

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

In re:

WASHINGTON MUTUAL, INC., *et al.*,¹
Debtors.

Chapter 11

Case No. 08-12229 (MFW)

Jointly Administered

Hearing Date: Jan. 28, 2010 at 4:00 p.m. (ET)

Objection Deadline: Jan. 15, 2010 at 4:00 p.m. (ET)

Related to Docket No. 1997

**OBJECTION OF THE THIRD-PARTIES TORONTO-DOMINION BANK AND
TD BANK, N.A. TO THE DEBTORS' MOTION FOR AN ORDER PURSUANT
TO BANKRUPTCY RULE 2004 AND LOCAL BANKRUPTCY RULE 2004-1
DIRECTING THE EXAMINATION OF WITNESSES AND PRODUCTION
OF DOCUMENTS FROM KNOWLEDGEABLE PARTIES**

The third-parties, Toronto-Dominion Bank ("Toronto-Dominion") and TD Bank, N.A. ("TD Bank," together with Toronto-Dominion, the "Banks"), hereby object (the "Objection") to the *Debtors' Motion for an Order pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004.1 Directing the Examination of Witnesses and Production of Documents from Knowledgeable Parties* (the "Motion"). In support of the Objection, the Banks respectfully state as follows:

The Motion should be denied because: (1) the Motion seeks production of the Banks' proprietary, privileged, and confidential information, and the Banks' attorney-client communications and attorney work-product; (2) the Motion seeks documents not within the control of the Banks; and (3) the Motion seeks the production of information that far exceeds the appropriate scope of a Rule 2004 examination.

¹ Debtors in these chapter 11 cases and the last four digits of each of the Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.



The Banks also join in the Objection of the FDIC-Receiver, filed this date. Specifically, the Banks join in the FDIC-Receiver's argument sections I (The Debtors' Open-Ended Investigation of Potential Claims Does Not Justify Third-Party Discovery Under Rule 2004) and II (Rule 2004 Is Not Available Because the Third-Party Discovery Sought Is the Subject of the Debtors' Pending D.C. Action Against the FDIC). The Banks incorporate those sections as though fully stated herein.

INTRODUCTION

Washington Mutual, Inc. ("**WMI**") and WMI Investment Corp. ("**WMI Investment**," together with WMI "**Washington Mutual**" or the "**Debtors**") have filed the Motion, seeking a Rule 2004 examination of approximately 20 "Knowledgeable Parties." (Debtors' Mot. at p. 1-2 n.2.) The Banks are not parties to any of the proceedings involving the Debtors. Rather, as to the Banks, the Motion concerns two third-party subpoenas, each comprised of 27 document requests (the "**Document Requests**") that seek information over a greater than three-year time period. (Debtors' proposed Subpoena for Rule 2004 Examination directed to Toronto Dominion Bank and Debtors' proposed Subpoena for Rule 2004 Examination directed to TD Bank, N.A. (hereinafter collectively the "**Subpoenas**") at Instruction 12, and Document Requests.) The Subpoenas cover an astounding breadth of documents, and demand that the Banks produce documents related to, *inter alia*, "any entity's efforts to acquire all or part of Washington Mutual," "the FDIC's analysis, evaluation, and/or consideration of any bids concerning Washington Mutual," and "all documents concerning any meetings and/or communications between JPMC and any Government Unit." (Subpoenas at Document Request 1, 20, and 27.) Each of the Document Requests is similarly broad.

Before filing the Motion, Debtors' counsel communicated with both the Banks' business representatives and outside counsel in an attempt to reach agreement on the scope of the

Document Requests and the appropriate procedure for the Banks to receive the Document Requests and produce documents. On November 9, 2009, Counsel for the Debtors also sent to the Banks' counsel "Debtors' [Document] Requests related to the JPMC Adversary Proceeding." (Email between E. Parness and A. Bono, Nov. 9, 2009, attached hereto at **Exhibit A**.) In serving document requests related to the JPMC adversary proceedings, the Debtors recognized that the adversary proceeding is the appropriate avenue for requesting information about JPMC and its interactions with the Debtors. Despite the additional burden placed on the Debtors under the Federal Rules of Civil Procedure, which are used in adversary proceedings, as opposed to Rule 2004, which is used in other non-adversary bankruptcy proceedings, it is actually the adversary proceeding through which the Debtors' Rule 2004 Document Requests should have been brought.

On November 19, 2009, counsel for the Banks confirmed an agreement reached between the Debtors and the Banks limiting the scope of the Document Requests, subject to receipt of a subpoena from the Debtors. (Email between A. Bono and E. Parness, Nov. 19, 2009, attached hereto as **Exhibit B**.) Nearly a month later, without ever repudiating the agreement contained in the November 19, 2009 email, the Debtors filed the Motion. Upon filing the Motion, counsel for the Debtors e-mailed a courtesy copy to counsel for the Banks, expressing a willingness to "continue to work with" the Banks in the hopes of reaching a "resolution on the scope of a production in response to the Debtors' Rule 2004 [Document] Requests." (Email between E. Parness and A. Bono, Dec. 15, 2009, attached hereto as **Exhibit C**.) This statement constitutes a tacit admission that the scope of the Document Requests is too broad and requires limitation by the parties.

After the Motion was filed, the Banks continued to cooperate with the Debtors by attempting to reach agreement on a reasonable scope for the Document Requests and production

of documents subject to receipt of a subpoena. (Email between A. Bono and E. Parness, Jan. 8, 2010, attached hereto as **Exhibit D**.) On January 11, 2010, counsel for the Banks sent a proposed limitation on the scope of the Document Requests to counsel for the Debtors. (Email from C. Beideman to E. Parness, Jan. 11, 2009, attached hereto as **Exhibit E**; Suggested Limited Scope of Document Requests, attached hereto as **Exhibit F**.) Despite the Banks' attempt to reach agreement with the Debtors, no agreement could be reached, and the Banks must object to the issuance of the Debtors' Subpoenas.

