

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Washington Mutual, Inc., <u>et al.</u> ,	)	Case No. 08-12229 (MFW)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	<b>Obj. Deadline: April 11, 2013 at 4:00 p.m. (ET)</b>
	)	<b>Hrg. Date: April 18, 2013 at 2:00 p.m. (ET)</b>
	)	
	)	RE: D.I. 11185

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

Michelle McCarthy, Robert Batt, Randy Melby, Steven Stearns, Scott Shaw, Patricia Schulte, Jeffrey Jones and Jeffrey Weinstein (collectively, the “Claimants”), by and through their undersigned counsel, hereby object (the “Objection”) to the Motion Of WMI Liquidating Trust For An Order Appointing A Mediator With Respect To Employee Claims And Pending Omnibus Objections. In support of this Objection (the “Motion”), Claimants respectfully represent as follows:

**BACKGROUND**

**I. General Background**

1. Washington Mutual, Inc. (“WMI”) and a related entity, WMI Investment Corp. (collectively with WMI, the “Debtors”) each filed voluntary petitions under Chapter 11 of title 11, United States Code (the “Bankruptcy Code”) and commenced the above-captioned cases on September 26, 2008 (the “Petition Date”). The Debtors remained in possession and control of their assets until they confirmed their Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the “Plan”) by Order dated February 23, 2012. Upon information and belief the effective date of the Plan was March 19,



2012. On the effective date certain of the Debtors' assets were transferred to the WMI Liquidating trust (the "WMILT") for administration under the Plan.

2. At all relevant times prior to September 25, 2008, WMI owned Washington Mutual Bank ("WMB") and through its ownership of WMB, indirectly owned WMB's subsidiaries including Washington Mutual Bank.

3. On September 25, 2008, the director of the Office of Thrift Supervision directed the FDIC to take immediate possession of the assets of WMB as receiver. The FDIC in its role as receiver then sold substantially all of the assets of WMB to JPMorgan Chase Bank, National Association ("JPMC"). The assets of WMB constituted, indirectly, substantially all of the operating banking assets of WMI.

## **II. Claimants' Claims**

4. Prior to September 25, 2008, Claimants were employed by WMI and/or its affiliated entities. As part of their employment, Claimants were parties to Change in Control Agreements (the "CICs"). Pursuant to their CICs, Claimant was entitled to certain compensation, as set forth in the CICs, if their employment was terminated without cause or they resigned under certain circumstances within two years following a "change in control."<sup>1</sup>

5. After the FDIC's seizure and sale of WMI's banking assets, each of the Claimants was terminated.

6. As a result of their termination, Claimants have filed proofs of claim (the "Claims") in these cases with respect to the compensation due to them under the CICs. Pursuant to the terms of the CICs, the Claims are based on Claimants' entitlement to compensation

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<sup>1</sup> For purposes of their CICs, a "change in control" was defined in paragraph 5(f)(1)(5) to include "[t]he sale or transfer (in one transaction or a series of related transactions) of all or substantially all of Washington Mutual, Inc.'s assets to another Person (other than a Subsidiary) whether assisted or unassisted, voluntary or involuntary." Claimants believe, and therefore aver, that the FDIC seizure and subsequent sale of assets to JPMC constituted an involuntary sale or transfer of substantially all of WMI's operating banking assets.

because they were terminated following a change in control. Certain of the Claims are also based on unpaid incentive payments and bonuses earned by the Claimants.

7. The WMILT has filed various omnibus objections to employment-related claims, including the Claims, in these cases (the “Claims Objections”). Each of the Claimants has filed a response to the Claims Objections and has participated in extensive discovery to date with respect to the claims objections. Until recently, a hearing was scheduled in early June in connection with respect to the Claims Objections.

### **III. Motion**

8. On March 29, 2013, the WMILT filed the Motion. By the Motion, the WMILT requests that this Court appoint a mediator to with respect to the Claims 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”).

9. More specifically, the Motion requests that the Court order mandatory mediation to be conducted either in New York or a west coast location of the mediator’s choosing. Moreover, the Motion requests that the costs of mediation be split evenly between the WMILT and the Non-Settling Responding Claimants “but allocated pro rata based on such claimant’s ultimately allowed claim amount.” Motion ¶ 24.

### **OBJECTION**

10. Claimants object to the Motion because the proposed mediation places an undue financial burden on the Claimants by (i) requiring certain of the Claimants to travel an inordinate distance; and (ii) requiring the Claimants to split the costs of mediation with the WMILT.

