOR REQUEST**

23. No prior request for the relief requested herein has been made to this or any other court.

**CONCLUSION**

**WHEREFORE**, the Trust Preferred Holders respectfully request entry of an Order substantially in the form attached hereto, (i) granting the Motion to Compel; and (ii) granting such other and further relief as the Court deems appropriate.

Dated: Wilmington, Delaware  
July 8, 2011

Respectfully submitted,

CAMPBELL & LEVINE LLC

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# EXHIBIT A

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**ARKIN KAPLAN RICE LLP**

ATTORNEYS AT LAW

June 16, 2011

**By Electronic Mail & Hand Delivery**

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Re: *In re Washington Mutual, Inc., et al.*, No. 08-12229 (MFW)

Counsel:

As you know, this firm represents Whitebox Advisors, Scoggin Capital Management, VR Global Partners, L.P., The Visium Funds, Black Horse Capital, Paige Capital Management LLC, Lonestar Capital Management, LLC, Greywolf Capital Management LP, and 683 Capital Management, LLC (collectively, "the Trust Preferred Holders") in the above-captioned matter.

Enclosed please find the Trust Preferred Holders Consortium's First Request for Production of Documents to the Settlement Noteholders. Notwithstanding the response date noted in these requests, we hereby call for you produce to us, by tomorrow, June 17, 2011, at 11 a.m. EST, all documents and materials you previously produced pursuant to the court's February 11 order granting, in part, the Official Committee of Equity Security Holders' motion for an order compelling discovery pursuant to Bankruptcy Rule 2004. As these materials already have been collected and produced once, this request should not be burdensome. As a condition of receiving these materials, Arkin Kaplan Rice LLP is prepared to be bound by the terms of the confidentiality agreement previously entered into between the Settlement Noteholders and others.

**ARKIN KAPLAN RICE LLP**

June 16, 2011

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We are aware that Rule 30(b)(6) depositions of Owl Creek Asset Management, L.P., Appaloosa Management, L.P. and Centerbridge Partners, L.P. are scheduled to proceed next week. On behalf of the Trust Preferred Holders, we intend to participate in those depositions. Given that we have yet to receive any documents from these entities, however, we cannot be assured that we will have sufficient time to prepare, and therefore may need additional deposition dates.

Please inform us today as to whether you will agree to the above requests. If you are not willing to agree, then we intend to raise these issues with the court tomorrow.

Regards,

A handwritten signature in black ink that reads "Howard J. Kaplan" followed by a stylized monogram "JKM".

Howard J. Kaplan

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re : Chapter 11  
WASHINGTON MUTUAL, INC, et al.,<sup>1</sup> : Case No. 08-12229 (MFW)  
Debtors. : Jointly Administered  
-----X

**TRUST PREFERRED HOLDERS CONSORTIUM'S FIRST REQUEST FOR  
PRODUCTION OF DOCUMENTS TO THE SETTLEMENT NOTEHOLDERS**

Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rule 2004-1, or, alternatively, Rules 26 and 34 of the Federal Rules of Civil Procedure and Rules 7026 and 7034 of the Federal Rules of Bankruptcy Procedure, Whitebox Advisors, Scoggin Capital Management, VR Global Partners, L.P., The Visium Funds, Black Horse Capital, Paige Capital Management LLC, Lonestar Capital Management, LLC, Greywolf Capital Management LP, and 683 Capital Management, LLC (“the Trust Preferred Holders”), by and through their undersigned counsel, hereby request that the Settlement Noteholders (as defined below), produce, for inspection and copying, the documents and things requested below, by no later than June 30, 2011, at 4:00 p.m. EST, at the offices of Arkin Kaplan Rice LLP, 590 Madison Avenue, 35th Floor, New York, New York 10022, or at such other time and place as the parties shall agree.

**DEFINITIONS**

The following terms (whether singular or plural, capitalized or uncapitalized) shall have the meanings set forth below:

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<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

1. “And” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. “Bankruptcy Code” means or refers to the Bankruptcy Reform Act of 1978, as amended, to the extent codified in Title 11, United States Code, as applicable to the Chapter 11 Cases.