Alternatively, should this Court decide that some production is warranted under Rule 2004, the Banks respectfully request that this Court limit the scope and applicable time period of the Document Requests. The Banks vigorously object to the production of documents that: contain the Banks' proprietary, confidential, or otherwise privileged information and the Banks' attorney-client communications and attorney work-product; are not within the control of the Banks; or simply are not related to the current bankruptcy case pending before this Court.

ARGUMENT

I. The Banks have Attempted in Good Faith to Come to An Agreement on the Scope of the Document Requests

The Banks used their best efforts to come to an agreement with the Debtors to produce those documents that are responsive to the Document Requests, while at the same time protecting the Banks' proprietary and confidential information, and not overburdening the Banks with the production of documents unrelated to the Debtors' bankruptcy case. (See **Exhibits B, D, E, and F**.) The Banks undertook numerous attempts to reach agreement with the Debtors; unfortunately to no avail. Instead, the Banks have been compelled to engage in this current motion practice before this Court.

II. The Document Requests are Overbroad

The Banks were willing to produce documents that are responsive to the Document Requests, provided that the Document Requests were appropriately tailored to encompass documents that were not proprietary, privileged, confidential, attorney-client communications, or attorney work-product, that were within the control of the Banks, and which were related to the issues in the Debtors' bankruptcy case. According to the Motion, the Debtors seek information about "potentially viable causes of action against JPMC" (Debtors' Mot. at p. 16), yet their Document Requests request information that far exceeds the basis of the Debtors' inquiry. The Banks were willing to produce, subject to a subpoena, any non-privileged or otherwise protected document in their possession that relates to JPMorgan Chase Bank, N.A. ("**JPMC**"), and JPMC's interactions and relationship with Washington Mutual. The Banks object to the production of documents that are unrelated to the Debtors' bankruptcy estate and the estate's claim against JPMC.

A. The Document Requests Demand Documents that Contain The Banks' Proprietary, Confidential, or Privileged Information.

The Banks are third-parties to the Debtors' bankruptcy case (including the adversary action), yet the Document Requests seek documents that include the Banks' proprietary, privileged, and confidential information, and information that constitutes attorney work-product and the Banks' trade secrets. The Document Requests that seek this category of document are Document Requests 8, 11, and 16. Document Request 8 seeks: "All documents concerning any actual, potential, or contemplated bid, term sheet, offer, or other expression of interest from You and/or any other entity to merge with, invest in, or purchase any stake in or portion of

Washington Mutual.”² The Banks were willing to produce any actual bid, term sheet, or offer made by the Banks to Washington Mutual. But many of the documents related to any contemplated bid, term sheet, or offer contain the Banks’ proprietary, privileged, confidential and attorney work-product information, and therefore are not appropriately within the scope of a Rule 2004 examination. *See In re Continental Forge Co.*, 73 B.R. 1005, 1006 (Bankr. W.D. Pa. 1987) (“Rule 2004 is not intended to be used as a vehicle for gathering confidential information for which no reasonable need is shown.”) The Banks were even willing to expand on this request to provide any document concerning JPMC—the alleged subject of each of these Document Requests—that is related to any actual bid, term sheet or offer made by the Banks to Washington Mutual, so long as the Banks were not required to turn over their proprietary, privileged, or confidential information. (*See Suggested Limited Scope of Document Requests, Exhibit F*, at Document Request 8.)

Document Request 11 seeks: “All documents concerning any due diligence concerning Washington Mutual performed by You or any other entity.”³ The Banks were willing to produce any information responsive to this request to the extent that the documents relate to JPMC—the purported subject of each of these Document Requests. (*See Suggested Limited Scope of Document Requests, Exhibit F*, at Document Request 11.) To require the Banks to produce all of their due diligence would compel the production of documents that have nothing to do with JPMC’s conduct, but rather include extremely sensitive documents that contain the Banks’ proprietary, privileged, and confidential information, and attorney work-product. Therefore, this

² This request is also overbroad and burdensome, because it assumes that the Banks have access to information about “any other entity[’s]” “actual, potential, or contemplated bid, term sheet, offer, or other expression of interest” in Washington Mutual, which they do not.

³ This Request is also overbroad and burdensome because it assumes that the Banks possess information about “any due diligence” performed by “any other entity.”

Document Request seeks documents outside of the scope of a proper Rule 2004 examination. *See In re Continental Forge Co.*, 73 B.R. at 1006.

Document Request 16 seeks: “All documents concerning the FDIC’s bid process for Washington Mutual, including (a) documents sufficient to demonstrate when You and/or any entity first became aware of the FDIC’s bidding process for Washington Mutual, (b) Your and any other entity’s consideration of whether to submit a bid, and/or (c) all documents concerning any draft, potential or actual bids submitted to the FDIC.”⁴ The Banks were willing to produce information from sections (a) and (b), to the extent that the Banks possess that information. However, as discussed above in relation to Document Request 8, the documents related to any draft, potential, or actual bid contain the Banks’ proprietary, privileged, and confidential information, and are therefore outside the scope of a proper Rule 2004 examination. *See id.*

