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August 29, 2011

The Honorable Mary F. Walrath
United States Bankruptcy Court
District of Delaware
824 North Market Street
5th Floor
Wilmington, DE 19801

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

Dear Judge Walrath:

We represent certain funds managed by Centerbridge Partners, L.P. ("Centerbridge"). During closing argument, the Official Committee of Equity Security Holders (the "Equity Committee") for the first time purported to rely on the Second Circuit's decision in *Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157 (2d Cir. 1999). We submit this letter, as permitted by the Court at the close of argument, to address *DeBartolo*. Counsel for Appaloosa Management L.P., Owl Creek Asset Management, L.P. and Aurelius Capital Management, LP have authorized us to represent to the Court that they join in this response to *DeBartolo*.

The Equity Committee relies on *DeBartolo* for the proposition that a party who has received confidential information about an issuer in connection with negotiations for a potential transaction becomes a temporary insider for purposes of Rule 10b-5 by reason of its access to such information. The Equity Committee's reading is wrong. Rather, the rules discussed in *DeBartolo*—which concerned negotiations for a potential merger—and the cases it cites, expressly require that the party receiving the information trade in violation of an expectation by the issuer that it not do so. Thus, *DeBartolo* stands for the simple proposition that a party who receives material nonpublic information pursuant to an understanding, contractual or otherwise, with the issuer that the information will be kept confidential, may be liable under Rule 10b-5 if it trades while in possession of this information and while this understanding or agreement remains in effect. That rule of law is not in dispute and, in fact, shows that the conduct at issue here was lawful. As Mr. Kosturos made clear at the confirmation hearing, once the Debtors made their cleansing filings at the end of each confidentiality period and the confidentiality agreements terminated, the Debtors had no continuing expectation of a duty of confidentiality, or any other duty, and in fact expected the opposite—that Centerbridge and the other Settlement Noteholders were free to resume unrestricted trading.

The Equity Committee's argument that *DeBartolo* compels a finding that a party receiving material nonpublic information in connection with a contemplated transaction acquires the status of a temporary insider, with attendant fiduciary duties, by reason of its access to such information, is misplaced. The language the Equity Committee relies on reads:

> Such a [fiduciary or similar relationship of trust and confidence] may arise, as noted previously, where an outside party is given access to material non-public information by an issuer 'solely for corporate purposes in the context of a special confidential relationship.' *U.S. v. Chestman*, 947 F.2d 551, 565 (2d Cir. 1991) (en banc), *cert. denied,* 503 U.S. 1004 (1992); *Dirks v. SEC,* 463 U.S. 646, 655 n.14. (1983). Appellants, by alleging that [the issuer] provided the defendants and the other [] parties with material non-public information to be used confidentially and solely for purposes of [a potential merger], appear to have placed the defendants squarely within this limited category of corporate outsiders subject to the prohibition on insider trading, as outlined in *Chestman* and *Dirks*.

DeBartolo, 186 F.3d at 172.

At the outset, it is important to note that the *DeBartolo* court did not actually find that those allegations were sufficient to establish a claim. DeBartolo's 10b-5 insider trading claims were in fact *rejected* by the District Court. *DeBartolo*, 186 F.3d at 169-70. On appeal, the Second Circuit merely found those allegations were not so frivolous as to justify the Rule 11 sanctions that had been imposed by the District Court against the plaintiff. *Id.* at 174.[1] Moreover, *DeBartolo* should not be read inconsistently with the great weight of authority which reads the *Dirks* "temporary insider" footnote to apply only to those who actually *become* insiders of the issuer on a temporary basis, such as "attorneys, accountants, [and] consultants." *See United States v. O'Hagan*, 521 U.S. 642, 652 (1997); *see also Sawant v. Ramsey*, 742 F. Supp. 2d 219, 238 (D. Conn. 2010) (declining to apply the temporary insider doctrine to shareholder who obtained material nonpublic information but was "not a professional advisor or consultant, and was not employed by [the company] as such").

However, even assuming, arguendo, that the confidentiality agreements entered into with the Debtors were sufficient to render Centerbridge or the other Settlement Noteholders

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[1] *DeBartolo* does stand for one proposition that is relevant to the issues before the Court. The Second Circuit notes the well-established rule that only contemporaneous traders—sellers or purchasers of the issuers' securities—can bring a private action for damages against a party liable under Rule 10b-5. *DeBartolo,* 186 F.3d at 169. *See also* Sec. 20A of the Securities Exchange Act of 1934, 15 U.S.C. § 78t-1 (2011) (creating private cause of action for damages for violations of the Act); *Winer Family Trust v. Queen*, 503 F.3d 319, 325 (3d Cir. 2007); *Scottrade, Inc. v. Broco Invs., Inc.,* 774 F. Supp. 2d 573, 577 (S.D.N.Y. 2011). The fact that the Debtors did not buy or sell their own debt securities during the relevant period means that the Debtors would have no standing to pursue damages against the Settlement Noteholders under Rule 10b-5.

"temporary insiders," *DeBartolo* does not demonstrate that they therefore had a duty to disclose or abstain from trading that was *broader* than the limited duty imposed by those agreements. To the contrary, *DeBartolo* itself makes abundantly clear that "[f]or such a duty [to disclose or to abstain from trading] to be imposed . . . *the corporation must expect the outsider to keep the disclosed nonpublic information confidential*, and the relationship at least must imply such a duty." *DeBartolo*, 186 F.3d at 169 (quoting *Dirks,* 463 U.S. at 655 n.14). Similarly, in *Chestman,* the Court explained a further important limitation on the "temporary insider" doctrine: "when the outsider obtains access to confidential information solely for corporate purposes in the context of a 'special confidential relationship' . . . [t]he temporary insider thereby acquires a *correlative* fiduciary duty to the corporation's shareholders." *Chestman,* 947 F.2d at 565 (emphasis added).