3. “Chapter 11 Cases” means the jointly administered cases commenced by the Debtors styled as *In re Washington Mutual, Inc., et al.* and being jointly administered in the United States Bankruptcy Court for the District of Delaware, Case No. 08-12229 (MFW), under Chapter 11 of the Bankruptcy Code.

4. “Communication” means any oral, written or electronic transmission of information, including without limitation any letter, correspondence, memorandum, electronic-mail message, text message, note or meeting log, conversation, meeting, discussion, telephone call, facsimile, telegram, telex, conference or message.

5. “Concerning” means comprising, consisting of, referring to, reflecting, regarding, supporting, evidencing, or relating to, the matter or Document described, referred to or discussed.

6. The term “Document” or “Documents” is used in the broadest sense permitted by the Federal Rules of Civil Procedure and means the original (or any copy when originals are not available) and any drafts or non-identical copies thereof, whether different from the original because of interlineations, receipt stamp, notation of copy sent or received or otherwise, of any email, instant message, voicemail, book, pamphlet, periodical, letter, report, note, memorandum, record, minutes, calendar or diary entry, transcript, study compilation, analysis, tabulation, map,

diagram, drawing, plan, picture, summary, working paper, chart, paper, graph index, data sheet, data processing card, computer printout, summary of a computer printout, tape, contract, agreement, lease, ledger, journal, balance sheet, account, invoice, purchase order, receipt, billing record, financial data, financial statement, file, diary, film, trip tickets, telex, teletype or other messages, telegram, expense vouchers, instructions, bulletins or any other writing or recording of information, as well as all tape recordings, computer tapes, disc and other electronic or mechanical recordings, however produced, maintained or reproduced, including information stored in or generated by a computer whether or not ever printout out or displayed, within the possession, custody or control of plaintiff or any of its officers, directors, employees, attorneys, or other agents and/or representatives.

7. “FDIC” shall mean the Federal Deposit Insurance Corporation and any and all of its current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting on its behalf, any of its parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

8. “Global Settlement Agreement” means or refers to that proposed agreement contained as exhibit H of the March 16, 2010 Plan, as such proposed agreement was amended or modified, and/or the settlement agreement by and among, *inter alia*, the Debtors, JPMC and the Federal Deposit Insurance Corp. announced to the Court on or about March 12, 2010.

9. “JPMorgan” shall mean JPMorgan Chase Bank, N.A. and any and all of its current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting on its behalf, any of its

parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

10. "Order" shall mean the Order Granting, In Part, Motion of the Official Committee of Equity Security Holders for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of the Washington Mutual, Inc. Settlement Note Holders Group, issued by The Honorable Mary F. Walrath, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Delaware, on February 11, 2011.

11. "Plan" means or refers to the "Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code" dated March 26, 2010 [Docket No. 2622], as such document was amended or modified.

12. "Reorganized Debtor" means or refers to WMMRC, as that term is used in Judge Walrath's January 7, 2011 Order Denying Confirmation, and/or the Debtor from and after the effective date of any proposed Plan of Reorganization.

13. "Settlement Noteholders" means and refers to the Settlement Noteholders referenced in footnote 2 to Judge Walrath's January 7, 2011 Order Denying Confirmation, and their counsel.

14. "Valuation" means or refers to the actual, perceived, estimate or appraised worth of any entity, asset or party whatsoever, and includes without limitation, enterprise value, going concern value, equity value, actual cash value, book value, intrinsic value, liquidation value, and market value.

15. "Washington Mutual" means or refers to WMI and WMB, and any and all of their current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting on their behalf, any of

their parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

16. “WMB” means or refers to the Washington Mutual Bank, Henderson, Nevada, and any and all of its current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting on its behalf, any of its parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

17. “WMI” means or refers to the Washington Mutual, Inc. and WMI Investment Corp. (collectively, the “Debtors”) and any and all of their current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting on their behalf, any of their parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

18. “You or “Your” refers to each and every member of the Settlement Noteholders, including Owl Creek Asset Management, L.P., Appaloosa Management, L.P., Centerbridge Partners, LP, and Aurelius Capital Management LP, any current or former parent, affiliates or subsidiaries, or any of their members, officers, directors, representatives, employees, agents, consultants, accountants, attorneys, financial advisors, predecessors, successors, assigns and any other person currently or formerly acting or purporting to act on any Settlement Noteholder’s behalf, or on behalf of several Settlement Noteholders, for any purpose whatsoever, from September 25, 2008 to the present.