Moreover, the Banks’ proprietary, privileged, and confidential information, and the Banks’ attorney-client communications and attorney work-product, is entitled to protection from production, because it is not related to the acts, conduct, property or liabilities of the Debtors, and therefore is not appropriately requested within the scope of a Rule 2004 examination. *See In re CIS Corp.*, 123 B.R. 488, 490 (S.D.N.Y. 1991) (reversing the bankruptcy court’s ruling requiring a non-party accounting firm to produce proprietary documents because, as the accounting firm argued: the documents “do not relate only to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate as provided in Rule 2004(b)”); *In re Continental Forge Co.*, 73 B.R. at 1006 (“Rule 2004 is not intended to be used as a vehicle for gathering confidential information for which no

⁴ This Request is also overbroad and burdensome because it seeks information from the Banks about when “any other entity” “first became aware of the FDIC’s bidding process” and “any other entity’s consideration of whether to submit a bid.” This information is not within the possession of the Banks.

reasonable need is shown.”); *In re Wilcher*, 56, B.R. 428, 434 (Bankr. N.D. Ill. 1985) (“It is clear that Rule 2004 may not be used as a device to launch into a wholesale investigation of a non-debtor’s private business affairs.”).

B. The Document Requests Demand Documents That Are Not Within the Control of the Banks.

The Document Requests seek a number of categories of documents that are not within the control of the Banks. The Document Requests that seek this category of document are 1, 3-7, 9, 10, and 12-27. The documents sought in the Document Requests include, *inter alia*: “All documents concerning any communications with or among JPMC, the FDIC, the media, ratings agencies, investors, and/or third party regarding Washington Mutual,” (Document Request 3); “All documents concerning any agreement between JPMC and Washington Mutual concerning access to and/or disclosure of non-public, confidential or proprietary information in connection with a potential transaction in which JPMC would acquire, merge with, or invest in Washington Mutual,” (Document Request 15); “All documents concerning Citigroup’s bid for Washington Mutual submitted to the FDIC on or about September 24, 2008,” (Document Request 18); and “All documents concerning the FDIC’s analysis, evaluation, and/or consideration of any bids concerning Washington Mutual (including Citigroup’s bid), including whether or not to open a new round of bidding,” (Document Request 20).

The Banks should not be forced to search for documents concerning (1) communications between JPMC and third parties, including the media, ratings agencies or investors; (2) an agreement between JPMC and Washington Mutual concerning disclosure of non-public or confidential information; (3) Citigroup’s bid for Washington Mutual; or (4) the FDIC’s analysis of bids for Washington Mutual, just to name a few. The Banks should not be required to expend resources to search for documents that are readily available from other sources.

The Debtors have not tailored the Document Requests to the Banks' actions with respect to Washington Mutual, or to the type of information that reasonably could be considered to be in the Banks' possession. The Banks should not be burdened with producing documents that are within the public domain or within the control of the other "Knowledgeable Parties" from which the Debtors seek documents. *See Clearview Concrete Prods., Inc.*, No. 79-2511, 1980 Bankr. LEXIS 4592, *12 (E.D.N.Y. Aug. 21, 1980) (a Rule 2004 exam should not be used to discover information that is a matter of public record, equally accessible to all parties).

C. The Document Requests Demand Documents That Are Not Related to the Bankruptcy Case Pending Before This Court.

Bankruptcy Rule 2004 permits the examination of any entity only related to the "acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate." Bankruptcy Rule 2004(b). Rule 2004 grants parties engaged in bankruptcy proceeding a broad right of discovery, which is not permitted in adversary proceedings. The Debtors have conceded that discovery under the rules applicable to adversary proceedings is more appropriate for their requests about information related to JPMC by serving the Banks with additional requests "related to the adversary proceeding." (*See Exhibit A.*) Despite their concession, the Debtors' attempt to circumvent the protections guaranteed to third-parties under the Federal Rules of Civil Procedure—such as Rule 45, providing protections to third-parties and recovery of costs related to production of documents pursuant to a subpoena—by attempting to use Rule 2004 of the Bankruptcy Code.⁵

⁵ Rule 45(c)(2)(B)(ii) requires the Court to "protect a person who is neither a party nor a party's officer from significant expense resulting from compliance" with a subpoena. Fed. R. Civ. P. 45(c)(2)(B)(ii). Where a third-party incurs legal fees for compliance with a subpoena to produce documents, the party benefiting from the discovery may be ordered to pay all or part of those fees or expenses. *In re First American Corp.*, 184 F.R.D. 234, 240-241 (S.D.N.Y. 1998); *Kisser v. Coalition for Religious Freedom*, No. 95-0174, 1995 U.S. Dist. LEXIS 14548, *3-4 (E.D. Pa. Oct. 2, 1995).

However, even under Rule 2004 standard, many of the Document Requests seek information outside of Rule 2004's scope.

The Document Requests that seek information outside of the scope of Rule 2004 are Document Requests 2, 8, 11, and 16. Moreover, each of the Document Requests, as issued to the Banks, seeks information outside the scope of Rule 2004, because it demands production of documents created over an extraordinarily long time period, during the vast majority of which the Banks were not in contact with Washington Mutual, JPMC, or any of the other "Knowledgeable Parties" in regard to any of the issues presented in the Debtors' bankruptcy case. Therefore, the Documents Requested by the Debtors seek information outside the scope of Rule 2004.

Document Request 2 seeks "All documents concerning any Washington Mutual board of directors meetings attended by You." The Banks were willing to produce documents containing the information sought in this Document Request to the extent that they related to JPMC—the purported subject of the Document Requests. However, all other documents containing the Banks' information about Washington Mutual board of director meetings are irrelevant to the Debtors' bankruptcy case and any potential claims the Debtors' estate might assert against JPMC, and are therefore not within the scope of Rule 2004.

