IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
WASHINGTON MUTUAL, INC., *et al.*,[1]	)	Case No. 08-12229 (MFW)
Debtors.	)	Jointly Administered
	)	**Re: Docket Nos. 1997, 2161, 2164, 2168, 2169, 2170, 2171, 2175, & 2200**

DEBTORS' REPLY TO THE OBJECTIONS OF THE KNOWLEDGEABLE PARTIES TO 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

Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment," and with WMI, "Debtors"), through their undersigned counsel, hereby file this reply (the "Reply") to the objections of the Knowledgeable Parties to Debtors' Motion (the "Motion") pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Local Rule 2004-1 of the United States Bankruptcy Court for the District of Delaware seeking the entry of an order directing the examination (the "Requested Examination") of the Knowledgeable Parties and respectfully represent:

PRELIMINARY STATEMENT

1. The Knowledgeable Parties have failed to identify any reason that the Court should reach a different conclusion here than it reached previously when it granted Debtors' motion seeking Rule 2004 discovery of JPMC.[2] Debtors have filed their present motion for the identical

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

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

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purpose that the Court authorized in its June 24 Order – specifically, to explore and uncover potential business tort claims against JPMC that may be available for the benefit of all stakeholders. As the Court has already recognized, the Requested Examination is therefore aligned with the "legitimate goals of Rule 2004 examinations" – "'discovering assets, examining transactions, and determining whether wrongdoing has occurred.'" June 24 Opinion at 9 (quoting *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002)); *In re Table Talk Inc.*, 51 B.R. 143, 145 (Bankr. D. Mass. 1985) (Bankruptcy Rule 2004 examinations are allowed for the purpose of discovering assets and unearthing frauds). Debtors have been pursuing those legitimate goals in their Court authorized examination of JPMC, and it is essential that Debtors be permitted to continue their investigation by examining the Knowledgeable Parties on the same subject matter.

2. A number of Knowledgeable Parties recognize that Debtors are entitled to their requested relief, and have therefore merely filed 'reservations of rights' whereby they preserve the option of interposing 'objections' to Debtors' individual document requests once Debtors' Motion is granted and subpoenas are issued. Debtors agree with these respondents that the Rule 2004 Motion should be granted, and that any disputes concerning the scope of production, to the extent such disputes cannot otherwise be resolved, should be presented to the Court only once the requested subpoenas have been served. The remaining respondents reject this well-established protocol and oppose Debtors' Motion outright, relying on a variety of faulty arguments, including a number of which the Court already rejected when it granted Debtors' Rule 2004 Motion directed to JPMC. Those arguments are no more persuasive now than they were previously.[3]

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[3] After Debtors filed their Motion, they reached agreement with a number of the Knowledgeable Parties for the voluntary production of documents. Debtors have therefore withdrawn their Motion as to those respondents (*i.e.*, Moody's, the Department of Treasury, and the Federal Reserve). As noted in text, there are other respondents – specifically, Wells Fargo and S&P – that have filed 'reservations of rights' in which they do not oppose Debtors' Rule 2004 Motion, but

3. For instance, the FDIC-Receiver, joined by a number of other respondents, invokes the 'pending proceeding rule' and claims that Debtors are precluded from pursuing their requested Rule 2004 examination on grounds that they should instead seek discovery pursuant to the Federal Rules of Civil Procedure in the DC Action. But the Court has already rejected this argument. As the Court held in its June 24 Opinion, Debtors' Rule 2004 Examination of JPMC "seeking to discover evidence regarding JPM[C]'s alleged malfeasance prior to the seizure and sale of WMB" is unrelated to the DC Action, in which Debtors assert claims against the FDIC "for dissipation of WMB's assets and the taking of Debtors' property without just compensation." June 24 Opinion, at 17 n. 14. Debtors' proposed Rule 2004 Examination of the Knowledgeable Parties is directed to the identical business tort claims underlying the Rule 2004 examination of JPMC. With the Court already having determined that the DC Action does not overlap with that investigation, the 'pending proceeding' rule does not apply.

4. There are several additional reasons that any effort to apply the pending proceeding rule in this action must be rejected. The court in the DC Action has stayed those proceedings pending the outcome of this bankruptcy. Thus, discovery is not available in the DC Action, which means that one of the fundamental prerequisites for application of the pending proceeding rule – *i.e.*, an alternative forum in which Debtors can pursue their investigation – is absent. *See In re Int'l Fibercom, Inc.*, 283 B.R. 290, 292 (Bankr. D. Ariz. 2002) (holding that pending proceeding rule was inapplicable when discovery was unavailable in other litigation due to a stay). Furthermore, aside from the FDIC-Receiver and FDIC-Corporate, none of the respondents are

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merely reserve their rights to object to individual document requests once subpoenas are issued. Seven of the Knowledgeable Parties with whom Debtors were unable to reach a voluntary agreement did not file an objection to Debtors' Motion. This Reply responds to those Knowledgeable Parties that have actually opposed Debtors' Motion – FDIC-Receiver, FDIC-Corporate, OTS, FHLB-SF, SEC, PwC, and TD Bank.

even parties to the DC Action, and none would have standing to invoke the pending proceeding rule even if it were otherwise available.

