

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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: **Chapter 11**
: **Case No. 08-12229 (MFW)**
: **(Jointly Administered)**
: **Hearing Date: April 18, 2013 at 2:00 p.m. (ET)**
: **Objection Deadline: April 11, 2013 at 4:00 p.m. (ET)**
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In re
WASHINGTON MUTUAL, INC., et al.,¹
Debtors.

-----X
WMI LIQUIDATING TRUST
Plaintiff,
v.
-----X
ANTHONY BOZZUTI,
-----X
CHANDAN SHARMA,
-----X
EDWARD F. BACH,
-----X
HENRY J. BERENS,
-----X
JOHN M. BROWNING,
-----X
KEITH O. FUKUI,
-----X
MARC MALONE,
-----X
MICHAEL R. ZARRO,
-----X
RACHEL M. MILEUR a/k/a
RACHELLE M. MILEUR,
-----X
ROBERT C. HILL,
-----X

Adversary Proc. No. 10-53131 (MFW)
Adversary Proc. No. 10-53147 (MFW)
Adversary Proc. No. 10-53132 (MFW)
Adversary Proc. No. 10-53134 (MFW)
Adversary Proc. No. 10-53156 (MFW)
Adversary Proc. No. 10-53139 (MFW)
Adversary Proc. No. 10-53152 (MFW)
Adversary Proc. No. 10-53143 (MFW)
Adversary Proc. No. 10-53133 (MFW)
Adversary Proc. No. 10-53153 (MFW)

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The principal offices of WMILT, as defined herein, are located at 1201 Third Avenue, Suite 3000 Seattle, Washington 98101.



STEPHEN E. WHITTAKER,	:	Adversary Proc. No. 10-53150 (MFW)
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THOMAS E. MORGAN,	:	Adversary Proc. No. 10-53154 (MFW)
-----X		
ANN TIERNEY	:	Adversary Proc. No. 11-53299 (MFW)
-----X		
TODD H. BAKER	:	Adversary Proc. No. 11-54031 (MFW)
-----X		
RICHARD STRAUCH	:	Adversary Proc. No. 12-50848 (MFW)
-----X		
GENNADIY DARAKHOVSKIY	:	Adversary Proc. No. 12-50902 (MFW)
-----X		
ROBERT BJORKLUND, DARYL DAVID,	:	Adversary Proc. No. 12-50965 (MFW)
MARY BETH DAVIS,	:	
MICHELE GRAU-IVERSEN,	:	
DEBORA HORVATH, JEFFREY JONES,	:	
JOHN MCMURRAY, CASEY NAULT,	:	
MICHAEL REYNOLDSON,	:	
DAVID SCHNEIDER, DAVID TOMLINSON,	:	
BRUCE ALAN WEBER, AND	:	
JEFFREY WEINSTEIN,	:	
	:	
Defendants.	:	
-----X		

**MOTION OF WMI LIQUIDATING TRUST
FOR AN ORDER APPOINTING A MEDIATOR WITH
RESPECT TO EMPLOYEE CLAIMS AND PENDING OMNIBUS OBJECTIONS**

WMI Liquidating Trust (“WMILT” or the “Trust”), as successor in interest to Washington Mutual, Inc. (“WMI”) and WMI Investment Corp., formerly debtors and debtors in possession (collectively, the “Debtors”), hereby files this motion (the “Motion”) requesting that the Court enter an order appointing a mediator in the employee claim matters. In support of this Motion, WMILT respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and the Plan.
2. This action is a core proceeding within the meaning of 28 U.S.C. §157(b)(2).

3. Venue of this action is proper in this District pursuant to 28 U.S.C. §1409(a).

BACKGROUND

The Chapter 11 Cases and the Chapter 11 Plan

4. On September 26, 2008 (the “Commencement Date”), each of the Debtors commenced with this Court a voluntary case pursuant to chapter 11 of the Bankruptcy Code.

5. On December 12, 2011, the Debtors filed their *Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [D.I. 9178] (as modified, the “Plan”). By order [D.I. 9759] (the “Confirmation Order”), dated February 23, 2012, this Court confirmed the Plan and, upon satisfaction or waiver of the conditions described in the Plan, the transactions contemplated by the Plan were substantially consummated on March 19, 2012.

The Bar Date

6. By order, dated January 30, 2009 (the “Bar Date Order”), the Court established March 31, 2009 (the “Bar Date”) as the deadline for filing proofs of claim against the Debtors in these chapter 11 cases. Pursuant to the Bar Date Order, each creditor, subject to certain limited exceptions, was required to file a proof of claim on or before the Bar Date.

