

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

**In re**

**WASHINGTON MUTUAL, INC., et al.,<sup>1</sup>**

**Debtors.**

**Chapter 11**

**Case No. 08-12229 (MFW)**

**(Jointly Administered)**

**DEBTORS' AMENDED NOTICE OF DEPOSITION OF JEROME F. BIRN PURSUANT  
TO RULE 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND  
RULE 30(B)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

**PLEASE TAKE NOTICE** that, pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure and Rule 30(B)(1) of the Federal Rules of Civil Procedure, and in accordance with that certain *Order Approving Stipulation Withdrawing Certain of Debtors' Deposition Notices to D&O Claimants with Respect to Estimation Motion in Connection with D&O Indemnification Claims* entered on January 3, 2012 [Docket No. 9299], Washington Mutual, Inc. and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors") in the above-referenced chapter 11 cases, for purposes of obtaining discovery, will take the deposition (the "Deposition") of Jerome F. Birn of Wilson Sonsini Goodrich & Rosati regarding the subject matter set forth in the attached Schedule A, which shall be interpreted in accordance with this Notice and the instructions and definitions set forth in the Debtors' Combined First Sets of Requests for the Production of Documents and Interrogatories Directed to Certain Current Director Claimants (the "First Requests"), dated November 18, 2011, a copy of which is attached hereto as Schedule B.

<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: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.



**PLEASE TAKE FURTHER NOTICE** that the Deposition previously noticed for 9:00 a.m. (ET) on January 17, 2012, will be conducted at the offices of Weil Gotshal & Manges, LLP, 767 Fifth Avenue, New York, New York 10153 at **9:00 a.m. (ET) on February 8, 2012**, or such other time and location agreed upon by the parties.

**PLEASE TAKE FURTHER NOTICE** that the deposition will be taken before a Notary Public or other person authorized to administer oaths pursuant to Rule 28(a) of the Federal Rules of Civil Procedure, and shall continue day to day, excluding weekends and holidays unless otherwise agreed by the parties, until completed. The testimony at the deposition may be recorded by videographic and stenographic means. You are invited to participate to the extent permitted by the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

Dated: January 18, 2012  
Wilmington, Delaware



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*Attorneys for Debtors  
and Debtors in Possession*

## SCHEDULE A

1. Your client's Proof of Claim.
2. Documents and responses produced in response to Debtors' Combined First Sets of Requests for the Production of Documents and Interrogatories Directed to Certain Director & Officer Claimants, dated November 18, 2011.
3. The basis for your client's objection to the Estimation Motion and/or the Sixtieth Omnibus.
4. Your calculation of:
  - (i) total projected fees and costs, as well as money damages, arising from or relating to any litigation, demand, investigation or other proceeding, action or request relating to your client's service as an officer or director of WMI or its subsidiaries for which your client seeks indemnification;
  - (ii) fees and costs already incurred; arising from or relating to any litigation, demand, investigation or other proceeding, action or request relating to your client's service as an officer or director of WMI or its subsidiaries for which your client seeks indemnification; and
  - (iii) future fees and costs arising from or relating to any litigation, demand, investigation or other proceeding, action or request relating to your client's service as an officer or director of WMI or its subsidiaries for which your client seeks indemnification.
5. Your calculation of:
  - (i) total projected payments and reimbursements by the D&O Policies relating to any litigation, demand, investigation or other proceeding, action or request relating to your client's service as an officer or director of WMI or its subsidiaries for which your client seeks indemnification;
  - (ii) payments and reimbursements already received from the D&O Policies relating to any litigation, demand, investigation or other proceeding, action or request relating to your client's service as an officer or director of WMI or its subsidiaries for which your client seeks indemnification;
  - (iii) future payments and reimbursements under the D&O Policies relating to any litigation, demand, investigation or other proceeding, action or request relating to your client's service as an officer or director of WMI or its subsidiaries for which your client seeks indemnification; and
  - (iv) the projected difference between total fees and costs and total payments and reimbursements under the D&O Policies relating to any litigation, demand, investigation or other proceeding, action or request relating to your client's service as an officer or director of WMI or its subsidiaries for which your client seeks indemnification.