5. The FDIC-Receiver also complains that Rule 2004 examination would impose an undue burden on itself and other third parties. But it is settled that Debtors are entitled to seek and obtain Rule 2004 discovery from third parties. *Snyder v. Society Bank*, 181 B.R. 40, 41 (S.D.Tex. 1994), *aff'd,* 52 F.3d 1067 (5th Cir. 1995); *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 432 (S.D.N.Y. 1993), *aff'd,* 17 F.3d 600 (2d Cir. 1994); *In re Ecam Publ'ns, Inc.*, 131 B.R. 556, 559 (Bankr. S.D.N.Y. 1991). Furthermore, any suggestion by the FDIC-Receiver that Debtors are pursuing an improper "litigation tactic" by seeking Rule 2004 discovery rather than by filing a business tort complaint or "taking over" the *American National* Action rests on a fundamental misunderstanding of Rule 2004. As this Court recognized previously, Debtors are fulfilling their obligations as estate fiduciaries by employing Rule 2004 as a pre-litigation tool for identifying potentially valuable claims on behalf of the estates.

6. The objections presented by the remaining respondents are misguided as well. A number of government agency respondents argue, for instance, that Debtors are barred from seeking discovery until those agencies have taken final action on Debtors' pending administrative requests. The courts have repeatedly held, however, that government agencies are not immune from court ordered discovery, and that litigants need not await formal processing of an agency request in order to obtain documents. *See, e.g., Forstmann Leff Assocs., Inc. v. Am. Brands, Inc.*, No. 99 Civ. 4485 (JMC), 1991 WL 168002, at *1-2 (S.D.N.Y. Aug. 16, 1991); *FDIC v. Wise*, 139 F.R.D. 168,170 n. 2 (D. Colo. 1991). It is apparent from the Regulators' objections, moreover, that they have no intention of producing the requested documents. It would therefore be an empty formality

for Debtors to wait indefinitely for a more "formal" agency announcement, and there is no legal requirement that they do so.

7. As set forth in Debtors' Motion, the documents that JPMC has thus far produced in response to Debtors' Rule 2004 examination has confirmed that the Knowledgeable Parties possess information necessary to Debtors' investigation into serious allegations concerning JPMC's actions prior to the seizure and sale of WMB. The Court has already authorized that investigation, through its order granting Debtors' Rule 2004 Motion as to JPMC, and Debtors cannot complete their work, which is essential to the estates, without obtaining similar authorization to examine the Knowledgeable Parties. A number of the Knowledgeable Parties recognize this and do not oppose Debtors' Motion. Those respondents that have filed objections have failed to identify any basis for avoiding Rule 2004 examination, and Debtors are entitled to their requested relief.

DISCUSSION

I. THIS COURT HAS ALREADY DETERMINED THAT DEBTORS' REQUESTED EXAMINATION IS DISTINCT FROM THE DC ACTION AND THAT THE "PENDING PROCEEDING" RULE THEREFORE DOES NOT APPLY

8. The FDIC-Receiver invokes the "pending proceeding rule" and argues that Rule 2004 relief is precluded by the DC Action. In advancing this position, the FDIC-Receiver acknowledges that the Court previously rejected a similar argument by JPMC, but claims that the Court reached that result only because JPMC, as of the time that the Court issued its June 24 Order, was not yet a party to the DC Action. (FDIC-Receiver Obj. ¶ 21.) The FDIC-Receiver's explanation of the Court's ruling is wrong. In fact, the Court specifically held that, even if JPMC were a party to the DC Action (as it is now), Rule 2004 discovery would still be warranted:

> With respect to the business tort claims, even if JPM successfully intervened in the DC Action, **the requested 2004 examination does not seek to discover evidence related to the DC Action**. The Debtors seek to discover evidence regarding JPM's alleged malfeasance prior to the seizure and sale of WMB. JPM argues that discovery of this evidence is related to the Debtors'

> alleged causes of action against the FDIC for dissipation of WMB's assets and the taking of Debtors' property without just compensation. However, these causes of action are premised on the FDIC's failure to maximize the value of the receivership's assets in the sale of WMB to JPM. Specifically, the Debtors assert the FDIC would have received a higher value through the liquidation of WMB than the sale to JPM. **The requested 2004 examination does not seek to discover evidence related to the hypothetical liquidation analysis implicated in the dissipation and takings causes of action asserted in the DC Action.**

(June 24 Opinion, at 17, n. 14 (emphasis added).) Thus, contrary to the FDIC-Receiver's suggestion, the Court did not reject the pending proceeding argument merely on the basis that JPMC, the respondent to Debtors' prior Rule 2004 Motion, was not a party to the DC Action. Rather, the Court rejected that argument for the added reason that the DC Action and Debtors' business tort investigation are directed to distinct claims. Thus, the Court has already flatly rejected the FDIC-Receiver's current contention that Debtors' claims in the DC Action "overlap" with the potential business tort claims that are now under investigation, and that ruling precludes any application of the pending proceeding rule here.