7. In accordance with the Bar Date Order, Kurtzman Carson Consultants, LLC (“KCC”), the Debtors’ court-appointed claims and noticing agent, mailed notices of the Bar Date and proof of claim forms to, among others, all of the Debtors’ creditors and other known holders of claims as of the Commencement Date. Notice of the Bar Date also was published once in *The New York Times (National Edition)*, *The Wall Street Journal*, *The Seattle Times*, and *The Seattle Post-Intelligencer*.

The Objections

8. On June 26, 2009, the Debtors filed the *Debtors' Fifth Omnibus (Substantive) Objection to Claims* [D.I. 1233] (the "Fifth Omnibus Objection") and the *Debtors' Sixth Omnibus (Substantive) Objection to Claims* [D.I. 1234] (the "Sixth Omnibus Objection"), objecting to, among others, certain employee claims. Subsequent thereto, several claimants whose claims were the subject of such objections filed responses. After an initial hearing, consideration of such objections was adjourned from time to time.

9. On August 15, 2012, WMILT, as successor in interest to the Debtors, filed the following objections to employee-related claims: (a) *WMI Liquidating Trust's Seventy-Ninth Omnibus (Substantive) Objection to Claims* [D.I. 10504] (the "Seventy-Ninth Omnibus Objection"), (b) *WMI Liquidating Trust's Eightieth Omnibus (Substantive) Objection to Claims* [D.I. 10505] (the "Eightieth Omnibus Objection"), (c) *WMI Liquidating Trust's Eighty-First Omnibus (Substantive) Objection to Claims* [D.I. 10506] (the "Eighty-First Omnibus Objection"), and (d) *WMI Liquidating Trust's Eighty-Second Omnibus (Substantive) Objection to Change in Control Claims* [D.I. 10507] (the "Eighty-Second Omnibus Objection").

10. On September 17, 2012, WMILT filed: (a) *WMI Liquidating Trust's Eighty-Fourth Omnibus (Substantive) Objection to, Among Others, Change in Control Claims* [D.I. 10677] (the "Eighty-Fourth Omnibus Objection"), (b) *WMI Liquidating Trust's Eighty-Fifth Omnibus (Substantive) Objection to Change in Control Claims* [D.I. 10678] (the "Eighty-Fifth Omnibus Objection"), and (c) *WMI Liquidating Trust's Eighty-Eighth Omnibus (Substantive) Objection to Disputed Equity Interests* [D.I. 10681] (the "Eighty-Eighth Omnibus Objection") and, together with the Fifth Omnibus Objection, Sixth Omnibus Objection, Seventy-Ninth Omnibus Objection, Eightieth Omnibus Objection, Eighty-First Omnibus Objection, Eighty-

Second Omnibus Objection, Eighty-Fourth Omnibus Objection, and Eighty-Fifth Omnibus Objection, the “Omnibus Objections”).

11. Following the filing of the Seventy-Ninth Omnibus Objection, Eightieth Omnibus Objection, Eighty-First Omnibus Objection, Eighty-Second Omnibus Objection, Eighty-Fourth Omnibus Objection, Eighty-Fifth Omnibus Objection, and Eighty-Eighth Omnibus Objection, certain claimants filed responses to such objections (together with the claimants that filed responses to the Fifth Omnibus Objection and the Sixth Omnibus Objection, the “Responding Claimants”).

12. On May 16, 2012, the Court entered orders granting the Fifth Omnibus Objection and the Sixth Omnibus Objection with respect to the non-responding employee claimants. *See* D.I. 10179 (as corrected by D.I. 10225), D.I. 10181 (as corrected by D.I. 10226). On September 19, 2012, the Court entered orders granting the Seventy-Ninth, Eightieth, Eighty-First and Eighty-Second Omnibus Objections with respect to the non-responding employee claimants. *See* D.I. 10689, 10690, 10691 and 10692.

The Adversary Proceedings

13. At various points in time, WMILT filed the above-captioned adversary proceedings against various Responding Claimants (the “Defendants”) seeking to set aside certain payments and/or agreements based on causes of actions under Chapter 5 of the Bankruptcy Code (the “Adversary Proceedings”).

The Scheduling Orders

14. On September 10, 2012, the Court held a status conference (the “September 10 Teleconference”) with respect to the Omnibus Objections and, at such time, requested that WMILT and the Responding Claimants confer regarding discovery and other procedures with

respect to a hearing or series of hearings to consider the relief requested in the Omnibus Objections (the “Hearing”). As a result of such conferences and the Court’s input with respect to remaining issues, (i) on October 15, 2012, the Court entered the *Agreed Order Establishing Procedures and Deadlines Concerning Hearing on Employee Claims and Discovery in Connection Therewith* which provided for, among other things, the consolidation of the litigation with respect to all of the Omnibus Objections (the “Omnibus Objections Original Scheduling Order”), and (ii) on November 2, 2012, the Court entered a *Scheduling Order* in each of the Adversary Proceedings, which provided that the Adversary Proceedings’ schedules would follow along the Omnibus Objections Original Scheduling Order timeline (collectively, together with the Omnibus Objections Original Scheduling Order, the “Original Scheduling Orders”). Each of the Original Scheduling Orders also provided for a schedule of deadlines related to these litigation and discovery protocols to be followed by the parties.