## SCHEDULE B

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

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	:	Chapter 11
In re	:	
	:	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., <i>et al.</i> , <sup>1</sup>	:	
	:	
Debtors	:	Jointly Administered
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**DEBTORS' COMBINED FIRST SETS OF REQUESTS FOR THE PRODUCTION  
OF DOCUMENTS AND INTERROGATORIES DIRECTED TO  
CERTAIN CURRENT DIRECTOR CLAIMANTS**

Pursuant to Federal Rules 26, 33 and 34 of the Federal Rules of Civil Procedure, as incorporated by reference in Rules 7026, 7033, 7034 and 9014 of the Federal Rules of Bankruptcy Procedure, Washington Mutual, Inc. and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors") in the above-referenced chapter 11 cases, serve their Combined First Sets of Requests for the Production of Documents and Interrogatories (the "First Requests") to each of the following current directors (collectively, the "Director Claimants" and each a "Claimant") who have asserted indemnification claims against the Debtors and their chapter 11 estates:

- **Phillip D. Matthews**
- **Orin C. Smith**
- **Michael K. Murphy**
- **Margaret Osmer Mcquade**
- **William G. Reed, Jr.**

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<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers 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.

- **James H. Stever**
- **Regina T. Montoya**
- **Stephen E. Frank**

The Debtors request that each Claimant produce for inspection and copying the documents described herein by 4:00 p.m. on December 19, 2011 at the offices of counsel for the Debtors, Weil, Gotshal & Manges LLP, located at 767 Fifth Avenue, New York, New York 10153, Attn: Amy Wolper. The Debtors further request that each Claimant separately and fully answer in writing and under oath each of the following interrogatories (each an “Interrogatory”). A true copy of the answers and any objections each Claimant may have to these interrogatories must be served on the undersigned attorneys by 4:00 p.m. on December 19, 2011. Each of the following document requests and interrogatories is to be read in accordance with the definitions and respective instructions that follow.

#### DEFINITIONS

1. “Affiliate” means any person or entity controlled or operated by, controlling, operating, or under common control with any other person or entity.
2. “All” and “each” shall be construed to include both all and each.
3. “Any” shall be construed to mean any, all, each and every.
4. The terms “Claimant”, “Director Claimants”, “you” or “your” refer to the above-listed current director claimants asserting indemnification claims in the above-referenced chapter 11 cases.<sup>2</sup>

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<sup>2</sup> As set forth at the outset of these Requests, the Director Claimants are: Phillip D. Matthews, Orin C. Smith, Michael K. Murphy, Margaret Osmer Mcquade, William G. Reed, Jr. James H. Stever, Regina T. Montoya, and Stephen E. Frank.

5. “Communicate” and “Communication(s)” mean any transfer of information, including but not limited to, conversations, meetings, telephone calls, correspondence, letters, notes, memoranda, e-mails, or any other media that may be used to exchange or transmit information.

6. “Concerning” means directly or indirectly mentioning, referring to, relating to, pertaining to, regarding, describing, evidencing, constituting, reflecting, embodying, discussing or having any logical or factual connection whatsoever with regard to the subject matter in question.

7. “Debtors” means Washington Mutual, Inc. (“WMI”) and WMI Investment Corp., and all their affiliated or related companies, their predecessor companies, as well as their officers, attorneys, agents, and all others purporting to act on their behalf.

8. “Describe” means as following:

(a) When used in reference to actions, identify each action by date, persons involved, actions taken, and documents involved. For all such persons or documents, identify such persons or documents in accordance with these instructions.

(b) When used to refer to an allegation, identify all evidence upon which you intend to rely to support the allegation and the legal basis for the allegation.

9. The term “D&O Policies” refers to various director and officer liability insurance policies purchased by WMI for claims made against present and former officers and directors of WMI and its subsidiaries, including, without limitation, the Director Claimants.<sup>3</sup>

10. “Document” or “Documents” means all materials encompassed by Rule 34 of the Federal Rules and Rule 26.3(c)(2) of the Local Civil Rules of the United States District

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<sup>3</sup> The D&O Policies are listed in Schedule 2.11(a) of the Disclosure Statement for the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code.