9. The Court's previous analysis was correct. Where the subject matter of the requested Rule 2004 examination is distinct from pending litigation, the "pending proceeding" rule does not apply to bar Rule 2004 discovery. *See Int'l Fibercom*, 283 B.R. at 293 (permitting requested discovery where it was not clear that all of the debtor's potential claims were the subject of pending litigation and that the proposed discovery was broader than the pending litigation and designed to uncover additional claims which was "precisely in line with the purpose of Rule 2004"); *In re M4 Enters., Inc.*, 190 B.R. 471, 475 (Bankr. N.D. Georgia 1995) (finding that where Rule 2004 investigation "specifically limits itself to avoid any overlap with issues in the adversary proceeding . . . the 'pending proceeding' rule finds no direct application to the present controversy by simple virtue of an ongoing adversary case existing"); *In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo.

1994) ("As long as the examinations involve only issues which are not directly or specifically part of the . . . pending adversary, the inquiry is permissible"). It is therefore dispositive that Debtors are seeking the Requested Examination from the Knowledgeable Parties for the identical reason that they sought similar discovery from JPMC – to investigate possible business tort claims against JPMC – and not in connection with the DC Action.

10. As detailed in Debtors' Motion, the discovery sought through the Requested Examination concerns possible misconduct by JPMC preceding the seizure and sale of WMB, including gaining access to WMI's confidential information in connection with JPMC's supposed interest in bidding for the company, improperly disclosing such information to third parties to cause market panic and foment a government seizure of the bank, and destroying a 119-year-old institution that once had more than $50 billion in market capital. The Requested Examination could potentially uncover claims that would require that Debtors prove that JPMC leaked confidential information to Rating Agencies, WaMu Suitors, Regulators, and WMB customers and potential customers, that such conduct harmed WaMu's standing in the marketplace and led to additional pressure from Regulators to sell to JPMC, and prevented Debtors from procuring a private equity investment or consummating a favorable business combination in advance of the government seizure of WMB. As the Court recognized, such claims are distinct from those protective claims asserted by Debtors in the DC Action, which are "premised on the FDIC's failure to maximize the value of the receivership's assets in the sale of WMB." June 24 Opinion, at 17 n. 14. Thus, for the same reasons that the Court authorized the Rule 2004 Examination of JPMC, the Court should permit the Requested Examination of the Knowledgeable Parties.[4]

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[4] In support of its pending proceeding argument, the FDIC-Receiver relies primarily on *Snyder v. Soc'y Bank*, 181 B.R. 40 (S.D. Tex. 1994). That case is easily distinguished. Unlike *Snyder*, in which the debtor sought discovery pursuant to Rule 2004 to "further its case" in a pending state court

11. Not only is Debtors' Rule 2004 Motion directed to different claims than those asserted in the DC Action, but the entire premise for the "pending proceeding" rule, *i.e.*, that equivalent discovery is available in an alternative forum, simply does not apply. The DC Action has been stayed pending the outcome of this bankruptcy, and no discovery is available in that action (and none will be available until these bankruptcy proceedings are concluded). *See* Jan. 7, 2010 DC Order, **Exhibit A**; *See Int'l Fibercom*, 283 B.R. at 291-93 (holding that pending proceeding rule was inapplicable when discovery was unavailable in other litigation due to a stay). Thus, while the FDIC-Receiver suggests that it is merely asking that this Court direct Debtors elsewhere, the reality is that the FDIC-Receiver is seeking to shut down Debtors' investigation entirely. Such a result would undermine the very purpose of Rule 2004, which is to enable Debtors to conduct an efficient investigation of potential claims on behalf of the estates. *Id.* at 293; *see also In re Dinubilo*, 177 B.R. 932, 941 (E.D.Cal. 1993) (noting that Rule 2004's function is to serve as a "'quick factual fix relative to the estate, its existence and location.'") (quoting *In re Silverman*, 36 B.R. 254, 259 (Bankr. S.D.N.Y. 1984)).

12. Finally, even if the "pending proceeding rule" were applicable here (and it is not), the only respondents that would be in a position to invoke it are the FDIC-Receiver and FDIC-Corporate. None of the remaining Knowledgeable Parties are party to the DC Action. *See* June 24 Opinion, at 11-12 ("'[E]ven after the trustee has commenced adversary proceeding(s), the trustee may conduct Rule 2004 examinations of entities which are not parties to or are not affected by the pending adversary proceeding(s)'. . . . Entities not affected by the adversary proceeding do not require the greater protections afforded under the Federal Rules, and the Trustee should be permitted to examine them under Rule 2004.'") (quoting *In re Buick*, 174 B.R. 299, 305 (D. Colo. 1994)); *In*

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action, the Requested Examination here is aimed at potential claims that, as discussed in text, this Court has already deemed distinct from the DC Action.

re Blinder, Robinson & Co., Inc., 127 B.R. 267, 275 (D. Colo. 1991)). Thus, the pending proceeding rule is inapplicable for at least two fundamental reasons: first, as the Court has already determined, Debtors' investigation into possible business torts by JPMC is distinct from the claims in the DC Action, and, second, several of the parties that are now seeking to invoke the pending proceeding rule have no possible standing to do so.