### **INSTRUCTIONS**

Each response must be made in accordance with the following instructions:

1. The responsive Documents should be produced in the manner prescribed by the Federal Rules of Civil Procedure, as made applicable herein by the Federal Rules of Bankruptcy Procedure, including producing the requested Documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the requests, and identifying the name of the person from whose files the Documents were produced.

2. You are to produce the original and all non-identical copies, including all drafts, of each request. If you are not able to produce the original of any document, please produce the best available copy and all non-identical copies, including drafts.

3. Each request herein extends to all Documents and Communications in your possession, custody or control. A Document is deemed to be in your possession, custody, or control if it is in your physical custody, or if it is in the physical custody of any other person, including, without limitation, your attorneys, and you: (1) own such Document in whole or in part; (2) have a right, by contract, statute or otherwise, to use, inspect, examine or copy such Document in any terms; (3) have an understanding, express or implied, that you may use, inspect, examine or copy such Document on any terms; or (4) as a practical matter, have been able to use inspect, examine, or copy such Document when you sought to do so. If any requested Documents were, but no longer are, in your control, state the disposition of each such Document.

4. Any reference in these requests to an individual or person include any and all agents, advisors, employees, representative, attorneys, and successors-in-interest.

5. If any Document is withheld under any claim of privilege, including without limitation, attorney-client privilege and attorney work product, you should provide the following information with respect to such Document:

- (1) The date of the Document;

- (2) The title of the Document;
- (3) The name of its author(s) or preparer(s) and an identification by employment and title of each such person;
- (4) The name of each person who was sent or furnished with, received, viewed or has custody of the Document or a copy thereof together with an identification by employment and title of each such person;
- (5) The request to which the Document relates;
- (6) The title and description of the Document sufficient to identify it without revealing the information for which privilege is claimed;
- (7) The claim of privilege under which it is withheld; and
- (8) A description of the subject matter of the Document in sufficient detail to support your contention that the Document is privileged;

6. If, after exercising due diligence to secure them, you cannot provide some or any of the requested Documents, so state and provide all Documents to the extent possible, specifying the reason for your inability to produce the remainder of the Documents.

7. If any requested Document or other Document potentially relevant to this action is subject to destruction under any Document retention or destruction program, the document(s) should be exempted from any scheduled destruction and should not be destroyed until the conclusion of this action or unless otherwise permitted by the Court.

8. If any Document response to these requests is known to have existed and cannot now be located, or has been destroyed or discarded, set forth a complete statement of the circumstances surrounding such loss or destruction.

9. If an objection is made to any request, state your objection and the ground or grounds with particularity in your written response. If an objection is made only to part of the request, identify that part in your written response and state your objection and the ground(s) therefor.

10. This request is a continuing one. If, after producing the requested Documents, you obtain or become aware of any further Documents responsive to this request, you are required to produce such additional Documents promptly.

11. Any ambiguity in a discovery request shall be construed to bring within the scope of the discovery request all responses that otherwise could be construed to be outside of its scope.

12. Unless otherwise specified, the time period covered by these requests is from September 25, 2008 to the present.

## REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All discovery responses and Documents You produced to the Official Committee of Equity Security Holders pursuant to the Order, including, without limitation, (i) all Documents You produced in response to the Official Committee of Equity Security Holders First Request for Production of Documents; (ii) Your responses to the Official Committee of Equity Security Holders First Set of Interrogatories to the Washington Mutual, Inc. Settlement Noteholders; (iii) Your responses to the Official Committee of Equity Security Holders First Request for Admissions to the Washington Mutual, Inc. Settlement Noteholders; (iv) transcripts of any deposition testimony given by You in connection with the discovery authorized by the Court in the Order, including all exhibits introduced during any such deposition; and (v) any privilege logs You have produced.

