

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re : Chapter 11
 WASHINGTON MUTUAL, INC., et al.,¹ : Case No. 08-12229 (MFW)
 : (Jointly Administered)
 Debtors. :
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**LIMITED OBJECTION OF CLAIMANTS
 EDWARD BACH, HENRY J. BERENS AND MICHAEL ZARRO
 TO ENTRY OF PROPOSED ORDER
 APPOINTING A MEDIATOR WITH RESPECT TO EMPLOYEE
 CLAIMS AND PENDING OMNIBUS OBJECTIONS AND JOINDER TO CERTAIN
 OTHER CLAIMANTS' LIMITED OBJECTION TO ENTRY OF PROPOSED
 ORDER APPOINTING A MEDIATOR WITH RESPECT TO
EMPLOYEE CLAIMS AND PENDING OMNIBUS OBJECTIONS**

Claimants, Michael A. Zarro (“Zarro”), Henry J. Berens (“Berens”), and Edward Bach (“Bach,” and together with Zarro and Berens, “Claimants”), by and through their undersigned counsel, hereby submit the following Limited Objection to Entry of Proposed Order Appointing a Mediator submitted by Certification of Counsel (the “COC”) by WMI Liquidating Trust (the “Mediation Order” [D.I. No. 11229] and join in the Limited Objection to Entry of Proposed Order Appointing a Mediator With Respect to Employee Claims and Pending Omnibus Objections filed on May 2, 2013 by certain other claimants (the “Providian Claimants”) [D.I. No. 11231]. In support of the Limited Objection, Claimants respectfully represent as follows:

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.



Jurisdiction and Venue

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

This is a core proceeding pursuant to 28 U.S.C. § 157(b).

**Limited Objection to Entry of
Proposed Order Regarding Mediation**

2. On May 1, 2012, counsel for WMI Liquidating Trust (“WMILT”) filed with this Court their COC requesting that the Court enter the Mediation Order [D.I. 11229].

3. In light of very recent developments, the Claimants oppose the timing of the mediation as being premature. Based on these troubling developments, Claimants do not believe that it would be prudent for this Court to enter the Mediation Order at this time and instead, discovery should resume.²

4. Counsel for the Claimants learned (not from counsel for WMILT) that the Federal Deposit Reserve Corporation (“FDIC”) has inserted itself into these proceedings and has placed WMI Liquidating Trust (“WMILT” or the “Trust”) on notice that any settlement payments made to any of the employee claimants will need to be separately approved by the FDIC.

5. Upon information and belief, sometime prior to April 22, 2013, counsel for WMILT became aware of the FDIC’s position regarding the need for its approval of each settlement. However, despite that the counsel for the Claimants and the other “Non Settling Responding Claimants” were actively negotiating on a daily basis with Mr. Rosen over the specific provisions of the Mediation Order and whether the parties could agree to the selection of a mediator, Mr. Rosen **failed to disclose to counsel** during those negotiations prior to yesterday that the FDIC was taking the position it needed to approve each settlement with the settling group of employee claimants.

² Prior to yesterday’s telephone call, the Claimants were not opposed to the form of the Mediation Order, the appointment of a mediator, and the mediation logistics in these matters [D.I. No. 11229].

6. During a telephone call yesterday (May 1, 2013), for the very first time, counsel for WMILT confirmed to counsel for the Claimants that the FDIC has taken this position with respect to settlements that have been already reached with the settling group of employee claimants.³ Counsel for WMILT further represented that WMILT is not willing to make distributions at this time to the group of settling employee claimants unless either (1) the FDIC approves the settlement or (2) the settling claimant agrees to indemnify the Trust against any action taken by the FDIC in connection with a settlement distribution.

7. At this time, Claimants take no position as to the validity of the FDIC's position that it must approve settlements or distributions of allowed claims in the matter. Nevertheless, counsel for WMILT has made clear the Trust would be unwilling to make any distribution to any Non-Settling Responding Claimant, even if agreement were reached at mediation, without FDIC approval.

8. In light of these recent developments, the Claimants are concerned about the prospects of the mediation. In counsel's experience, mediations are most successful when the parties are able to negotiate a binding resolution. However, with the uncertainty of the FDIC's position in these matters, it does not appear that a binding settlement (resulting in certain distribution) could be achieved at the mediation. For these reasons, the Claimants do not believe it would be prudent for the parties to invest the time and resources to mediate the claims of the Non-Settling Responding Claimants until such time as the FDIC issue has been resolved.