II. THE REQUESTED EXAMINATION IS PROPER AND IMPOSES NO UNDUE BURDEN ON THE KNOWLEDGEABLE PARTIES

13. The FDIC-Receiver, seemingly recognizing that Debtors' requests are directed to relevant information concerning possible business tort claims against JPMC, argues that the Rule 2004 Motion should nevertheless be rejected on grounds that it imposes "unnecessary burden and expense" on third parties. (FDIC-Receiver Opp. ¶¶ 1, 14-18.) This argument is fundamentally misguided, as third parties are routinely subject to Rule 2004 examination. *See, e.g.*, *Snyder*, 181 B.R. at 41 (Rule 2004 affords debtors "broad rights of examination of a third-party's records") (citing *Cameron v. United States*, 231 U.S. 710, 716 (1914)); *Ecam Publ'ns, Inc.*, 131 B.R. at 559 ("Third parties are subject to examination pursuant to Rule 2004 if they have knowledge of the debtor's affairs."); *Ionosphere Clubs,* 156 B.R. at 432 ("...any third party who can be shown to have a relationship with the debtor can be made subject to a Rule 2004 investigation"). As set forth in the Debtors' Motion, the information gathered thus far from JPMC confirms that the Knowledgeable Parties can be expected to possess significant information that may bear on whether Debtors have grounds to assert valuable business tort claims on behalf of the estates. Third party discovery is plainly available and appropriate to obtain such information. *Id.*

14. The FDIC-Receiver next suggests that Debtors are somehow pursuing an improper "litigation tactic" by conducting their business tort investigation through Rule 2004 examination, rather than by filing a business tort complaint or seeking to intervene in the *American*

National Action. (FDIC-Receiver Opp. ¶ 6.) Any suggestion that an investigation into potential business tort claims against JPMC is an improper subject for Rule 2004 examination, however, is foreclosed by the Court's decision authorizing Debtors to pursue such an investigation through their examination of JPMC. Furthermore, for the FDIC-Receiver to suggest that Debtors are somehow at fault for not rushing to bring these claims before their investigation is complete ignores (or misapprehends) one of the primary purposes of Rule 2004 – to afford debtors a mechanism for investigating potential claims on behalf of an estate prior to making any premature decision to assert a cause of action. *In re Recoton Corp.*, 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004) ("The purpose of a Rule 2004 examination is to assist a party in interest in determining the nature and extent of the bankruptcy estate, revealing assets, examining transactions and assessing whether wrongdoing has occurred.").

15. The FDIC-Receiver simply has no basis for its repeated innuendo that Debtors are in some way using Rule 2004 for an improper purpose. Quite the contrary, Debtors' decision to refrain thus far from bringing business tort claims against JPMC or seeking to intervene in the *American National* Action is evidence of Debtors' good faith and prudent efforts to responsibly and methodically maximize the value of the estates for the benefit of creditors. Rather than simply filing a business tort complaint, or seeking to commandeer the *American National* Action, Debtors relied on the allegations therein to initiate a Rule 2004 investigation designed to determine whether such business tort claims are available to the estates. Having identified a number of documents in JPMC's production evincing potential causes of action, Debtors now seek to advance their investigation – an investigation that the Court has already approved – by obtaining documents from those third parties likely to have information concerning JPMC's activities in pursuit of WMB in the

weeks and months prior to the receivership. Debtors are proceeding exactly as they should, and entirely in accord with the Court's guidance in its June 24 Order.

III. DEBTORS ARE ENTITLED TO SEEK AND OBTAIN DOCUMENTS FROM THE REGULATORS

16. The FDIC-Corporate and OTS contend that Debtors cannot pursue a Rule 2004 examination of government agencies without first exhausting assorted agency regulations applicable to public requests for the disclosure of information.[5] The courts have recognized, however, that a party need not exhaust administrative remedies before seeking discovery from a government agency in a civil proceeding. *See Forstmann*, 1991 WL 168002, at *1-2 (denying OTS's motion for a protective order, finding that parties' failure to adhere to requirements of 12 C.F.R. § 510.5 for requesting OTS documents "does not preclude [them] from obtaining the requested discovery"); *FDIC v. Wise*, 139 F.R.D. at 170 n.2 (stating that the court was "not persuaded" by the OTS's argument that a party "may not compel production of . . . documents for failure to comply with certain regulations").