2. All Documents Concerning any trading by You of any debt or equity of WMI, WMB and/or the Debtors on or after September 25, 2008.

3. All Documents Concerning any information You received in connection with any negotiations or Communications Concerning the actual or potential settlement of Your claims against the Debtors, the Global Settlement Agreement and/or the negotiations of the Global Settlement Agreement, including, without limitation, information received from WMI, WMB and/or the Debtors, JPMorgan, the FDIC, any other Settlement Noteholders.

4. All Documents Concerning any non-public information You received Concerning WMI, WMB and/or the Debtors on or after September 25, 2008.

5. All confidentiality or non-disclosure agreements You signed in connection with the Chapter 11 Cases.

6. All Documents Concerning Your assessment or opinion of the value of the Reorganized Debtor.

7. All Documents Concerning any analysis performed with respect to the price or value of the debt or equity securities of WMI, WMB and/or the Debtors on or after September 25, 2008.

8. All Documents Concerning any policies and procedures You instituted or employed, attempted to institute or employ, or contemplated instituting or employing to govern Your decisions to trade (or to refrain from trading) in any debt or equity security of WMI, WMB and/or the Debtors on or after September 25, 2008, including, without limitation, all Documents Concerning any such policies or procedures designed or intended to ensure that Your trading decisions with respect to WMI, WMB and/or the Debtors debt or equity securities were (or are) not informed or affected by any confidential or non-public information in Your possession.

9. To the extent that You claim that counsel conducted negotiations of the Global Settlement Agreement without Your knowledge, all Communications between You and Your counsel Concerning the actual or potential settlement of Your claims against the Debtors, the Global Settlement Agreement and/or the negotiations of the Global Settlement Agreement.

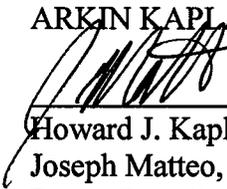
10. All Documents Concerning any agreement between or among any of the Settlement Noteholders with respect to (i) the debt or equity securities of WMI, WMB and/or the Debtors or (ii) the existence or assertion of any joint defense, common interest other joint interest privilege.

Dated: New York, New York  
June 16, 2011

CAMPBELL & LEVINE LLC  
Marla Rosoff Eskin, Esq. (DE 2989)  
Bernard G. Conaway, Esq. (DE 2856)  
Kathleen Campbell Davis, Esq. (DE 4229)  
800 North King Street, Suite 300  
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Telephone: (302) 426-1900  
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- and -

ARKIN KAPLAN RICE LLP



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Howard J. Kaplan, Esq.  
Joseph Matteo, Esq.  
Deana Davidian, Esq.  
590 Madison Avenue, 35<sup>th</sup> Fl.  
New York, NY 10022  
Telephone: (212) 333-0200  
Facsimile: (212) 333-2350

*Counsel for the Trust Preferred Holders*

# EXHIBIT B

590 Madison Avenue  
New York, New York 10022  
Tel: (212) 333-0200  
Fax: (212) 333-2350

9536 Wilshire Boulevard  
Suite 500  
Beverly Hills, California 90212  
(310) 273-3777

**ARKIN KAPLAN RICE LLP**

ATTORNEYS AT LAW

July 7, 2011

**By Electronic Mail**

Jeffrey S. Trachtman, Esq.  
Kramer Levin Naftalis & Frankel LLP  
1177 Avenue of the Americas  
New York, New York 10036

Re: *In re Washington Mutual, Inc., et al.*, No. 08-12229 (MFW)

Dear Mr. Trachtman:

As you know, we represent certain of the Trust Preferred Holders in the above-captioned proceeding. We now have had the opportunity to review the documents Aurelius Capital Management, LP (“Aurelius”) previously produced to the Official Committee of Equity Security Holders, which the court ordered Aurelius to produce to us at the conclusion of last Wednesday’s hearing.