Document Requests 8, 11, and 16, as discussed above, seek information about any of the Banks' due diligence, proposed or contemplated bids, or offers to merge with or invest in Washington Mutual. The Banks were willing to produce any actual bid, and any information that falls into the above categories, as such bids or other information relates to JPMC. Any other information sought within these categories of documents is not within the scope of Rule 2004, because it has no relation whatsoever to the Debtors' acts, conduct, property, or liabilities, or to the administration of the Debtors' estate. *See* Bankruptcy Rule 2004; *In re CIS Corp.*, 123 B.R.

at 490; *In re Continental Forge Co.*, 73 B.R. at 1007 (“While the purpose is broad, Rule 2004 is not without limits. The 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.”).

Furthermore, each of the Document Requests greatly exceeds the scope of a Rule 2004 examination, because the Document Requests seek information from January 1, 2007 to the present. *See* Subpoenas at Instruction 12. The Banks only contemplated a transaction with Washington Mutual for approximately two to three weeks in September 2008. Therefore, the Banks’ relevant documents span only that time period. In an abundance of caution and an attempt to be cooperative, the Banks offered to produce documents from July 1, 2008 to October 31, 2008. (*See Exhibit B.*) Any document outside of this time period is completely irrelevant to the Debtors’ bankruptcy case and to the administration of the Debtors’ estates, and therefore does not properly fall within the scope of a Rule 2004 examination. *See* Bankruptcy Rule 2004; *In re Continental Forge Co.*, 73 B.R. at 1007 (finding that the requested documents are outside the scope of Rule 2004 and that when determining the appropriate scope of Rule 2004 document requests: “Ultimately, the question is one of relevancy to the *pending action*”) (emphasis in original).

III. Rule 2004 Does not Authorize a Fishing Expedition for Documents Unrelated to the Debtors’ Bankruptcy Case.

Although the scope of Rule 2004 is broad, it is not unlimited. *In re CIS Corp.*, 123 B.R. at 490 (a third-party’s proprietary information that is unrelated to the bankruptcy case is outside the scope of Rule 2004 examinations); *In re Washington Mutual, Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009) (“There are, however, limits to the use of Rule 2004 examinations.”); *In re Continental Forge Co.*, 73 B.R. at 1007 (finding a company’s proprietary information not within the scope of a Rule 2004 examination). A Rule 2004 examination cannot “stray into matters

which are not relevant to the basic inquiry” of the bankruptcy case. *In re Washington Mutual, Inc.*, 408 B.R. at 50 (quoting *In re Table Talk, Inc.*, 51 B.R. 143, 145 (Bankr. D. Mass. 1985)). Nor can a Rule 2004 examination be used to compel the production of proprietary, privileged, or confidential information that is not relevant to the Debtors’ bankruptcy case. *In re Continental Forge Co.*, 73 B.R. at 1006 (“Rule 2004 is not intended to be used as a vehicle for gathering confidential information for which no reasonable need is shown.”); *In re Wilcher*, 56 B.R. at 434 (“It is clear that Rule 2004 may not be used as a device to launch into a wholesale investigation of a non-debtor’s private business affairs.”). Because the Debtors seek information that is proprietary, privileged and confidential, and is not related to the issues raised in Debtors’ bankruptcy case, the Document Requests seek information that is outside of the scope of Rule 2004.

The Debtors assert in the Motion that “because the Knowledgeable Parties [including the Banks] had dealings with the Debtors or have information relevant to potential valuable estate claims based on JPMC’s alleged wrongdoings, they are subject to examination under Bankruptcy Rule 2004.” (Debtors’ Mot. at p. 18.) Even if true, this statement does not end the inquiry. The “Knowledgeable Parties” are only subject to examination under Rule 2004 to the extent that the scope of the examination falls within the confines of Rule 2004. In other words, the Banks might be subject to a Rule 2004 examination based on what they know about issues relevant to the Debtors’ bankruptcy case and the Debtors’ claims against JPMC, but they are not subject to a Rule 2004 examination that requires the production of information outside of this scope— information either outside of the Banks’ possession, or irrelevant to the Debtors’ bankruptcy case and the Debtors’ claims against JPMC. This information even falls outside of the broad scope of Rule 2004. See *In re Continental Forge Co.*, 73 B.R. at 1007; *In re Wilcher*, 56 B.R. at 434.

Although the Debtors state, *pro forma*, that “each of the proposed document requests properly seeks documents relating to the Debtors’ ‘acts, conduct, or property,’ or their ‘liabilities and financial condition’, and/or “any other matter which may affect the administration’ of their estates” (Debtors’ Mot. at p. 18), the Banks respectfully submit that the Court must look at the actual Document Requests to determine whether the Document Requests seek information outside the scope of Rule 2004. Even a cursory examination of the Document Requests demonstrates that they seek documents from the Banks that far exceeds the scope of a proper Rule 2004 examination. See *In re CIS Corp.*, 123 B.R. at 490; *In re Continental Forge Co.*, 73 B.R. at 1006-07.

IV. The Banks Remain Willing to Produce Documents Within a Limited Scope

Alternatively, if the Court determines that some production is warranted under Rule 2004, the Banks respectfully request that the Court limit the Debtors’ Document Requests as proposed in the Banks’ Suggested Limited Scope of Document Requests, attached hereto as **Exhibit F**. The Banks object to the production of documents to the extent that the information sought: (1) is not within the control of the Banks; (2) contains the Banks’ proprietary, privileged and/or confidential information; and/or (3) is not related to the acts, conduct, or property or to the liabilities and financial condition of the Debtors, will not have any effect on the administration of the Debtors’ estate, and therefore falls outside the scope of a proper Rule 2004 examination.