17. Requiring Debtors to exhaust administrative remedies prior to seeking the Requested Examination would improperly override the application of the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure and divest this Court of its jurisdiction over discovery. *See Exxon Shipping Co. v. U.S. Dep't. of Interior*, 34 F.3d 774, 780 (9th Cir. 1994) (holding that "district courts should apply the federal rules of discovery when deciding on discovery requests made against government agencies"); *see also RTC v. Deloitte & Touche*, 145 F.R.D. 108, 111 (D. Colo. 1992) ("Those courts which have considered the issue" of "whether the Rules of Civil Procedure governing discovery in federal courts can be abrogated by agency regulations . . . . have

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[5] Two of the agencies that oppose Debtors' Motion, the FDIC-Receiver and the SEC, have not raised this dubious objection. It is also telling that the Department of Treasury and the Federal Reserve, despite operating under similar administrative regulations, have agreed to produce documents voluntarily.

uniformly answered the query in the negative."); *Sperandeo v. Milk Drivers & Dairy Employees Local Union No. 537*, 334 F.2d 381, 383 (10th Cir. 1964) ("Federal agencies are bound by the discovery rules in the same manner as any other litigant.").[6] Awaiting "final" agency determinations would also run counter to the purpose of Rule 2004, which is to allow Debtors to quickly ascertain the nature of their estates. *See Dinubilo*, 177 B.R. at 941. This Court possesses the authority to order Rule 2004 examination for good reason – to permit Debtors to fulfill their obligation to pursue assets of the estates – and there is nothing in any agency procedures that overrides those imperatives.

18. It is clear from their own cited authority that the Regulators should not be permitted to place form over substance by asking this Court to await completion of their administrative review. In *Yousuf v. Samantar*, 451 F.3d 248, 250 (D.C. Cir. 2006), the plaintiffs submitted both a subpoena pursuant to Fed. R. Civ. P. 45 and a request pursuant to the Department's *Touhy* regulations. While agreeing with the government that the Administrative Procedure Act requires final agency action prior to court ordered discovery, the court enforced the pending subpoena because "an agency's refusal to comply with a subpoena constitutes 'final agency action' ... ripe for ... review under the APA.'" *Id.* at 251 (quoting *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (1999)). As in *Yousuf*, the Regulators have announced their intentions, and their objections to producing the requested documents are "ripe for review."

19. From a practical standpoint, the "underlying purpose of the regulations have been fulfilled." *Forstmann*, 1991 WL 168002, at *2. The Regulators have had more than a month to consider Debtors' discovery requests, which, as evidenced from their filings, has been more than

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[6] The FDIC's own regulations concerning disclosure of documents recognize that the FDIC's determination that a document is exempt from disclosure may be trumped by a court ruling that the document must be disclosed. *See* C.F.R. § 309.5(g) ("Classification of a record as exempt from disclosure . . . shall not be construed as authority to withhold the record if it is otherwise subject to . . . any directive or order of any court of competent jurisdiction.").

enough time for the Regulators to identify and raise any objections to disclosure. *Forstmann*, 1991 WL 168002, at *2 ("The OTS has had full opportunity to review defendants' discovery request and assert its objections to disclosure. To require defendants to adhere to the OTS' technical procedures at this late date would be wasteful and merely result in duplicative motion practice."). With the Regulators having announced that they have no intention of producing the requested documents, there would be no purpose served in requiring Debtors to wait indefinitely until those Regulators make the same pronouncement in some "official" correspondence released upon completion of their administrative review. The Court should not permit the Regulators to stand on ceremony to the obvious detriment of the estates, and should rule now that Debtors' proposed discovery, aimed at investigating the same business tort claims that the Court approved previously, should proceed without unnecessary delay.[7]

IV. THE KNOWLEDGEABLE PARTIES' OBJECTIONS TO BREADTH AND BURDEN ARE PREMATURE

20. Some of the Knowledgeable Parties claim that Debtors' proposed document requests are excessively broad and unduly burdensome. (*See, e.g.*, Objections by TD Bank and Toronto Dominion, Objections by FHLB-SF). To the contrary, these requests are properly within the scope of Rule 2004 as they concern matters related to Debtors' affairs and the administration of

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[7] As set forth in Section IV, *infra*, any objections by the Knowledgeable Parties as to scope or privilege should appropriately be addressed after Debtors' Motion is granted and subpoenas are issued. In any event, it is settled that agency regulations "do not create privileges applicable to the Chapter 7 Trustee seeking to compel production under Bankruptcy Rule 2004." *See In re Fin. Corp. of Am.*, 119 B.R. at 728 (rejecting the argument by the FDIC and successors to a failed bank that exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b), as well as the FDIC and OTS regulations restricting public access to documents, 12 C.F.R. §§ 309.5 and 510.5, created evidentiary privileges protecting disclosure of documents to the Chapter 7 Trustee who sought to compel the production of documents pursuant to Rule 2004); *see also Kerr v. U.S. Dist. Court*, 511 F.2d 192, 197-98 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976) ("exceptions to disclosure in the [Freedom of Information] Act were not intended to create evidentiary privileges for civil discovery"); *Denny v .Carey*, 78 F.R.D. 370, 373 (E.D.Pa. 1978) (same).