Based on our review of these documents, it is apparent that Aurelius’ production is incomplete. First, Aurelius does not appear to have produced communications with its outside counsel regarding determinations as to whether Aurelius was in possession of material, non-public information concerning Washington Mutual, Inc. It is unclear to us whether Aurelius contends that communications with its outside counsel on this issue are protected by the attorney-client privilege. If Aurelius does assert such a privilege, then it is our view that the privilege either never attached, or has been waived in light of Mr. Gropper’s testimony that Aurelius relied on outside counsel to determine whether it was in possession of material, non-public information. (*See, e.g., Gropper Tr. at 131:16-32:4.*) We therefore request that Aurelius produce to us all communications with outside counsel between January 1, 2009, and March 26, 2010, concerning any deliberations or discussions as to whether information in Aurelius’ possession regarding Washington Mutual, Inc. was material or non-public. If Aurelius contends that any such communications are privileged, then we request that Aurelius produce a privilege log.

Second, aside from a few email communications to Aurelius in which outside counsel forwarded information from third parties, Aurelius’ production is noticeably lacking in communications from its outside counsel concerning information obtained during settlement negotiations. As you know, the court ordered Aurelius, together with the other Settlement

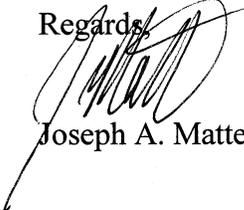
**ARKIN KAPLAN RICE LLP**

Jeffrey S. Trachtman, Esq.  
July 7, 2011  
Page 2

Note Holders, to produce any information they received “during settlement negotiations.” (February 7, 2011, Transcript at 82:5-7.) The court’s order plainly encompasses information Aurelius received from its attorneys. We therefore request that Aurelius produce all such communications. Again, if Aurelius contends that these communications are privileged (and we do not believe that they would be), then we request that Aurelius produce a privilege log.

Kindly inform us by this evening whether Aurelius will agree to the above requests. Given that the confirmation hearing is to commence next Wednesday, we would request that you produce the requested documents as soon as practicable, and are willing to discuss with you an appropriate schedule.

Regards,



Joseph A. Matteo

# EXHIBIT C

590 Madison Avenue  
New York, New York 10022  
Tel: (212) 333-0200  
Fax: (212) 333-2350

9536 Wilshire Boulevard  
Suite 500  
Beverly Hills, California 90212  
(310) 273-3777

**ARKIN KAPLAN RICE LLP**

ATTORNEYS AT LAW

July 7, 2011

**By Electronic Mail**

Richard D. Owens, Esq.  
Latham & Watkins LLP  
885 Third Avenue  
New York, New York 10022

Re: *In re Washington Mutual, Inc., et al.*, No. 08-12229 (MFW)

Dear Mr. Owens:

As you know, we represent certain of the Trust Preferred Holders in the above-captioned proceeding. We now have had the opportunity to review the documents Centerbridge Partners, L.P. (“Centerbridge”) previously produced to the Official Committee of Equity Security Holders, which the court ordered Centerbridge to produce to us at the conclusion of last Wednesday’s hearing.

Based on our review of these documents, it is apparent that Centerbridge’s production is incomplete. First, Centerbridge has not produced communications with its outside counsel regarding determinations as to whether Centerbridge was in possession of material, non-public information concerning Washington Mutual, Inc. It is clear that such communications exist. For example, Centerbridge’s corporate designee, Vivek Melwani, testified during his deposition that he recalled reviewing emails in which Fried, Frank, Harris, Shriver & Jacobson LLP (“Fried Frank”) purportedly “confirmed” with the Debtors that certain information was neither material nor non-public. (Melwani Tr. at 105:18-106:4.) We were unable to locate any such email communications in Centerbridge’s production. It is unclear to us whether Centerbridge contends that communications with Fried Frank on this issue are protected by the attorney-client privilege. If Centerbridge does assert such a privilege, then it is our view that the privilege either never attached (*e.g.*, in the case of communications merely forwarding the Debtors’s views), or has been waived in light of Mr. Melwani’s testimony that Centerbridge relied on outside counsel at Fried Frank to determine whether Centerbridge was in possession of material, non-public information. (*See, e.g.*, Melwani Tr. at 236:21-237:8; *id.* at 103:23-106:9.) We therefore request that Centerbridge produce to us all communications with outside counsel between January 1, 2009, and March 26, 2010, concerning any deliberations or discussions as to whether information in Centerbridge’s possession regarding