CONCLUSION

The Debtors’ Motion for a Rule 2004 examination should be denied because it seeks production from the Banks of documents that: (1) contain proprietary, privileged, and confidential information, and the Banks’ attorney-client communications and attorney work-product; (2) are not within the Banks’ control; and/or (3) are simply outside the scope of a proper

Rule 2004 examination because they are unrelated to the Debtors' bankruptcy case pending before this Court.

Alternatively, should this Court decide that some production is warranted under Rule 2004, the Banks' respectfully request that the Court limit the Document Requests contained in the Subpoena in accordance with the Banks' Suggested Limited Scope of Document Requests, attached hereto as **Exhibit F**. The Banks similarly request that the Court limit the documents requested by the Debtors' to exclude that information that is subject to protection under the attorney-client privilege and attorney work-product doctrines, and the Banks' proprietary, privileged, confidential and trade secret information pursuant to Bankruptcy Rule 9018.

Further, the Banks respectfully request this Court to award costs and attorneys fees expended in responding to the Motion and in producing any documents pursuant to the Subpoenas.

Dated: January 15, 2010
Wilmington, Delaware

Respectfully Submitted,

/s/ Richard W. Riley

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ATTORNEYS FOR THE TORONTO-DOMINION
BANK AND TD BANK, N.A.

EXHIBIT A

November 9, 2009 Email between E. Parness and A. Bono

Bono, Alexander

From: Evan Parness [evanparness@quinnemanuel.com]
Sent: Monday, November 09, 2009 4:45 PM
To: Bono, Alexander
Subject: RE: WMI Rule 2004 Requests to TD Bank
Attachments: WMI Requests to TD Bank re Adversary Proceedings.pdf

Hi Alex,

Good speaking with you as well. As discussed, attached please find a copy of Debtors' Requests related to the JPMC Adversary Proceeding. Please advise whether TD Bank will voluntarily produce in response to these requests as well.

Thanks,
Evan

From: Bono, Alexander [mailto:ABono@duanemorris.com]
Sent: Monday, November 09, 2009 4:22 PM
To: Evan Parness
Subject: RE: WMI Rule 2004 Requests to TD Bank


Hi Evan-

Good speaking with you today. My contacts are below.

As discussed, I represent TD Bank regarding your client's Rule 2004 requests; but, I need to get my arms around this. Thank you for sending the requests.

I'll confer with my client and get back to you promptly.

Regards, Lex.



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From: Evan Parness [mailto:evanparness@quinnemanuel.com]
Sent: Monday, November 09, 2009 4:05 PM
To: Bono, Alexander
Subject: FW: WMI Rule 2004 Requests to TD Bank

Hi Lex,

Here is the e-mail I sent Angela Willey at TDBank concerning WMI's Rule 2004 Requests to TDBank.

Best,
Evan

From: Evan Parness
Sent: Tuesday, October 27, 2009 5:18 PM
To: 'angela.willey@tdbanknorth.com'
Cc: Adam Abensohn
Subject: WMI Rule 2004 Requests to TD Bank

Dear Angela,

I write to follow-up on our telephone conversation. As discussed, we represent Debtors Washington Mutual Inc. and WMI Investment Corporation in the Washington Mutual bankruptcy proceeding in the United States Bankruptcy Court for the District of Delaware, *In re Washington Mutual, Inc. et. al*, No. 08-12229 (MFW). Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure, Debtors plan to serve TD Bank with document requests in connection with Debtors' investigation into possible business tort claims against JPMorgan Chase. Per Local Rule 2004-1 of the United States Bankruptcy Court for the District of Delaware, attached please find Debtors' requests to TD Bank. Please inform us directly or, if you are represented by counsel, through your attorney, by Tuesday, November 3, 2009, whether TD Bank will produce documents responsive to the attached requests and we will arrange a mutually agreeable date, time, place and scope of the production. If TD Bank is not willing to voluntarily produce the requested documents or we do not hear from you by November 3, Debtors will seek an order from the Court directing TD Bank to produce the requested documents.

Thank you for your attention to this matter, and, if you have any questions or would like to schedule a telephonic or in-person meeting to discuss further, please do not hesitate to call me at (212) 849-7368, or my colleague Adam Abensohn at (212) 849-7229.

Regards,

Evan Parness
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New York, NY 10010
Direct: (212) 849-7368
Main Phone: (212) 849-7000
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Web: www.quinnemanuel.com

For more information about Duane Morris, please visit <http://www.DuaneMorris.com>

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EXHIBIT B

November 19, 2009 Email Between A. Bono and E. Parness

Bono, Alexander

From: Bono, Alexander
Sent: Thursday, November 19, 2009 11:45 AM
To: 'Evan Parness'
Cc: Ash, Dana J.
Subject: WMI/ TD Bank and The Toronto-Dominion Bank

Hi Evan –

This confirms our discussion today:

I represent two separate entities that have responsive documents: The Toronto-Dominion Bank; and TD Bank, N.A.

My clients will cooperate on debtors' document requests under Bankruptcy Rule 2004 and in the Adversary Proceeding, as follows:

- **Subpoenas.** My clients prefer to receive subpoenas, rather than to volunteer data.
 - I'm authorized to accept service of the subpoenas for each client.
 - You expect to issue subpoenas out of SDNY for The Toronto-Dominion Bank, and DDel for TD Bank.
 - I'll send you NY and Delaware addresses .
- **Governing time.** July 1, 2008 to October 31, 2008.
 - Debtors reserve the right to seek to expand later.
- **Protected information.** Confidential; privileged, proprietary, trade secret and other research, development or commercial information, and otherwise protected information – there may be some highly sensitive, non-public data that's potentially responsive.
 - My clients reserve the right to object to production of such protected data, and because it would be unreasonably burdensome and not reasonable calculated to lead to the discovery of admissible evidence.
 - You will advise about a proposed protective order.
 - We'll work in good faith and without prejudice to resolve any protected information issues.
- **Time for Production** -- My clients have begun gathering responsive data and are willing to make a rolling production after the data are reviewed.
 - My clients may, however, be unable to respond completely within the 30 day time period discussed previously.
 - They reserve the right to object to time as unreasonably burdensome.
 - We'll work in good faith and without prejudice to resolve any timing issues.
- **Other Objections.** My client reserve the right to assert objections.
 - We'll work in good faith and without prejudice to resolve any issues on such objections.