Debtors' estates. *See* Bankruptcy Rule 2004(b) (noting that Rule 2004 examination may concern "any matter which may affect the administration of the debtor's estate"). As demonstrated in the Motion, the Knowledgeable Parties dealt with the Debtors or have information relevant to potential valuable estate claims based on JPMC's alleged wrongdoing. *See Ecam Publ'ns*, 131 B.R. at 559 (courts permit the examination of any third party that has "knowledge of the debtor's affairs"); *Ionosphere Clubs*, 156 B.R. at 432 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994) (Rule 2004 examinations are appropriate of third parties who had dealings with the debtor); *Table Talk Inc.*, 51 B.R. at 145 (finding that Bankruptcy Rule 2004 examinations are allowed for the purpose of discovering assets and unearthing frauds). As the Court held previously, Debtors are entitled to pursue such information through Rule 2004 examination.

21. In any event, as two of the respondents recognize – specifically, Wells Fargo and S&P – any objections as to scope and burden are premature. If the Court grants Debtors' Motion, the Knowledgeable Parties will have the opportunity, pursuant to Bankruptcy Rule 9016 and Rule 45 of the Federal Rules of Civil Procedure, to assert general and specific objections regarding scope, burden, and privilege as to the proposed document requests. Moreover, the parties will have an opportunity to meet and confer regarding any asserted objections. To the extent that any dispute as to particular document requests cannot be resolved through this process, Debtors may then file a motion to compel with the Court. Thus, there is no need for the Court to determine, at this juncture, the scope of the Requested Examination on a request by request basis.[8]

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[8] The SEC makes the internally inconsistent objection that there is no basis to expect that it possesses responsive documents and that Debtors' Rule 2004 discovery requests are nevertheless unduly burdensome. Any complaint by the SEC as to the scope of the proposed document requests is precisely the sort of concern that Debtors and the SEC can address through meet and confer discussions once the subpoenas issue (just as the Debtors have successfully addressed such concerns with a number of other agencies that have agreed to produce documents voluntarily). In any event, the SEC's blanket claim that Debtors have failed to state a basis for Rule 2004 examination of that

V. DEBTORS HAVE FULLY COMPLIED WITH THE MEET AND CONFER REQUIREMENTS UNDER LOCAL RULE 2004-1

22. The FDIC-Receiver makes the absurd argument, unsupported by a single cited decision, that the Motion should be denied on the basis that Debtors have somehow failed to satisfy the meet and confer requirements of Local Rule 2004-1. This claim is belied by the fact that Debtors reached agreement with approximately nine entities prior to filing their Motion, and with three additional entities prior to submitting this Reply. Furthermore, the FDIC-Receiver acknowledges that Debtors initiated two weeks of discussions aimed at reaching agreement with the FDIC-Receiver for its voluntary production of documents. (*See* FDIC-Receiver Opp. ¶ 28.) Debtors more than satisfied their meet and confer obligations, which, as set forth in Rule 2004-1, merely require that the moving party "attempt to confer" with respondents. Moreover, given the FDIC-Receiver's expansive objections, it should come as no surprise that the agency was unwilling to produce documents on reasonable terms, which is the reason that Debtors exercised their right to file the present Motion.

CONCLUSION

23. For all of the above reasons, Debtors request the Court enter an order denying the Objections and granting the Motion.

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agency is wrong. The SEC acknowledges that Debtors' Motion references an emergency order issued by the SEC in September 2008 that included WMI on a short sale ban list. SEC Objection at 2. The SEC did not include WMI in a similar order issued in July 2008, however, which contributed to WMI's financial deterioration. Given that JPMC was meeting with regulators throughout this period concerning its interest in WMB, it is surely appropriate for Debtors, among other things, to investigate why the SEC initially excluded WMI from its ban on short sales, thereby facilitating WMI's decline and JPMC's ultimate acquisition of WMB. (*See* Debtors' Proposed SEC Doc. Request No. 8.) Given that Rule 2004 permits even a "fishing expedition," the Debtors have ample basis for examination of the SEC. *In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 400 (Bankr. W.D. Pa. 2008).

WHEREFORE Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as it deems just and proper.

Dated: January 25, 2010
Wilmington, Delaware

ELLIOTT GREENLEAF

/s/ Neil R. Lapinski

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON MUTUAL, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 09-533 (RMC)**
FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as receiver of Washington Mutual Bank, *et al.*,	)	
Defendants.	)	

ORDER

Washington Mutual, Inc. *et al.* ("WMI") sued Federal Deposit Insurance Corporation ("FDIC") under the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1811 *et seq.*, alleging, among other things, that the FDIC improperly disallowed WMI's claims with respect to the sale of assests of Washington Mutual Bank to J.P. Morgan Chase. On November 4, 2009, the Court heard arguments regarding the motion to dismiss by the FDIC in it's corporate capacity ("FDIC-C") [Dkt. # 27], the partial motion to dismiss by the FDIC in it's capacity as receiver of Washington Mutual Bank ("FDIC-R") [Dkt. # 24], and WMI's motion to dismiss FDIC's counterclaims and stay the proceedings pending the resolution of the concurrent proceedings in the Bankruptcy Court for the District of Delaware [Dkt. # 45]. The Court will deny without prejudice the FDIC-C's motion to dismiss, FDIC-R's partial motion to dismiss, and WMI's motion to dismiss the FDIC's counterclaims, and will grant the motion to stay the case.

