

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

In re:	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC., et al.,	:	Case No. 08-12229 (MFW)
	:	
Debtors.	:	Jointly Administered
	:	

**THE SECURITIES AND EXCHANGE COMMISSION’S RESPONSE TO
DEBTORS’ MOTION FOR AN ORDER PURSUANT TO BANKRUPTCY
RULE 2004 AND LOCAL BANKRUPTCY RULE 2004-1**

INTRODUCTION

On December 14, 2009, Washington Mutual, Inc. (“WMI”) and WMI Investment Corp. (together “Debtors”) filed a motion pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure for an order directing production of records from six federal government entities, including the Securities and Exchange Commission (“SEC”), 1/ and fourteen other entities and individuals (together “Knowledgeable Parties”).

The motion seeks records that are related to potential claims of Debtors against JPMorgan Chase Bank (“JPMC”) for malfeasance in connection with

1/ The five other government entities are the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Board of Governors of the of the Federal Reserve System, and the Department of the Treasury.



JPMC's acquisition of WMI. Because WMI has provided no reason to believe that the SEC possesses any records that are relevant to Debtors' potential claims against JPMC and because the subpoena proposed by Debtors would place an undue burden on the SEC, the SEC requests that Debtors' motion be denied.

FACTUAL BACKGROUND

In their motion, Debtors detail their potential malfeasance claims against JPMC, which are set forth in American National Insurance Co. v. FDIC, No. 1:09-cv-01743 (D.D.C.). Motion at 3-4. Debtors claim that JPMC may have: (1) engaged in sham negotiations designed to elicit confidential information from WMI; (2) publicly leaked this information to gain an unfair advantage in acquiring WMI; and (3) misused access to government regulators to acquire confidential information about contemplated government action of WMI. Id.

In their motion, Debtors identify the events or matters involving Knowledgeable Parties about which they seek information. Motion at 6-15. Regarding the six government entities, Debtors focus almost exclusively on events or matters involving the FDIC, which took over WMI and then sold the bank to JPMC. The only mention of the SEC in Debtors' motion is a reference to an emergency order issued by the SEC in September 2008 ("2008 SEC Order"). Motion at 7.

The 2008 SEC Order barred the short selling 2/ of securities in 798 publicly traded banks, insurance companies, and securities firms, including WMI.

Securities Exchange Act of 1934 Release No. 34-58592 at

<http://www.sec.gov/rules/other/2008/34-58592.pdf>. The SEC issued the order to decrease the likelihood of sudden and excessive price fluctuations in the securities of publicly-traded financial institutions. *Id.* Debtors do not explain the relevance of the 2008 SEC Order to their potential claims against JPMC. They simply state that “[t]he SEC also served an oversight role over Debtors given Debtors’ publicly traded equity and debt securities” and then cite the order as an example of the SEC’s oversight role. Motion at 7.

Debtors’ proposed subpoena lists 20 categories of records sought from the SEC. The proposed subpoena requests all responsive records generated since January 1, 2007 or related to the time period after January 1, 2007. Most of the

2/ A short sale is the sale of a security that the seller does not own and any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. In order to deliver the security to the purchaser, the short seller borrows the security, typically from a broker-dealer or an institutional investor. The short seller later closes out the position by purchasing equivalent securities on the open market, or by using an equivalent security it already owned, and returning the borrowed security to the lender. Short selling is generally used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of a long position in the same security. See <http://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm>

document requests concern JPMC's acquisition of WMI (document request numbers 1-2, 6-7, 9-20). The subpoena also seeks all records relating to WMI and the 2008 SEC Order (document request number 8), all communications between the SEC and WMI (document request number 3), and all documents relating to any potential or actual SEC regulatory actions involving WMI (document request numbers 4, 5).

ANALYSIS

I. LEGAL BACKGROUND

The purpose of a Rule 2004 examination is to “enable the trustee to discover the nature and extent of the bankruptcy estate.” In re: Washington Mutual, Inc., 408 B.R. 45, 50 (Bank. D. Del. 2009). There are limits, however, “to the use of a Rule 2004 examination. It may not be used for purposes of abuse or harassment and it cannot stray into matters which are not relevant to the basic inquiry.” Id. (citations omitted). For example, “[t]he examination of a witness as to matters having no relationship to the debtor’s affairs or no effect on the administration of his estate is improper.” In re: Wilcher, 56 B.R. 428, 433 (Bankr. D. Ill. 1985).

A Rule 2004 examination must meet a threshold standard of “good cause” for a court to issue a subpoena. In re: Countrywide Home Loans, Inc., 384 B.R. 373, 393 (Bankr. W.D. Pa. 2008). To establish good cause a mechanical test is not

used. Id. Rather, “a totality of circumstances approach is required, taking into account all relevant factors.” Id. “[W]hile Rule 2004 allows a fishing expedition to some extent, it may not be used as a device to launch into a wholesale investigation of a non-debtor’s private business affairs.” Id. at 393-94.

In order to determine whether good cause exists, a balancing test is used which weighs the examiner’s interests in obtaining the information versus the examinee’s interests in avoiding the cost and burden of disclosure. Countrywide Homes Loans, 384 B.R. at 393. The scope of a Rule 2004 examination should not be so broad as to be more disruptive and costly to the party to be examined than beneficial to the party seeking discovery. Id. The level of good cause required to be established before one can obtain documents under Rule 2004 varies, like a sliding scale, “depending on the potential intrusiveness involved.” Id. ^{3/} The burden of establishing “good cause” rests on the party requesting a Rule 2004

^{3/} See also In re: Continental Capital Investment Services, 2009 Bank. LEXIS 1450, *14 (Bankr. N.D. Ohio 2009) (court should apply balancing test in determining appropriateness of Rule 2004 examination); Wilcher, 56 B.R. at 434 (“the standard of relevancy in Rule 2004 requires the court to exercise its discretion, and balance the competing interests between the examiner’s right to expose allege chicanery and [defendant’s] right to privacy in his business affairs.”); In re: Fearn, 96 B.R. 135, 138 (Bankr. S.D. Ohio 1989) (balancing test should be applied); In re: Vantage Petroleum Corp., 34 B.R. 650 (Bankr. E.D.N.Y. 1983) (same).

examination. 4/

II. DEBTORS HAVE PROVIDED NO REASON TO BELIEVE THAT THE SEC POSSESSES ANY RECORDS THAT ARE RELEVANT TO DEBTORS' POTENTIAL CLAIMS AGAINST JPMC.