Courts for the Southern and Eastern Districts of New York, including, but not limited to, the originals (or copies when originals are not available), or any non-identical copies or drafts (whether different from the originals because of notes made on such copies or otherwise), of writings or recordings of every kind and description, whether made by hand or by mechanical, electronic, microfilm, photographic or other means. Without limiting the generality of the foregoing definition, "documents" includes e-mails and any other information contained on a hard drive, computer disc, or other electronic, magnetic, or optical medium, including, but not limited to, all materials written, printed, typed, photographed or recorded such as writings, notes, correspondence, memoranda, agreements, contracts, drafts, mark-ups, red-lined materials, proposals, offers, minutes of meetings, agendas, reports, calendar or diary entries, drawings, graphs, charts, logs, photographs, phone records, tape recordings, computer disks, computer printouts or tape, e-mail, internet postings, or any other data compilations from which information can be obtained or translated. For the sake of clarity, "document" includes the responsive parent email along with any and all attachments to the email or vice versa a responsive attachment along with its parent email and any other sibling attachments.

11. The term "Estimation Motion" refers to the Motion to Estimate the Maximum Amount of Certain Claims for Purposes of Establishing Reserve Under the Debtors' Confirmed Chapter 11 Plan [Docket No. 5971] filed in the above-captioned chapter 11 cases on November 17, 2010.

12. "Identify or "identity" means as follows:

(a) When used in reference to an individual means to state his or her full name, present or last known business and residential addresses, present or last known position and business affiliation, and employer, title, and position at the time in question. For each

person identified, describe with particularity the subject matter of the knowledge of information possessed by that individual.

(b) When used in reference to a writing means to state the date, author, type of document (e.g. letter, memorandum, email, notes, chart, presentation, etc.) or other means of identification and its present location or custodian.

(c) When used in reference to a communication means to state the date of the communication, the identify of all parties to the communication, conference or meeting, and describe or state the subject matter of the communication, conference of meeting, and the substance of what was said and/or transpired.

13. The term "Indemnity Claim" means any and all secured and unsecured claims for indemnity asserted in the Claims.

14. "Including" means including but not limited to.

15. "Information" shall be expansively construed and shall include, but not be limited to, facts, data, opinions, images, impressions, concepts and formulae.

16. "Person" means as any natural person or any business, legal or governmental entity or association, and includes, where applicable, any of their employees, agents, or other persons acting or purporting to act on their behalf or pursuant to their authority.

17. "Possession, custody or control" means in physical custody of any Claimant, or if it is in the physical custody of any other person and a Claimant: (a) owns such document in whole or part; (b) has a right by contract, statute or otherwise to use, inspect, examine or copy such document on any terms; (c) has an understanding, express or implied, that the Claimant may use, inspect, examine or copy such document on any terms; or (d) has, as a practical matter, been able to use, inspect, examine or copy such document when the Claimant

has sought to do so. Such documents shall include, without limitation, documents that are in the custody of the Director Claimants attorney(s), other representatives or other agents.

18. The term “Proof of Claim” refers to the individual proof of claim filed by each Claimant in the above-captioned chapter 11 cases which have been assigned the following claim numbers for administrative purposes:

Claim Number	Claimant
2241	Phillip D. Matthews
2247	Orin C. Smith
2248	Michael K. Murphy
2606	Margaret Osmer Mcquade
2629	William G. Reed Jr.
2633	James H. Stever
2634	Regina T. Montoya
2635	Stephen E. Frank

19. The term “Quarterly Fee/Cost Summary” refers to the confidential summary of the fees and costs for each of the lawsuits pending against the Director Claimants for which the Director Claimants have sought advancement under the D&O Policies which are provided pursuant to the Order Modifying the Automatic Stay to Allow Advancement Under Insurance Policies [Docket No. 445] and the Order Modifying Automatic Stay to Allow Advancement Under Insurance Policies Regarding ERISA Litigation [Docket No. 894] entered in the above-captioned chapter 11 cases.

20. “Relating to” means concerning, reflecting, referring to, pertaining to, containing, describing, regarding, illustrating, mentioning, evidencing, embodying, involving, analyzing, reporting on, commenting on, constituting, supporting, discussing or having any logical or factual connection whatsoever with the subject matter in question.

21. The term “Sixtieth Omnibus” refers to the Sixtieth Omnibus (Substantive) Objections to Claims (Claims Nos. 2108, 2240, 2241, 2246, 2247, 2248, 2604, 3606, 2631, 2633,



2634, 2635, 2636, 2637, and 3242) [Docket No. 5970] filed on November 17, 2010 in the above-captioned chapter 11 cases.

22. “WMI” means Washington Mutual, Inc.