I. LEGAL STANDARDS

Federal district courts and bankruptcy courts have concurrent jurisdiction over claims

arising under Title 11 of the Bankruptcy Code:

> The subject matter jurisdiction of the bankruptcy court is defined by statute in 28 U.S.C. §§ 157 and 1334. Section 1334(b) grants the district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (2003). Section 157(a) allows the district courts to refer "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11" to the bankruptcy judges for the district. 28 U.S.C. § 157 (a) (2003). Thus, § 157 (a) vests four categories of subject matter in the jurisdiction of the bankruptcy court: (1) cases "under title 11;" (2) civil proceedings "arising under title 11;" (3) civil proceedings "arising in" a case under title 11; and (4) civil proceedings "related to" a case under title 11. 28 U.S.C. § 157(a); *see also Plaza at Latham Assocs. v. Citicorp N. Am., Inc.*, 150 B.R. 507, 510-12 (N.D.N.Y. 1993) (discussing the distinctions between the four categories of subject matter jurisdiction). Bankruptcy courts have the power to enter "appropriate orders and judgments" in cases under title 11 and in all "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1).

In re Garnett, 303 B.R. 274, 277 (E.D.N.Y. 2003); *see also Plum Run Serv. Corp. v. U.S., Dep't of Navy (In re Plum Run Serv. Corp.)*, 167 B.R. 460, 463 (Bankr. S.D. Ohio 1994). In simpler terms, and addressing the issues most relevant to the instant case, while both the bankruptcy court and district court may have jurisdiction over civil proceedings arising in or related to a case under title 11, neither has *exclusive* jurisdiction under the Bankruptcy Code. However, the Bankruptcy Court has already asserted jurisdiction over most, although not all, elements of this action. *See* WMI Aff. re Mot. to Dismiss [Dkt. # 47], Ex. C (Bankr. Tr. at 95 (June 24, 2009)).

The facts and property at issue here are similar, but not identical, to those at issue in the bankruptcy proceeding because there are claims in this action that did not arise under Title 11 and thus do not fall within the Bankruptcy Court's jurisdiction. Nonetheless, there is still cause for this Court to abstain from deciding the issues presented in this case during the pendency of the

bankruptcy case. In the first instance, the Bankruptcy Code explicitly states: "[N]othing in this section prevents a district court in the interest of justice, or in the interest of comity with the State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 1334(c). Therefore, if the Court finds that it is in the interest of justice to abstain from hearing this case at this time, it may do so. Application of the abstention doctrine to concurrent proceedings in federal and state courts is sufficiently analogous to lend guidance here.

"Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). The Supreme Court recognizes three basic exceptions to the rule that a district court should adjudicate any controversy properly before it. *Id.* First, a federal court should abstain where the case presents a federal constitutional issue that may be mooted or altered by a state court's interpretation of the relevant state law issues. *Id.* at 814. Second, a federal court should abstain where "there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar." *Id.* And finally, a federal court should abstain where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, nuisance proceedings, or tax collection. *Id.* at 816. Furthermore,

> [i]n assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling [sic] against that exercise is required.

Id. at 819.

II. ANALYSIS

Courts have recognized that

> parallel litigation of factually related cases in separate fora is inefficient. Indeed, separate parallel proceedings have long been recognized as a judicial inconvenience. For "reasons of wise judicial administration," the district court is given discretion to dismiss or stay a pending suit in favor of a consolidated action in another forum but it is a discretion both the Supreme Court and our court have limited. In the case of parallel litigation in two federal district courts, the "general principle is to avoid duplicative litigation." So long as the parallel cases involve the same subject matter, the district court should – for judicial economy – resolve both suits in a single forum.

Handy v. Shaw, Bransford, Veilleux & Roth, 325 F.3d 346, 350 (D.C. Cir. 2003); *see Columbia Plaza Corp. v. Sec. Nat'l Bank,* 525 F.2d 620, 626 (D.C. Cir. 1975) ("Sound judicial administration counsels against separate proceedings, and the wasteful expenditure of energy and money incidental to separate litigation of identical issues should be avoided.") (footnotes omitted).

The Supreme Court has noted that the "task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' . . . to justify the surrender of that jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983). The first exception justifying abstention, i.e., that issues may be mooted or altered by the other court's interpretation of the relevant issues over which it has jurisdiction, *see Colorado River*, 424 U.S. at 814, is applicable here. The Bankruptcy Court's determination of what constitutes the property of the estate — an issue over which it has exclusive jurisdiction — could alter many of the issues raised and relief sought in WMI's Complaint.