9. Further, counsel for Claimants feels it necessary to bring to this Court's attention that the COC is disingenuous with respect to the selection of the mediator. First, WMILT has rejected the three mediators (one of whom is on Court's Registry of Mediators and Arbitrators

³ This telephone conversation took place at approximately 9:00 a.m. (E.D.T) between Brian Rosen, Esquire of Weil Gotshal & Manges LLP and Abbe A. Miller, Esquire of Weir & Partners LLP.

(the “Delaware Bankruptcy Court Registry”)) suggested by the non-settling claimant group. Second, WMILT suggested two mediators neither of whom is on Delaware Bankruptcy Court Registry. Third, despite Mr. Rosen’s representations in the COC, neither counsel for Claimants nor counsel for the other claimants has agreed to the selection of Mr. Trepper as the mediator. In fact, Mr. Rosen and Ms. Miller (the Claimants’ counsel on the conference call) discussed Mr. Trepper’s qualifications during their May 1st telephone call, and Mr. Rosen declined to give Ms. Miller Mr. Trepper’s telephone number, telling her that he did not want the proposed mediator to be “inundated” with telephone calls from claimants. Mr. Rosen suggested that Ms. Miller obtain Mr. Trepper’s telephone number from counsel for the Providian Claimants. The very same day, Mr. Rosen filed the COC stating that “no party opposes the selection of” Mr. Trepper. Claimants have not had the opportunity to vet Mr. Trepper and, therefore, have not yet made a determination as to whether to oppose the selection of Mr. Trepper. Apparently, Mr. Trepper is not available to begin the mediations until after May, 2013.

10. Claimants believe it would be more appropriate that this Court select a mediator from the Delaware Bankruptcy Court Registry, if these matters are to be mediated.

WHEREFORE, for the reasons set out herein, Claimants request that this Court refrain from entering the Mediation Order until such time as a determination has been made regarding the FDIC’s position as to the employee claims and the effect of the FDIC’s position on the proposed mediations.

Dated: May 2, 2013
Wilmington, DE

WEIR & PARTNERS LLP

BY: /s/ Kenneth E. Aaron
Kenneth E. Aaron, Esquire (# 4043)
824 Market Street Mall, Suite 800
Wilmington, Delaware 19801
Telephone: (302) 652-8181
Facsimile: (302) 652-8909
kaaron@weirpartners.com

Abbe A. Miller, Esquire (admitted *pro hac vice*)
WEIR & PARTNERS LLP
The Widener Building
1339 Chestnut Street
Suite 500
Philadelphia, Pennsylvania 19107
Telephone: (215) 665-8181
Facsimile: (215) 665-8464
abbe.miller@weirpartners.com
Attorneys for Michael A. Zarro

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CERTIFICATE OF SERVICE

I, Kenneth E. Aaron, Esquire, hereby certify that on this date I caused to be served true and correct copies of the **Limited Objection of Claimants Edward Bach, Henry J. Berens and Michael R. Zarro to Entry of Proposed Order Appointing a Mediator With Respect to Employee Claims and Pending Omnibus Objections and Joinder to Certain Other Claimants' Limited Objection to Entry of Proposed Order Appointing a Mediator With Respect to Employee Claims and Pending Omnibus Objections** via CM/ECF notification and electronic mail, upon the following:

Amanda R. Steele, Esquire
Richard Layton and Finger
920 N. King Street
Wilmington, DE 19801
Steele@RLF.com

Brian S. Rosen, Esquire
Lawrence J. Baer, Esquire
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
brian.rosen@weil.com

Patrick M. Mott, Esquire
Christopher L. Boyd, Esquire
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
cboyd@akingump.com
pmott@akingump.com

Julio C. Gurdian, Esquire
Weil Gotshal & Manges LLP
1395 Brickell Avenue
Suite 1200

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lawrence.baer@weil.com

Miami, FL 33131
julio.gurdian@weil.com

Dated: May 2, 2013

/s/ Kenneth E. Aaron
Kenneth E. Aaron, Esquire (No. 4043)
Weir & Partners LLP
824 N. Market Street, Suite 800
Wilmington, DE 19801
Telephone: (302) 652-8181
kaaron@weirpartners.com