15. Thereafter, WMILT and certain of the Responding Claimants began the discovery process and quickly realized that, based upon the discovery propounded, additional time would be required to complete such process and prepare for the Hearing. Consequently, and as a result of such mutual understanding, on January 7, 2013, the Court entered the *Agreed Order Amending Scheduling Orders With Respect to Employee Claims Hearing and Adversary Proceedings* (the “Amended Scheduling Order” and, together with the Original Scheduling Orders, the “Scheduling Orders”) which, among other things, amended the deadlines set forth in the Original Scheduling Orders and established June 3, 2013 as the hearing date to consider the change of control issues raised by the Omnibus Objections.

The Motion to Amend the Omnibus Objections

16. On February 19, 2013, WMILT filed *WMI Liquidating Trust's Motion for Leave to Amend the Fifth, Sixth, Seventy-Ninth, Eightieth, Eighty-First, Eighty-Second, Eighty-Fourth, Eighty-Fifth, and Eighty-Eighth Omnibus Objections to Claims* [D.I. 11032] (the "Motion to Amend"). The Motion to Amend was originally scheduled to be heard on March 25, 2013.

17. On March 25, 2013, the Court held a hearing (the "March 25 Hearing") at which WMILT and certain of the Responding Claimants, through their counsel, announced that the parties had agreed to adjourn the hearing on the Motion to Amend to June 3, 2013, and suspend discovery, except in limited circumstances,² contemplated by the Scheduling Orders. In doing so, the parties acknowledged that, under any circumstances, and based upon (a) the enormity of documents still to be provided by third parties, reviewed, and posted, and (b) the number of depositions to be taken, the deadlines and dates in the Scheduling Orders would need to be modified and the hearing to consider the "change in control" issue necessarily needed to be rescheduled to a date at least several months following the most recently contemplated hearing date. Additionally, WMILT discussed that the costs associated with the pending litigation have been excessive and will continue to deplete distributions which would otherwise be made to creditors holding allowed claims.

18. The parties also announced that (i) WMILT and certain of the Responding Claimants have been involved in extensive settlement discussions, (ii) the parties wished to expand the settlement discussions to all of the Responding Claimants, and (iii) settlement discussions would only make sense if all of the Responding Claimants settled their claims

² The limited circumstances relate (i) to the production by WMILT of certain 2008 board minutes, (ii) to the extent any Responding Claimant has failed to do so, to the filing of witness lists and written responses to discovery requests propounded on such Responding Claimants, and (iii) to certain third party discovery.

against the estates. To that end, the parties recommended that, during the suspension of the discovery contemplated by the Scheduling Orders, the parties continue to engage in settlement discussions, and, to the extent that WMILT cannot settle the claims or Adversary Proceeding with any Responding Claimant by April 15, 2013, that the Court **require** all such Responding Claimants to attend mediation. To reduce costs associated with such attendance, WMILT also announced a willingness to bifurcate the mediation process and hold sessions in both New York and at a location selected by the Court-appointed mediator on the West Coast.

19. Consistent with its representations, as of the date hereof, WMILT has provided settlement offers to all Responding Claimants.

RELIEF REQUESTED

20. As outlined during the March 25 Hearing, WMILT seeks, pursuant to Rules 9019-3 and 9019-5 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the entry of an order appointing a mediator with respect to the claims of the Responding Claimants and Defendants that remain unresolved as of April 15, 2013.

ARGUMENT

21. Local Rule 9019-3 provides, in relevant part, that, "[n]otwithstanding any provision of law to the contrary, the Court may refer a dispute pending before it to mediation" Local Rule 9019-5 further provides that the "Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case." WMILT requests that, pursuant to the Local Rules, the Court appoint a mediator in these matters and, to the extent the Omnibus Objections or Adversary Proceedings with respect to any

particular Responding Claimant and/or Defendant (the “Non-Settling Responding Claimants”) are not settled by April 15, 2013, that such mediation be mandatory for any such claimant.