**ARKIN KAPLAN RICE LLP**

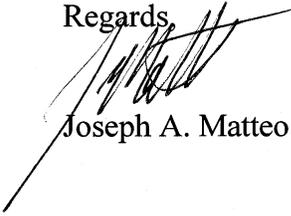
Richard D. Owens, Esq.  
July 7, 2011  
Page 2

Washington Mutual, Inc. was material or non-public. If Centerbridge contends that any such communications are privileged, then we request that Centerbridge produce a privilege log.

Second, aside from a few email communications to Centerbridge in which Fried Frank forwarded information from third parties, Centerbridge's production is noticeably lacking in communications from its outside counsel concerning information obtained during settlement negotiations. As you know, the court ordered Centerbridge, together with the other Settlement Note Holders, to produce any information they received "during settlement negotiations." (February 7, 2011, Transcript at 82:5-7.) The court's order plainly encompasses information Centerbridge received from its attorneys. We therefore request that Centerbridge produce all such communications. Again, if Centerbridge contends that these communications are privileged (and we do not believe that they would be), then we request that Centerbridge produce a privilege log.

Kindly inform us by this evening whether Centerbridge will agree to the above requests. Given that the confirmation hearing is to commence next Wednesday, we would request that you produce the requested documents as soon as practicable, and are willing to discuss with you an appropriate schedule.

Regards,



Joseph A. Matteo

# EXHIBIT D

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**From:** Trachtman, Jeffrey S. [JTrachtman@KRAMERLEVIN.com]  
**Sent:** Thursday, July 07, 2011 8:50 PM  
**To:** Joseph Matteo  
**Cc:** Eckstein, Kenneth H.  
**Subject:** RE: In re Washington Mutual, Inc., et al., No. 08-12229 (MFW)

Dear Mr. Matteo:

I am writing in response to your letter of earlier today seeking document discovery in connection with the Confirmation Hearing set to begin in less than a week. Your requests are inappropriate, untimely, burdensome, and harassing. If you pursue them through a motion to compel, we reserve the right to seek sanctions, including attorneys' fees.

With respect to the first category of documents you seek -- communications with outside counsel "regarding determinations as to whether Aurelius was in possession of material, non-public information concerning Washington Mutual, Inc." -- as you are well aware, such documents are not within the scope of production ordered by the Court on February 8, and indeed have never been specifically sought except as part of broad-brush requests that the Court has twice refused to enforce. On that ground alone, we decline your request.

Moreover, such documents are obviously privileged, as you appear to recognize. Your claim that Mr. Gropper waived the privilege by responding to deposition questions with a general statement that one of many inputs into materiality determinations was consultation with counsel is not supported by any legal authority of which we are aware.

The second request -- for "communications with outside counsel concerning information obtained during settlement negotiations" -- is also objectionable for several reasons. To the extent you are seeking information from the Debtors passed along by outside counsel to Aurelius, that has already been produced. To the extent you seek communications between Aurelius and its outside counsel "concerning" such information, that is obviously privileged. And to the extent you seek to revisit the scope of Aurelius's compliance with the Feb. 8 order, that precise issue was presented to the Court last week by your fiduciary, the Equity Committee, and decided adversely to your position. Any attempt to relitigate the exact same issue again, now, on the eve of the hearing would obviously be undertaken in bad faith and for purposes of harassment, and we will respond accordingly.

Let me know if you wish to discuss these issues further.