**I. The Proposed Locations For Mediation Impose An Undue Burden On Certain Claimants**

11. The WMILT has proposed that the mediation occur in one of two locations: either New York or the west coast. Both of these options are inconvenient for certain of the Claimants. Michelle McCarthy resides in Chicago, Illinois. Randy Melby resides in Florida. Steven Stearns resides in London. These Claimants should not be forced to incur the additional expense of travel for mediation when the WMILT has not offered any reason why mediation cannot be conducted in a more convenient location for these Claimants.<sup>2</sup>

12. The WMILT relies on Local Rule 9019-5 for its support for the Motion. However, Local Rule 9019-5 requires that, “the mediator schedule a time and place for the mediation conference that is acceptable to the parties and the mediator.” Local Rule 9019-5(c)(1). The proposed mediation locations have been unilaterally selected by the WMILT. The proposed mediation locations are not acceptable to the above-referenced Claimants as the costs and inconvenience of travel impose an undue hardship on such Claimants. Claimants request that, to the extent that the Court orders mandatory mediation, mediation be conducted at a location acceptable to Claimants consistent with the Local Rules.

**II. Claimants Should Not Be Required To Pay The Costs Of Mediation**

13. Claimants object to the Motion to the extent that it requires Claimants to pay the costs of mediation.

14. The WMILT states that it is proposing mediation in an effort to reduce the costs of this litigation. However, at this stage of the employee-related claims litigation, where discovery is substantially complete, savings are not significant. Moreover, given that until

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<sup>2</sup> This is especially true where the Motion appears to suggest that multiple mediation sessions may occur – thereby multiplying the travel costs to Claimants.

recently the WMILT has made no effort to resolve the employee-related claim, its newfound concern over costs rings hollow. Rather than an effort to reduce costs to the WMILT, Claimants submit that the Motion is an attempt to place another obstacle in front of Claimants.

15. Nothing in the Local Rules require that the costs of mediation be split and the WMILT has cited no support for its cost-sharing proposal. Where, as here, the Claimants and the WMILT are on vastly different footing in terms of resources, and where Claimants have already incurred significant expenses to date in the employee-related claims litigation, Claimants should not be required to incur further the additional expense of funding mediation in these cases.

### **III. Claimants Should Be Permitted To Opt Out Of Mediation**

16. In support of its “all or nothing” approach to mediation, the WMILT states that mediation is only worthwhile if all of the claimants are subject to mediation due to the costs of the employee-related claims litigation. The WMILT cites a cost figure of \$1 million per month in support of its position. However, it is illogical to assume that the WMILT will continue to incur costs of \$1 million per month regardless of the number of claimants that remain in the litigation. The WMILT’s litigation costs would undoubtedly less for 30 claimants than they would be for 300 claimants. To suggest otherwise is simply not credible.

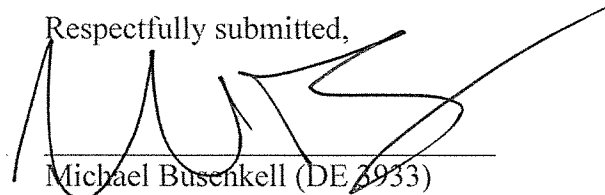
17. There is no justification for the WMILT’s “all or nothing” approach and request for mandatory mediation for all claimants. Accordingly, Claimants should be permitted to opt out of mediation.

18. Claimants join in any other objections to the Motion filed by other claimants to the extent such objections are not inconsistent with the arguments set forth herein.

WHEREFORE, for all the above reasons, Claimants requests that the Court enter an order (i) denying the Motion and (ii) granting such other and further relief as is just and equitable.

Date: April 11, 2013  
Wilmington, Delaware

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael Busenkell', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Michael Busenkell (DE 3933)

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**CERTIFICATE OF SERVICE**

I, Michael Busenkell, Esquire, hereby certify that on April 11, 2013, a true and correct copy of the *Objection of Certain Claimants to Motion of WMI Liquidating Trust for an Order Appointing a Mediator With Respect to Employee Claims and Pending Omnibus Objections* was caused to be served upon the parties listed below by way of the Court's CM/ECF system via electronic notification and in the method as indicated:

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Date: April 11, 2013

**GELLERT SCALI BUSENKELL &  
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\_\_\_\_\_  
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