22. As discussed at the March 25 Hearing, WMILT, along with certain of the Responding Claimants and Defendants agreed to temporarily suspend, with certain limited exceptions, discovery related to the Omnibus Objections and Adversary Proceedings and engage in meaningful settlement discussions. As part of those settlement discussions, the parties also agreed that it would be in the best interest of the parties to engage a mediator with respect to any Responding Claimant and/or Defendant who does not agree to settle his or her claims by April 15, 2013. As further discussed at the March 25 Hearing, settlement discussions would make sense only if **all** of the Responding Claimants’ and Defendants’ claims and Adversary Proceedings were settled. Otherwise, WMILT would be left to continue discovery, costing over a million dollars per month, to litigate with the Responding Claimants and Defendants who decline to settle, thus providing little incentive for WMILT to engage in any settlement discussions. Accordingly, to avoid such expenditure and encourage all parties to settle the remaining issues as quickly as possible, WMILT requests that the Non-Settling Responding Claimants be **required** to attend one or more mediation sessions scheduled by the court-appointed mediator. To the extent a Non-Settling Responding Claimant cannot attend any such session, but is represented by counsel, such counsel must be authorized to participate and be vested with full settlement authority.

23. As previously noted, WMILT recognizes that (a) mediation may be costly for the parties involved, and (b) the Responding Claimants, many of whom represent themselves *pro se*, are located throughout the country. Thus, WMILT requests that the Court appoint a mediator willing to hold mediation sessions in New York, and a West Coast location of his or her

choosing. This would allow the most Non-Settling Responding Claimants to participate without expending significant funds to travel across the country.

24. Additionally, WMILT understands the applicability of the Local Rules and the allocation of mediation costs in connection therewith. To address this, WMILT proposes that the cost of the mediator be split between WMILT and the Non-Settling Responding Claimants so that WMILT pays fifty percent (50%) of the mediator's costs (more than its required share under the Local Rules) and the Non-Settling Responding Claimants pay fifty percent (50%) of the mediator's costs, but allocated pro rata based on such claimant's ultimately allowed claim amount. In order not to cause the Non-Settling Responding Claimants to come out-of-pocket to satisfy such amount, WMILT proposes to satisfy their obligations in the first instance and reduce subsequent distributions to such claimants to the extent of their pro rata share.

25. With respect to the identification and selection of a mediator, WMILT only requests that the mediator be a person with (a) significant availability to (i) review the myriad of documents necessary to understand the issues presented, and (ii) travel the country and conduct multiple mediation sessions, and (b) a thorough understanding of the Bankruptcy Code and applicable federal regulations relating to, among other matters, "golden parachute" payments.

Notice

26. Notice of this Motion shall be provided to (i) the United States Trustee for the District of Delaware and (ii) each of the Responding Claimants and Defendants. In light of the nature of the relief requested, WMILT submits that no other or further notice need be provided.

CONCLUSION

WHEREFORE WMILT respectfully requests that the Court enter an order appointing a mediator in these matters, and granting such other and further relief as the Court deems just and equitable.

Dated: March 29, 2013
Wilmington, Delaware

/s/ Amanda R. Steele

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Paul N. Heath (No. 3704)
Tyler D. Semmelman (No. 5386)
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Attorneys for WMI Liquidating Trust

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re : **Chapter 11**
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WASHINGTON MUTUAL, INC., et al.,¹ : **Case No. 08-12229 (MFW)**
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¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The principal offices of WMILT, as defined herein, are located at 1201 Third Avenue, Suite 3000 Seattle, Washington 98101.

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DAVID SCHNEIDER, DAVID TOMLINSON,	:	
BRUCE ALAN WEBER, AND	:	
JEFFREY WEINSTEIN,	:	
	:	
Defendants.	:	
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NOTICE OF MOTION AND HEARING

PLEASE TAKE NOTICE that on March 29, 2013, WMI Liquidating Trust, as successor in interest to Washington Mutual, Inc. and WMI Investment Corp., formerly debtors and debtors in possession (collectively, the “Debtors”), filed **Motion of WMI Liquidating Trust for an Order Appointing a Mediator with Respect to Employee Claims and Pending Omnibus Objections** (the “Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

PLEASE TAKE FURTHER NOTICE that any objections or responses to the Motion must be filed in writing with the Clerk of the Bankruptcy Court, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon and received by the undersigned counsel for the Debtors on or before **April 11, 2013 at 4:00 p.m. (EDT)**.

PLEASE TAKE FURTHER NOTICE that, in the event that one or more objections or responses to the Motion are timely filed and not otherwise resolved, the Motion will be considered at a hearing before The Honorable Mary F. Walrath at the Bankruptcy Court, 824 North Market Street, 5th Floor, Courtroom 4, Wilmington, Delaware 19801, on **April 18, 2013 at 2:00 p.m. (EDT)**.

PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS OR RESPONSES TO THE MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: March 29, 2013
Wilmington, Delaware

/s/ Amanda R. Steele

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