Debtors have not shown that the SEC possesses any records that are relevant to Debtors' potential claims against JPMC. Debtors seek records concerning JPMC's acquisition of WMI to support potential claims that JPMC engaged in malfeasance in connection with this acquisition. Debtors, however, have not shown that the SEC played any role in connection with this acquisition or possesses any relevant records. 5/

4/ See In re: Hammond, 131 B.R. 78, 82 (Bankr. S.D. Ohio 1991) ("the party seeking to conduct [a Rule 2004] examination must produce probative evidence demonstrating that "good cause" exists for the taking of the requested discovery"); In re: Coffee Cupboard, 1991 Bankr. LEXIS 943, *12 (Bankr. E.D.N.Y. 1991) ("the burden of showing good cause [for a Rule 2004 examination] is an affirmative one and is not satisfied merely by a showing that justice would not be impeded by production of the requested documents"); In re: Drexel Burnham Lambert Group, 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991) (same); Wilcher, 56 B.R. at 434 (same); In re: Metiom, 318 B.R. 263, 268 (Bankr. S.D.N.Y. 2004) ("the [Rule 2004] examiner bears the burden of proving that good cause exists for taking the requested discovery"); In re: Buick, 174 B.R. 299, 304 (Bankr. D. Co. 1994) (same); In re: Dinubilo, 177 B.R. 932, 943 (Bankr. E.D. Cal. 1993) (same).

5/ Although the SEC has the authority to review securities offerings and tender offers of publicly traded corporations such as WMI, SEC counsel is unaware of any role that the SEC played in JPMC's acquisition of WMI and does not believe that the SEC possesses any records relevant to Debtors' potential malfeasance claims. SEC counsel contacted several divisions and

The only reference to the SEC in Debtors' motion is the discussion of the 2008 SEC Order. The proposed subpoena requests records related to the 2008 SEC Order (document request number 8). Debtors, however, have failed to establish any connection between the 2008 SEC Order and the acquisition of WMI, and there exists no apparent connection between the order and acquisition. Accordingly, Debtors have failed to establish good cause for seeking these records.

The subpoena also seeks records relating to SEC regulatory actions of WMI (document request numbers 4,5) and communications between WMI and the SEC (document request number 3). Because Debtors have failed to establish that the SEC played any role in JPMC's acquisition of WMI, Debtors have failed to establish good cause that these requests seek records relevant to their claims.

III. IT WOULD BE UNDULY BURDENSOME FOR THE SEC TO FULLY COMPLY WITH DEBTORS' PROPOSED SUBPOENA.

Most of the proposed subpoena's requests seek records related to JPMC's acquisition of WMI (document request numbers 1-2, 6-7, 9-20). As the SEC does not possess records related to this acquisition, the SEC does not possess records responsive to these document requests.

offices within the SEC but did not locate any records responsive to the proposed subpoena that were related to WMI's acquisition.

Regarding document request number 3, however, it would be unduly burdensome for the SEC to fully comply with this request. The document request seeks records “concerning any meetings and/or communications between Washington Mutual and any Government Unit.” The request is overly burdensome because it seeks records that could be possessed by any division, office, or employee of the SEC, including the SEC’s Office of General Counsel, the Division of Enforcement, the Division of Trading and Markets, and the Division of Corporation Finance. The request is also overly vague as it is unclear what constitutes records *concerning* meetings and/or communications.

It would also be unduly burdensome for the SEC to comply fully with document request numbers 4 and 5. These requests seek all records “concerning any potential or actual regulatory and/or supervisory actions” involving any government body (including the SEC) with respect to WMI. The SEC possesses records related to investigations and other regulatory matters involving WMI. The SEC should not have to locate and process all of these documents when they clearly do not pertain to the issues that Debtors have identified as justifying its

proposed subpoena. 6/

Given that Debtors have not established that the SEC possesses any records that are relevant to Debtors' potential claims against JPMC and that full compliance with the proposed subpoena would be unduly burdensome to the SEC, the balancing test clearly favors the SEC. The proposed subpoena is more disruptive and costly to the party being examined than it is beneficial to the party seeking discovery. As the Debtors have failed to establish good cause for the proposed Rule 2004 examination, this Court should deny Debtors' motion.

CONCLUSION

The SEC requests that this Court deny Debtors' Rule 2004 motion because the Debtors' interest in obtaining the information sought is clearly outweighed by the SEC's interest in avoiding the burden of disclosure.

6/ It is likely that many of these documents – and others that WMI seeks – would be privileged. Any request that seeks internal, non-public SEC documents should be denied as it is likely to lead only to an assertion of privileges.

Respectfully submitted,

RICHARD M. HUMES
Associate General Counsel
Securities and Exchange Commission

MELINDA HARDY
Assistant General Counsel
Securities and Exchange Commission

/s/Kevin Dean Solonsky
KEVIN DEAN SOLONSKY
Senior Counsel
Securities and Exchange Commission
100 F Street, NE,
Washington, D.C. 20549-9612
(202) 551-5014

Dated: January 15, 2010