

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

<i>In re</i>	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC., <i>et al.</i> , ¹	:	Case Number 08-12229 (MFW)
Debtors.	:	(Jointly Administered)
	:	

**THE UNITED STATES TRUSTEE’S RESPONSE IN SUPPORT OF THE MOTION OF
THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR THE
APPOINTMENT OF AN EXAMINER PURSUANT TO SECTION 1104(c) OF THE
BANKRUPTCY CODE
(DOCKET ENTRY # 3579)**

In support of the motion of the Official Committee of Equity Security Holders (“Equity Committee”) for the appointment of an examiner pursuant to section 1104(c) of the Bankruptcy Code (the “Motion”), Roberta A. DeAngelis, Acting United States Trustee for Region 3 (“U.S. Trustee”), by and through her counsel, submits:

SUMMARY

Pursuant to section 1104(c)(2) of the Bankruptcy Code, the appointment of an examiner is mandated because the requisite debt threshold is satisfied. Moreover, compelling reasons exist for the appointment of an examiner in order to best advance the interests of the Debtors’ estates, their creditors and equity security holders under Code section 1104(c)(1). Chief among those reasons is that the mechanics of the reorganization process will be served by an impartial review of the claims and causes of action which the Debtors seek to resolve under the proposed plan, as parties in interest

¹
The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.



will be aided by the examiner's independent, expert report.

INTRODUCTION

1. Under an applicable order of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a) and 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and determine this Motion.

2. Under 28 U.S.C. § 586, the U.S. Trustee is charged with monitoring the federal bankruptcy system. See *United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the United States trustee has “public interest standing” under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the United States trustee as a “watchdog”).

LEGAL ANALYSIS

3. The appointment of an examiner is required and will aid the progress of these cases. If the Court has not ordered the appointment of a chapter 11 trustee, this Court must direct the appointment of an examiner

to conduct such an investigation of [the Debtors] as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of [the Debtors] of or by current or former management of [the Debtors], if –

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) [the Debtors'] fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

11 U.S.C. § 1104(c).

4. The “first day” declaration of Stewart M. Landefeld, the Debtors’ former Executive Vice President (Docket Entry # 13), describes the Debtors’ capital structure as including funded unsecured bond debt held by non-insiders in excess of the \$5 million threshold of Code section 1104(c)(2). Accordingly, the appointment of an examiner under section 1104(c)(2) to investigate the affairs of the Debtors is mandatory. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500-01 (6th Cir. 1990) (“[Section 1104(c)(2)] plainly means that the bankruptcy court ‘shall’ order the appointment of an examiner when the total fixed, liquidated, unsecured debt exceeds \$5 million if the U.S. trustee requests one.”); *In re Loral Space & Communications Ltd.*, No. 04 Civ. 8645RPP, 2004 WL 2979785, at *4, 5 (S.D.N.Y. Dec. 23, 2004) (reversing Bankruptcy Court’s decision denying appointment of examiner where \$5 million debt threshold under section 1104(c)(2) was met and parties seeking appointment had standing to do so); *In re UAL Corp.*, 307 B.R. 80, 83-86 (Bankr. N.D. Ill. 2004) (“best reading of the statute” is that appointment of an examiner is mandatory if the requirements of section 1104(c)(2) are satisfied); *see also In re Mechem Fin. of Ohio, Inc.*, 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988); *In re The Bible Speaks*, 74 B.R. 511, 514 (Bankr. D. Mass.1987); *In re 1243 20th Street, Inc.*, 6 B.R. 683, 685 n.3 (Bankr. D.C. 1980); *In re Lenihan*, 4 B.R. 209, 211 (Bankr. D.R.I. 1980).

5. The language of Code section 1104(c)(2) clearly and unambiguously provides that the appointment of an examiner is mandatory in these cases. Accordingly, the “as is appropriate” language in that statutory subsection confers discretion upon this Court to determine the appropriate scope of the examination, consistent with the statutory mandate. *See Loral*, 2004 WL 2979785, at *5 (“[i]t is [the bankruptcy court’s] duty to fashion the role of an examiner to avoid substantial interference with the ongoing bankruptcy proceedings.”); *UAL Corp.*, 307 B.R. at 85 n.2

(construing the “as is appropriate” language in section 1104(c)(2) to vest discretion in the bankruptcy court nullifies its mandate).

6. Further, this Court should direct the appointment of an examiner under section 1104(c)(1), as such appointment would be in the best interests of the Debtors’ estates, their creditors and equity security holders. An examiner would provide this Court and parties in interest with an objective opinion regarding the merits of the claims and causes of action which the Debtors seek to resolve under the settlement reflected in their proposed plan. Those claims and causes of action include potentially significant estate causes of action related to and/or stemming from the takeover and sale of Washington Mutual Bank to JPMorgan Chase, including the D.C. Action, the JPMC Adversary Litigation and the Turnover Action (as those terms are defined in the Motion). The examiner’s work product – the independent, publicly-available report – may also serve as a catalyst for the negotiation and resolution of plan-related issues by establishing an objective, reliable reference point for discussion among parties in interest. *See* CLIFFORD J. WHITE III AND WALTER W. THEUS, JR., *Chapter 11 Trustees and Examiners After BAPCPA*, 80 AM. BANKR. L.J. 289, 323-24 (2006).

7. There are other justifications for appointment of an examiner of these cases. If parties in interest “stand down” while an examiner reviews the proposed settlement, the Debtors’ estates may reduce professional costs substantially. Presently, the cases appear to be headed for protracted litigation between equity security holders and the settling parties on a range of issues in more than one forum. The costs stemming from the involvement of multiple constituencies in such litigation will likely be taxing. Additionally, there is a great deal of value in having a “clear, unbiased narrative of why the company ended up in chapter 11.” WHITE AND THEUS, 80 AM.

BANKR. L.J. at 324. The Equity Committee's proposed examination includes key parts of the Debtors' story.

8. In sum, appointment of an examiner will aid the proper resolution of these cases. Accordingly, the U.S. Trustee supports the Equity Committee's request for relief.

CONCLUSION

WHEREFORE the U.S. Trustee requests that this Court issue an order granting the Motion.

Respectfully submitted,

**ROBERTA A. DeANGELIS
ACTING UNITED STATES TRUSTEE**

BY: /s/ Joseph J. McMahon, Jr.
Joseph J. McMahon, Jr., Esquire (# 4819)
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Room 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491
(302) 573-6497 (Fax)

Date: May 4, 2010