Jeffrey S. Trachtman

Partner  
Kramer Levin Naftalis & Frankel LLP  
1177 Avenue of the Americas  
New York, New York 10036  
Tel: 212-715-9175  
Fax: 212-715-8000  
Email: [JTrachtman@KRAMERLEVIN.com](mailto:JTrachtman@KRAMERLEVIN.com)  
<http://www.kramerlevin.com>

This communication (including any attachments) is intended solely for the recipient(s) named above and may contain information that is confidential, privileged or legally protected. Any unauthorized use or dissemination of this communication is strictly prohibited. If you have received this communication in error, please immediately notify the sender by return e-mail message and delete all copies of the original communication. Thank you for your cooperation.

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**From:** Carolyn Scheppy [mailto:cscheppy@arkin-law.com] **On Behalf Of** Joseph Matteo

**Sent:** Thursday, July 07, 2011 4:54 PM

**To:** Trachtman, Jeffrey S.

**Subject:** In re Washington Mutual, Inc., et al., No. 08-12229 (MFW)

[Please see the attached.](#)

Carolyn Scheppy/Legal Secretary/Arkin Kaplan Rice LLP/  
590 Madison Avenue, 35th Floor, New York, New York 10022/direct:212-333-0234/fax:212-333-0246/cscheppy@arkin-law.com

# EXHIBIT E

**LATHAM & WATKINS** LLP

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Madrid	Washington, D.C.
Milan	

July 8, 2011

Joseph A. Matteo, Esq.  
Arkin Kaplan Rice LLP  
590 Madison Avenue  
New York, New York 10022

Re: In re Washington Mutual, Inc., et al.

File No. 045093/0045

Dear Mr. Matteo:

We have received your letter of July 7, 2011. In that letter you demand that we produce certain unspecified non-privileged communication in connection with the Court's February 11 order that you insist must exist. In the alternative you demand that we provide you with a privilege log even though we were not required to do so as part of our production to the Equity Committee.

As represented to the Court last week, we have produced all non-privileged documents responsive to the discovery ordered by the Court. The Court did not accept Mr. Sargent's speculations last week that there had to be more responsive documents, and your letter is more of the same. Furthermore, the Court's order last week in response to your motion was limited to directing the Equity Committee to provide you with a copy of what we provided to it, and did not provide you with a right to make additional discovery demands. We will therefore not provide a privilege log or any other additional discovery.

Sincerely,



Mark A. Broude  
of LATHAM & WATKINS LLP

cc: Richard D. Owens

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

-----X  
In re : Chapter 11  
WASHINGTON MUTUAL, INC, et al.,<sup>1</sup> : Case No. 08-12229 (MFW)  
 : Jointly Administered  
Debtors. :  
 :  
 :  
 : **Related Docket No.**  
-----X

**ORDER GRANTING MOTION TO COMPEL  
AURELIUS CAPITAL MANAGEMENT LP AND  
CENTERBRIDGE PARTNERS, LP TO PRODUCE DOCUMENTS**

Upon consideration of the Motion, dated July 8, 2011, filed by Trust Preferred Holders, to compel Aurelius Capital Management LP (“Aurelius”) and Centerbridge Partners, LP (“Centerbridge”) to produce discovery; and it appearing that the Court has jurisdiction to consider and determine the Motion; and it appearing that due and proper notice of the Motion has been given; and it appearing that the relief requested in the Motion is appropriate; and after due deliberation and sufficient cause appearing therefore; it is hereby:

ORDERED that the Motion to compel is granted; and it is further

ORDERED that Aurelius and Centerbridge shall produce to the Trust Preferred Holders all documents relating to communications with outside counsel from December 30, 2009, through March 12, 2010, concerning any deliberations or discussions as to whether information in Aurelius’ and Centerbridge’s possession regarding Washington Mutual, Inc. was material or non-public and information obtained during settlement negotiations on or before

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<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

\_\_\_\_\_, 2011, at the offices of Arkin Kaplan Rice LLP, 590 Madison Avenue, 35<sup>th</sup> Floor, New York, New York 10022; and it is further

ORDERED that this Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this order and any further proceedings with respect to the Motion.

Dated: \_\_\_\_\_, 2011  
Wilmington, Delaware

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THE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY JUDGE