Yet here, the Equity Committee attempts to invoke the "temporary insider" doctrine to suggest that the Settlement Noteholders' duty to disclose or abstain somehow extended *beyond* the Debtors' expectations of confidentiality. The parties' understandings and expectations regarding the confidentiality of the limited information shared with Centerbridge and the other Settlement Noteholders were clearly set forth in the March 9, 2009 and November 16, 2009 confidentiality agreements. Even if those confidentiality agreements were sufficient to give rise to "temporary insider" status—something the evidence shows is inapplicable in this case—those agreements created, governed, *and terminated* any "special relationship of trust and confidence" between the parties.[2] The confidentiality agreements themselves and the uncontroverted testimony at trial established that their expiration also terminated the Settlement Noteholders' confidentiality obligations. As Mr. Kosturos testified, the expiration of the confidentiality agreements also terminated the Debtors' *expectation* that information would thereafter be kept confidential. Thus, the expiration of the agreements terminated any relationship of trust and confidence between the parties and terminated any obligation to refrain from trading.[3] Put another way, even if the Settlement Noteholders were somehow temporary insiders by reason of their access to confidential information, their duties—to the Debtors or any other party—were still bounded by the terms of the confidentiality agreements that created those duties. Any

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[2] The Equity Committee's efforts to cast Centerbridge as a 'temporary insider' are in any event nothing more than an effort to relitigate this Court's earlier ruling, in the context of approving the Global Settlement Agreement, that "the Settlement Noteholders were not acting in this case in any fiduciary capacity." *In re Washington Mutual, Inc.,* 442 B.R. 314, 349 (D. Del. 2011). Centerbridge was not a member of, and was never asked by the U.S. Trustee to join, any official committee. Thus the only potential basis for concluding it entered into a "special relationship of trust and confidence" remains the confidentiality agreements with the Debtors, and that basis alone is in any event not sufficient.

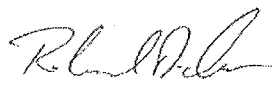
[3] Again, given that *DeBartolo* was decided in the context of an appeal from Rule 11 sanctions, it should not be read to hold that a confidentiality agreement is sufficient to create a "special relationship of trust and confidence," particularly when the clear weight of controlling precedent holds otherwise. *See Walton v. Morgan Stanley & Co.,* 623 F.2d 796, 799 (2d Cir. 1980) (holding that "the fact that the information was confidential did nothing, in and of itself," to create a fiduciary relationship between the parties in question); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 14 (2d Cir. 1983). *See also In re Am Bus. Fin. Servs, Inc.,* Nos. 05–10203, 06–50826, 2011 WL 3240596, at *3-4 (Bankr. D. Del. July 28, 2011) (noting that a "confidentiality agreement alone does not establish that there was a fiduciary relationship between the two parties").

limitation on their trading could still only arise from—but not exceed—the limitations imposed by the confidentiality agreements. Neither *DeBartolo* nor any other case supports the Equity Committee's implicit assertion that some fiduciary-like obligation persisted *after* the termination of those agreements or extended *beyond* the Debtors.

Controlling precedent compels the conclusion that Centerbridge and the other Settlement Noteholders did not violate §10(b) or Rule 10b-5. Quite to the contrary, their conduct was within the full view of the Debtors and the Debtors' counsel and was designed, in light of existing precedent, to ensure complete and ethical compliance with the securities laws. Centerbridge and the other Settlement Noteholders either stopped all trading during the confidentiality periods or erected ethical walls, and both obtained and relied upon the Debtors' contractual undertaking to make public all material information at the end of each confidentiality period before they resumed trading. The Settlement Noteholders' reliance on this undertaking was reasonable, as the federal securities laws *required* the Debtors to make such filings under Regulation FD: "when an issuer, or person acting on its behalf, discloses material nonpublic information to certain enumerated persons (in general, securities market professionals and holders of the issuer's securities who may well trade on the basis of the information), it *must make public disclosure of that information.*" Rel. Nos. 33-7881, 34-43154, IC-24599, available at http://sec.gov/rules/final/33-7881.htm (emphasis added). *See* 15 U.S.C. § 78j(b); 17 C.F.R. §§ 240.10b-5, 243.100. Finding a violation of Rule 10b-5 or inequitable conduct on these facts now—which would require a corresponding finding that the Debtors violated Regulation FD—would simply and unequivocally be inconsistent with the evidence, applicable statutes and the case law, including *DeBartolo*.

Chapter 11 proceedings are difficult processes because, by definition, there is never enough value to go around. Still, the plain facts of this case are inescapable—Centerbridge and the other Settlement Noteholders in good faith scrupulously complied with the securities laws and the confidentiality agreements, which by their very terms were designed to release them from their confidentiality obligations and permit them to resume trading. Such agreements are common in bankruptcy cases. Having acted in good faith under those agreements, there is no legal or equitable justification to deny confirmation of the Debtors' Plan or to equitably disallow or subordinate the Settlement Noteholders' claims. Even if the Court were to determine that in the future, debtors should engage with their creditors by means of a different process, that should not, and respectfully, cannot result in a finding of deception or bad faith in these proceedings, where all applicable precedent was complied with.

Respectfully submitted,



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