Thank you for your cooperation.

Regards, Lex.

Duane Morris	
www.duanemorris.com	
Alexander D. Bono Partner	
Duane Morris LLP 30 South 17th Street Philadelphia, PA 19103-4196	P: 215.979.1181 F: 215.689.4472 C: 215.292.7215
E-MAIL BIO VCARD	

EXHIBIT C

December 15, 2009 Email between E. Parness and A. Bono

Bono, Alexander

From: Evan Parness [evanparness@quinnemanuel.com]
Sent: Tuesday, December 15, 2009 11:00 AM
To: Bono, Alexander
Subject: Debtors' Rule 2004 Motion
Attachments: WaMu Ex 1-2.PDF; WaMu Ex 3.pdf; WaMu Ex 4-7.pdf; WaMu Ex 8-12.PDF; WaMu Ex 13-18.PDF; WaMu Ex 19-29.PDF; WaMu Ex 30-33.pdf; WaMu Notice.pdf; WaMu 2004 Motion.PDF

Dear Lex,

As previously discussed, we represent Debtors Washington Mutual Inc. and WMI Investment Corporation in the Washington Mutual bankruptcy proceeding in the United States Bankruptcy Court for the District of Delaware, *In re Washington Mutual, Inc. et. al*, No. 08-12229 (MFW). TD Bank and Toronto-Dominion Bank were included in Debtors' Motion For an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of Witnesses and Production of Documents from Knowledgeable Parties, which was just filed electronically. TD Bank and Toronto-Dominion Bank should be receiving a hand-delivered copy of the motion. As a courtesy, I wanted to provide you the attached copy. Of course, Debtors are willing to continue to work with TD Bank and Toronto-Dominion Bank and will withdraw the motion as to TD Bank and Toronto-Dominion Bank before the hearing date if we are able to reach resolution on the scope of a production in response to Debtors' Rule 2004 Requests.

Regards,

Evan

Evan Parness
Quinn Emanuel Urquhart Oliver & Hedges, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
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EXHIBIT D

January 8, 2010 Email between A. Bono and E. Parness

Bono, Alexander

From: Bono, Alexander
Sent: Friday, January 08, 2010 7:04 AM
To: 'evanparness@quinnemanuel.com'
Subject: Re: Confidentiality Stipulation and Protective Order

Thanks, Evan.

We'll review and respond soon.

Also, we'll send a proposal on subpoenas to T-D and TD Bank; and, this confirms with thanks that, if we unable to work out subpoena scope issues, then my clients have to Jan. 15, 2010 to respond to the 2004 Motion.

Finally, we'll follow up on acceptance of subpoenas without a court order.

Regards, Lex.

Alexander D. Bono | Duane Morris LLP
P: 215-979-1181 | C: 215-292-7215

From: Evan Parness <evanparness@quinnemanuel.com>
To: Bono, Alexander
Sent: Thu Jan 07 16:40:41 2010
Subject: Confidentiality Stipulation and Protective Order

Hi Lex,

Attached please find a copy of the confidentiality stipulation and protective order submitted to the Delaware Bankruptcy Court.

Thanks,
Evan

Evan Parness
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EXHIBIT E

January 11, 2010 Email between C. Beideman and E. Parness

Beideman, Catherine E.

From: Beideman, Catherine E.
Sent: Monday, January 11, 2010 3:23 PM
To: 'evanparness@quinnemanuel.com'
Cc: Bono, Alexander
Subject: Washington Mutual Subpoenas
Attachments: Scope Limitations for Washington Mutual Subpoenas.DOCX

Evan,

As we discussed earlier this afternoon, I am sending you a document with suggested scope limitations for Washington Mutual's Document Requests. The document also contains limitations on the definitions of Toronto-Dominion Bank and TD Bank, and the time covered by these requests, the limitation on applicable time being something that I believe you and Lex agreed upon last week.

We would also like to emphasize that in agreeing to produce these documents to Washington Mutual, Toronto-Dominion Bank and TD Bank reserve their rights to assert any privilege or protection over any document to the extent that it is confidential, privileged, constitutes a trade secret or proprietary information, constitutes attorney work product, or is subject to any other legal privilege or protection.

As we discussed earlier, Toronto-Dominion Bank and TD Bank would be happy to enter into a consent order providing for the production of these documents, which could then be signed by the bankruptcy court, resulting in the withdraw of Washington Mutual's Motion as to Toronto-Dominion Bank and TD Bank. Please advise if this procedure is acceptable.

Please advise, also, if Washington Mutual agrees to the limitations on the definitions, applicable time, and scope of the Document Requests, as modified in the attached document.

Please do not hesitate to contact me with any questions.