Furthermore, several additional factors weigh in favor of staying the proceeding until the resolution of the bankruptcy proceeding. For example:

- **Avoiding parallel litigation:** "[T]he desirability of avoiding piecemeal litigation favors abstention. Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Foster-El v. Beretta U.S.A. Corp.*, 163 F. Supp. 2d 67, 71 (D.D.C. 2001) (internal citations and quotation marks omitted).
- **Order of filing:** WMI commenced the bankruptcy action in Delaware on September 26, 2008, and did not file its action here until March 20, 2009. Furthermore, "[t]he Supreme Court has made clear that the focus of this factor is not only the timing of the filing of the complaint but also the progress that has been made in each case." *Sheehan v. Koonz*, 102 F. Supp. 2d 1, 5 (D.D.C. 1999). The bankruptcy case has been proceeding at a faster pace than has this one; thus, this factor weighs in favor of abstention.
- **Jurisdiction over property:** Finally, and perhaps most significantly, "a court that assumes jurisdiction over property first may exercise that jurisdiction to the exclusion of other courts." *Foster-El*, 163 F. Supp. 2d at 71. To the extent any of WMI's claims here relate to property that may be considered part of the bankruptcy estate, this Court is barred from making any determinations as to the ownership of that property. *See In re Devitt*, 126 B.R. 212, 215 (Bankr. D. Md. 1991) (finding that "once equitable jurisdiction has been properly invoked it will proceed to render a full and complete disposition of the controversy. This is obvious, not only to prevent a duplication of effort and a multiplicity of suits, but . . . because the bankruptcy court alone has exclusive jurisdiction to determine dischargeability of debts

. . ."); *Rare, LLC v. Marciano (In re Rare, LLC)*, 298 B.R. 762, 764 (Bankr. D. Colo. 2003) ("Defendants have taken it upon themselves to make the determination of what is and is not property of the bankruptcy estate. They did, and continue to do so, at their peril, for it lies within the exclusive province of the bankruptcy courts to determine what interests are part of the estate."). Relatedly, "the Bankruptcy Code's automatic stay functions as a quasi-jurisdictional statute that precludes proceedings, without leave of the bankruptcy court, in nonbankruptcy courts that otherwise have concurrent jurisdiction." *Fidelity Nat'l Title Ins. Co. v. Franklin (In re Franklin)*, 179 B.R. 913, 919 (Bankr. E.D. Cal. 1995); 11 U.S.C. § 362(a). However, the automatic stay only applies to acts to obtain possession of property of the estate. Claims unrelated to the property of the estate may proceed.

Conversely, the main factor weighing against abstention is that some of WMI's claims arise under the FDI Act; thus, the District Court has *exclusive* jurisdiction over those claims. Nonetheless, the Bankruptcy Court's decisions regarding the property of the estate could impact WMI's claims here.

III. CONCLUSION

Although the Court has concurrent or even exclusive jurisdiction over many of WMI's claims, this Court will stay this case pending the outcome of the bankruptcy proceeding. The Bankruptcy Court's decision as to what constitutes the property of the estate may impact the Court's decision about whether to dismiss certain of WMI's claims as well as Defendant FDIC's and Intervenor-Defendant J.P. Morgan Chase's counterclaims. Accordingly, it is hereby

ORDERED that WMI's Motion to Dismiss the FDIC's Counterclaims and Stay the Proceeding in its Entirety [Dkt. # 45] is **GRANTED IN PART** and **DENIED IN PART**

WITHOUT PREJUDICE; and it is further

ORDERED that WMI's Motion to Dismiss the FDIC's Counterclaims [*see* Dkt. # 45] is **DENIED WITHOUT PREJUDICE**; and it is further

ORDERED that the FDIC-C's Motion to Dismiss [Dkt. # 27] is **DENIED WITHOUT PREJUDICE**; and it is further

ORDERED that the FDIC-R's Motion to Dismiss in Part [Dkt. # 24] is **DENIED WITHOUT PREJUDICE**; and it is further

ORDERED that WMI's Motion to Stay the Proceeding in its Entirety [*see* Dkt. # 45] is **GRANTED**. This case is stayed pending further order of the Court. The parties shall submit joint status reports every 120 days, with the first due May 7, 2010, updating the Court on the progress and status of the bankruptcy case.

SO ORDERED.

Date: January 7, 2010

/s/
ROSEMARY M. COLLYER
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
WASHINGTON MUTUAL, INC., *et al.*,[1]	)	Case No. 08-12229 (MFW)
	)	
Debtors.	)	Jointly Administered

CERTIFICATE OF SERVICE
REGARDING DEBTORS' REPLY TO THE OBJECTIONS OF THE KNOWLEDGEABLE PARTIES TO 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, Neil R. Lapinski, Delaware counsel to Washington Mutual, Inc. and WMI Investment Corp., hereby certify that I caused copies of the *Debtors' Reply to the Objections of the Knowledgeable Parties to 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* to be served on January 25, 2010 via hand delivery on all local parties; and via U.S. First Class Mail and Foreign First Class Mail upon the remaining parties.

Dated: January 25, 2010
Wilmington, Delaware

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

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