**INSTRUCTIONS FOR DOCUMENT REQUESTS**

1. Each request is to be responded to by each Claimant separately.

2. Documents should be produced as they are kept in the files of Claimant, or Claimant’s counsel, or shall be organized and labeled to correspond with the requests below. If documents are produced as they are kept in the files of Claimant, or Claimant’s counsel, sufficient information should be provided to permit the Debtors to identify the source of particular documents from within the files of Claimant or Claimant’s counsel.

3. In order to bring within the scope of these document requests all information that might otherwise be construed to be outside of their scope, the following rules of construction apply: (a) the singular shall include the plural and vice versa; (b) the masculine, feminine or neuter pronoun shall not exclude other genders or entities; (c) the connectives “and” and “or” shall be read either disjunctively or conjunctively as necessary to bring within the scope of the document requests all responses that might otherwise be construed to be outside their scope; (d) the terms “any,” “all” and “each” shall be read to mean any, all, each and every; (e) the word “including” shall be read to mean including without limitation; and (f) the present tense shall be construed to include the past tense and vice versa.

4. These document requests call for the production of documents that are in the possession, custody or control of Claimant. In addition to documents currently in your possession, custody or control, you are to produce all documents within the scope of these requests that are not currently in your possession, custody or control, but can be obtained through

reasonable effort. If any of the documents requested were formerly in your possession, custody or control, but are no longer in your possession, custody or control, state when and what disposition was made of the document and what efforts, if any, you made to obtain each such document in response hereto. Further, if any such document is not in your possession, custody or control, but you know the identity of the entity or person currently in possession, custody or control of such document, state the identity of the entity or person who has the documents, including the address and telephone number of the entity or person. In the event that a copy of a requested document is not identical to any other copy of the same document, by reason of alterations, notes in the margins, comments, etc., all non-identical copies shall be produced separately. All documents that are physically attached to each other when located for production shall be left so attached.

5. If you object to any portion or aspect of a request, produce all documents responsive to the remainder of the request.

6. Unless otherwise indicated, these document requests pertain to the period January 1, 2004 to the present.

7. If information is redacted from a document produced pursuant to any of the document requests herein, identify the redaction by stamping the word "Redacted" on the document at the place where information has been redacted and separately log each redaction on the privilege log described in paragraph 9 below.

8. Each paragraph and subparagraph herein should be construed independently and not by reference to any other paragraph or subparagraph of these document requests for purposes of limitation.

9. If you object to the production of any of the documents or any portion of the documents requested on the grounds of privilege or any other grounds, for each document, state: (a) the nature of the privilege which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; (b) the type of document; (c) the general subject matter of the document; (d) the date of the document; and (e) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author of the document, the addressees of the document, and any other recipients of the document (including each person who was carbon or blind copied the document), and where not apparent, the relationship of the author, addressees, and recipients to each other.

10. If there are no documents responsive to any of the following document requests, please provide a written response stating so.

11. These document requests shall be deemed continuing as provided in Fed. R. Civ. P. Rule 26(e) so as to require further, amended, or supplemental production if additional documents called for by the First Requests are obtained by Claimant between the time of the initial production and the time of trial.

#### **INSTRUCTIONS FOR INTERROGATORIES**

1. Each Interrogatory is to be responded to separately under oath by each Claimant.

2. Each Interrogatory shall be construed independently and not with reference to any other Interrogatory for the purpose of limitation or exclusion.

3. If you object to any Interrogatory, please state with specificity the grounds for such an objection.



4. If an Interrogatory cannot be answered in full, answer to the extent possible, specifying the reason why the remainder cannot be answered and the efforts made to supply a complete answer.

5. Separate and complete responses (or, as the case may be, separate objections) are required for each Interrogatory or subpart thereof.

6. These Interrogatories extend to any information in your possession, custody or control, including but not limited to any of your respective employees, agents, attorneys, or other persons acting or purporting to act on your behalf.

7. In the event any information responsive to any Interrogatory is withheld based upon a claim of attorney-client, work-product or any other privilege or immunity, explain the basis of the privilege or other protection you are claiming and provide a general description of the nature of the information you are withholding.

8. These Interrogatories shall be deemed continuing so as to require prompt supplemental responses if you learn additional information responsive to these Interrogatories between the time of the initial response to these Interrogatories and the time of the final order on the Estimation Motion or the Sixtieth Omnibus.