Thanks,
Kate

Catherine E. Beideman
Associate

Duane Morris LLP
30 South 17th Street
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EXHIBIT F

Banks' Suggested Limited Scope of Document Requests

Limited Scope for Washington Mutual's Requests for Production of Documents

DEFINITIONS

31. "TD Bank" means TD Bank, N.A., and all of its predecessors and successors in interest, as well as all of its partners, ~~parents,~~ subsidiaries, divisions, and affiliates; any of their present and former officers, directors, ~~or employees, representatives, agents or attorneys;~~ and ~~any other Person acting on behalf of any of them.~~

33. "Toronto-Dominion Bank" means The Toronto-Dominion Bank and all of its predecessors and successors in interest, as well as all of its partners, ~~parents,~~ subsidiaries, divisions, and affiliates; any of their present and former officers, directors, ~~or employees;~~ ~~representatives, agents or attorneys;~~ and ~~any other Person acting on behalf of any of them.~~

INSTRUCTIONS

12. Unless otherwise specified, the time period covered by these requests is from ~~January 1, 2007 to the present~~ **March 1, 2008 to October 31, 2008** and shall encompass all documents and information relating in whole or in part to such period, or to events or circumstances during such period, even though dated, predated, generated or received prior to that date.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All documents concerning, or communications with, Washington Mutual with respect to ~~any entity's~~ **JPMC's** efforts to acquire all or part of Washington Mutual, and/or any of its substantial assets.

2. All documents concerning any Washington Mutual board of directors meetings attended by You **where JPMC was discussed.**

3. All documents concerning any communications with or among JPMC, ~~the FDIC,~~ ~~the media, ratings agencies, investors, and/or third party~~ regarding Washington Mutual.

4. All documents concerning Washington Mutual's efforts to raise capital and/or locate a potential merger partner or acquiror, including without limitation (1) any actual or possible acquisition, purchase, or investment by any entity of any stake in or portion of Washington Mutual; (b) any efforts to raise capital through the issuance of debt securities in December 2007 (including the issuance of approximately \$3 billion of debt securities on or about December 17, 2007); (c) any efforts to raise capital and/or locate a potential merger partner or acquiror during the first quarter of 2008; (d) TPG's investment of about \$7.2 billion into Washington Mutual on or about April 7, 2008; and/or (e) any efforts to raise capital and/or locate a potential merger partner or acquiror in September 2008, including efforts by Goldman Sachs and/or Morgan Stanley on Washington Mutual's behalf. **[Overbroad, will only produce documents related to JPMC]**

5. All documents concerning any actual or possible merger ~~with~~ **between JPMC and** Washington Mutual, or any actual or possible purchase or investment by ~~any entity~~ **JPMC** of any stake in or portion of Washington Mutual.

6. All documents, including communications with or among ~~Washington Mutual, JPMC, the FDIC, any Government Unit and/or any third party,~~ concerning Your and/or ~~any other entity's~~ **JPMC's** interest in merging with, investing in, or purchasing any stake in or portion of Washington Mutual.

7. All documents concerning JPMC's knowledge of Your ~~and/or any other entity's~~ interest in potentially merging with, investing in, or purchasing any stake in or portion of Washington Mutual.

8. ~~All documents concerning any~~ **Any** actual, potential, or contemplated bid, term sheet, offer, or other expression of interest from You ~~and/or any other entity~~ to merge with,

invest in, or purchase any stake in or portion of Washington Mutual, **and any other document concerning JPMC related to any actual bid, term sheet, offer, or other expression of interest from You to merge with, invest in, or purchase any stake in or portion of Washington Mutual.**

9. All documents concerning Washington Mutual's consideration or evaluation or any bid, term sheet, offer, or other expression of interest from You ~~and/or any other entity~~ to merge with, invest in, or purchase any stake in or portion of Washington Mutual.

10. All documents concerning Your ~~and/or any other entity's~~ JPMC's access to Washington Mutual information **to the extent known.**

11. All documents concerning any due diligence concerning Washington Mutual performed by You or any other entity, **as it related to JPMC.**

12. All documents concerning Washington Mutual provided to You by JPMC, ~~the FDIC, and/or any third party.~~

13. All documents concerning JPMC's disclosure of any Washington Mutual information, or disclosure of any information about Washington Mutual, to You, ~~any Governmental Unit, the media, ratings agencies, investors, and/or any other third parties.~~

14. All documents concerning any effect JPMC's disclosure of any Washington Mutual information, or disclosure of any information about Washington Mutual had on any actual, potential, or contemplated bid, term sheet, offer, or other expression of **Your** interest to merge with, invest in, or purchase any stake in or portion of Washington mutual. **[We will produce this if it is in our possession, we will have to check.]**

15. All documents concerning any agreement between JPMC and Washington Mutual concerning access to and/or disclosure of non-public, confidential or proprietary information in

connection with a potential transaction in which JPMC would acquire, merge with, or invest in Washington Mutual. **[We will produce this if it is our possession, we will have to check.]**

16. All documents concerning the FDIC's bid process for Washington Mutual, including (a) documents sufficient to demonstrate when You ~~and/or any entity~~ first became aware of the FDIC's bidding process for Washington Mutual, (b) Your ~~and any other entity's~~ consideration of whether to submit a bid, and/or (c) all documents concerning any draft, potential or actual bids submitted to the FDIC. **[We will produce information from (a) and (b) if it is in our possession, will only produce information in response to (c) to the extent it is not proprietary, privileged or confidential.]**

17. All documents concerning any effort by JPMC to negotiate, discuss, participate, or work with the FDIC "to design bidding parameters that would suit JPMC's needs, and which would rule out other potential bidders" and/or "to sell assets of Washington Mutual without an adequate or fair bidding process." **[Overbroad, will only produce documents related to JPMC]**

18. All documents concerning Citigroup's bid for Washington Mutual submitted to the FDIC on or about September 24, 2008. **[Overbroad, will only produce documents related to JPMC]**

19. All documents concerning the following statement, in form or in substance, from Citigroup to the FDIC: "We recognize that our approach does not conform to the bidding instructions for Washington Mutual. We believe, however, that our suggested approach will in fact provide greater systematic ability and lower losses than would conforming bid . . . [W]e would expect that, consistent with the FDIC's statutory obligation under the 'least-cost' test, this

construct would be offered to all potential bidders in a new round of bidding.” **[Overbroad, will only produce documents related to JPMC]**

20. All documents concerning the FDIC’s analysis, evaluation, and/or consideration of any bids concerning Washington Mutual (including Citigroup’s bid), including whether or not to open a new round of bidding. **[Overbroad, will only produce documents related to JPMC]**

21. All documents concerning the potential for WMB to be seized by OTS and the decision or plans to seize WMB, as well as the potential for the FDIC to be appointed receiver of WMB and the decision to place WMB into receivership with the FDIC, including all documents concerning any communication from FDIC officials to JPMC in early September 2008, to inform JPMC in words or substance that “the FDIC was carefully monitoring [WMB] and that a seizure of its assets was likely” and that the FDIC “would want to immediately auction of [WMB’s] assets.” **[Overbroad, will only produce documents related to JPMC]**

22. All documents concerning OTS’s determination that “adverse publicity” caused WMB to “suffer[] significant cash outflows.” **[Overbroad, will only produce documents related to JPMC]**

23. All documents concerning JPMC’s access to Washington Mutual data, including but not limited to (a) JPMC due diligence of Washington Mutual and/or (b) any effort by JPMC to place “moles” at Washington Mutual for the purpose of obtaining confidential Washington Mutual information, which JPMC used “to bargain and work with federal regulators for the seizure and sale of Washington Mutual’s assets,” including JPMC’s placement of former JPMC employees at Washington Mutual, including but not limited to, the placement or employment of Stephen J. Rotella, Steve Fortunato, Taj Bindra, John Berens, Youyi Chen, and Bill Murray. **[Overbroad, will only produce documents related to JPMC]**

24. All documents concerning JPMC's interest in any potential Transaction and any attempt by JPMC to engage in any potential Transaction, including but not limited to any actual, potential, or contemplated bid or offer by JPMC to merge with, invest in, or purchase Washington Mutual, including (a) Washington Mutual's rejection of JPMC's offer to merge with, invest in or acquire Washington Mutual in or about April 2008, (b) capital contributions or investments received by JPMC in connection with any potential Transaction in or about September 2008, and/or (c) any agreement or arrangement with or among JPMC and any Governmental Unit, including but not limited to the FDIC, OTS, OCC, the Federal Reserve, the EC, and/or the U.S. Department of the Treasury, concerning any potential transaction in which JPMC might or did acquire WMB, or any stake or portion of WMB. **[Overbroad, will only produce documents related to JPMC]**

25. All documents concerning any potential or actual regulatory and/or supervisory actions, rating, or examinations directed toward or taken with respect to Washington Mutual by any Governmental Unit, including the FDIC, OTS, OCC, the U.S. Department of the Treasury, the SEC, and Federal Reserve, including but not limited to (a) OTS's decision to initiate discussions about memorandums of Understanding with WMI and WMB, (b) the Memorandums of Understanding OTS issued to WMI and WMB on or about September 7, 2008, (c) any regulatory classification of Washington Mutual by OTS, including without limitation any decision by OTS to classify WMB as a "problem institution," and/or (d) U.S. Treasury Secretary Henry Paulson's "RTC plan" concerning Washington Mutual. **[Overbroad, will only produce documents related to JPMC]**

26. All documents concerning Washington Mutual's responses or potential responses to any regulatory and/or supervisory actions, rating, or examinations by any Governmental Unit,

including the FDIC, OTS, OCC, the U.S. Department of the Treasury, SEC, and Federal Reserve. **[Overbroad, will only produce documents related to JPMC]**

27. All documents concerning any meetings and/or communications between JPMC and any Government Unit, including the FDIC, OTS, OCC, the U.S. Department of the Treasury, SEC, and Federal Reserve, concerning Washington Mutual including (a) any meetings on or about march 28, 2008, (b) any meetings between JPMC and the U.S. Department of the Treasury in April 2008, and/or (c) any meetings on or about July 18, 2008. **[Overbroad, will only produce documents related to JPMC]**

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

In re:

WASHINGTON MUTUAL, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 08-12229 (MFW)

Jointly Administered

Hearing Date: Jan. 28, 2010 at 4:00 p.m. (ET)

Objection Deadline: Jan. 15, 2010 at 4:00 p.m. (ET)

**CERTIFICATE OF SERVICE REGARDING OBJECTION OF THE THIRD-PARTIES
TORONTO-DOMINION BANK AND TD BANK, N.A. TO THE DEBTORS' MOTION
FOR AN ORDER PURSUANT TO BANKRUPTCY RULE 2004 AND LOCAL
BANKRUPTCY RULE 2004-1 DIRECTING THE EXAMINATION OF WITNESSES
AND PRODUCTION OF DOCUMENTS FROM KNOWLEDGEABLE PARTIES**

I, Richard W. Riley, hereby certify that I caused true and correct copies of the *Objection to the Motion of the Debtors' for an Order pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004.1 Directing the Examination of Witnesses and Production of Documents from Knowledgeable Parties* (the "**Motion**") to be served on January 15, 2010 upon the parties listed below in the manner indicated:

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¹ Debtors in these chapter 11 cases and the last four digits of each of the Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395).

BY HAND DELIVERY

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Dated: January 15, 2010
Wilmington, Delaware

/s/Richard W. Riley

Richard W. Riley