#### **DOCUMENTS REQUESTED**

1. All documents and communications relied upon by Claimant in support of the claims asserted in his or her Proof of Claim, including, but not limited to, all fees and costs for which you seek indemnification (including those already incurred, any future fees and costs, and the total projected fees and costs).

2. All documents and communications relating to payments and reimbursements by the D&O Policies, including:

- (i) all payments and reimbursements already advanced to each Claimant under the D&O Policies, including the amount of the payment, the Claimant(s) on whose behalf such payment was advanced, and the party to whom the payment was made;
- (ii) all invoices detailing the fees and costs for which each Claimant has sought reimbursement under the D&O Policies, including a breakdown by Claimant and by law firm of the fees and costs summarized on the Quarterly Fee/Cost Summaries;
- (iii) any documents relied upon to calculate total projected payments and reimbursements by the D&O Policies; and
- (iv) documents to support any projected difference between total fees and expenses incurred by Claimant and total payments and reimbursements under the D&O Policies, including, without limitation, all bills, insurance documents, evaluations, projections, reports, and studies.

3. All documents upon which any Claimant relies in answering the interrogatories below.

### INTERROGATORIES

1. Identify any and all documents supporting Claimant's claim for indemnification and advancement of defense costs in its Proof of Claim, including any documents establishing Claimant's right to indemnification and advancement of defense costs.

2. For each lawsuit, demand, or investigation involving Claimant and relating to Claimant's service as a director of WMI or its subsidiaries, identify:

- (i) the date upon which the litigation, demand, or investigation was commenced;
- (ii) for each litigation, the case caption for the litigation (including case number and the court in which the litigation was filed);
- (iii) for each litigation, whether or not such litigation has been consolidated with any other pending litigations;



- (iv) for each demand or investigation, the party or parties from whom the demand was received, or the party or parties conducting the investigation;
- (v) for each demand, whether the demand was written or oral;
- (vi) the claims and causes of action at issue in the litigation, or the subject matter at issue in any demand or investigation;
- (vii) whether or not the claims or causes of action at issue in the litigation, demand or investigation relate to equity or debt securities issued by WMI or its subsidiaries;
- (viii) all law firms or other professionals providing services on behalf of Claimant in connection with the litigation, demand or investigation;
- (ix) the total fees or costs incurred by Claimant in connection with the litigation, demand or investigation both on behalf of Claimant, and for an litigation, all other defendants to the litigation;
- (x) the total fees or costs advanced under the D&O Policies in connection with the litigation, demand or investigation;
- (xi) any fees or costs incurred by Claimant in connection with the litigation, demand or investigation that have not been reimbursed under the D&O Policies; and
- (xii) the status of the litigation, demand or investigation as of December 19, 2011.

3. Identify any other proceeding, action, or request not identified in response to Interrogatory 2 which has caused Claimant to incur fees or costs for which Claimant seeks indemnification.

4. Identify any future or projected litigation fees and costs for which Claimant seeks indemnification.

5. Identify any fees or costs incurred in connection with the Debtors' chapter 11 cases for which Claimant has sought or may seek reimbursement from D&O Policies, including but not limited to, fees or costs relating to the Sixtieth Omnibus, the Estimation Motion, the Proof of Claim.

6. Identify any documents supporting Claimant's objection to the Estimation Motion or the Sixtieth Omnibus.

7. Identify any witnesses that Claimant intends to call at the hearing to consider the Estimation Motion and the Sixtieth Omnibus.

8. Identify each individual who supplied information for and/or participated in the preparation of Claimant's answers to these interrogatories.

Dated: Wilmington, Delaware  
November 18, 2011



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Mark D. Collins (No. 2981)  
Michael J. Merchant (No. 3854)  
Travis A. McRoberts (No. 5274)  
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Attorneys for Debtors  
and Debtors in Possession

**CERTIFICATE OF SERVICE**

I, Travis A. McRoberts, do hereby certify that on January 18, 2012, I caused a copy of the foregoing *Debtors' Amended Notice of Deposition of Jerome F. Birn Pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure and Rule 30(b)(1) of the Federal Rules of Civil Procedure* to be served on the party listed below via overnight delivery.

Jerome F. Birn  
Wilson Sonsini Goodrich & Rosati, P.C.  
650 Page Mill Road  
Palo Alto, CA 94304



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Travis A. McRoberts (No. 5274)