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

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

**OBJECTION OF THE OFFICE OF THRIFT SUPERVISION TO THE COMMITTEE OF EQUITY SECURITY HOLDERS' MOTION FOR RELIEF PURSUANT TO BANKRUPTCY RULE 2004**

The Office of Thrift Supervision ("OTS" or "Agency"), submits the following objection to the Official Committee of Equity Security Holders' ("Committee") Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of the FDIC and Certain Third Parties [Docket # 4414] (the "Motion"). For the reasons stated below, the Court should deny the Motion as to OTS.

## I. The Court Should Deny the Committee's Rule 2004 Motion as to OTS.

### A. The Committee Has Failed to Show "Good Cause" for the Discovery It Seeks from OTS.

1. OTS has already produced to the Debtors material that is responsive to several of the more focused requests the Committee now proposes to serve on the Agency. OTS has produced the entire administrative record on which its Director's decision to place Washington Mutual Bank in receivership was made. In addition, the Agency has produced all non-deliberative final enforcement documents (formal and informal) relating to WMI and WMB. And it has produced pertinent non-privileged materials from the office files of those senior OTS

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

employees believed most likely to have information responsive to the Debtors' requests.[2] The Committee concedes, as the Debtors have reported to OTS, that it has copies of the OTS production. Yet it now asks for many of those materials, including the receivership documents, to be produced again. See Request No. 11.

2. The Committee has not represented in its Motion that after completing its review of the materials OTS has produced, it still needs the information it now seeks. Indeed, the Committee has not represented that it has completed a review of the materials OTS produced to the Debtors. Nor has the Committee set forth in the Motion the results of such review of OTS' production as it has performed, and why it needs to propound the additional requests to OTS.

3. The Committee seems focused on the number of pages, or "the paucity of production that the Debtors and Creditors Committee received from third parties."[3] Motion, para. 9. However, the Committee does not discuss what, specifically, the OTS production lacks that the Committee still needs and can obtain only from OTS.

4. The Committee concedes that it has not yet reviewed some 22,000 pages of material TPG Capital produced. Motion, para. 14. Unless and until this has occurred, and the Committee has obtained and reviewed all permissible discovery from the entities (a) whose conduct arguably has given rise to the claims proposed for compromise, and (b) who negotiated the Proposed Settlement, the Committee cannot show "good cause" for requiring additional discovery from OTS. See In re Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985) (holding that a party was "not properly subject to a Rule 2004 examination" due to the absence of any actual evidence of the alleged duplicity); see also In re Strecker, 251 B.R. 878, 883 (Bankr. D. Colo.

[2] Debtors' requests concerned (a) the possibility that JPMorgan Chase might purchase or acquire all or a portion of WMI and/or WMB, and (b) meetings between or among Washington Mutual, OTS, and the FDIC that were proposed for or occurred on or about April 5, 2008, and July 31, 2008.

[3] Third parties include the OTS.

2000) (quashing 2004 subpoena where examiner lacked "some alleged conduct, or other facts, which could lead to a cause of action" beyond fact that debtor had written a bad check before bankruptcy); In re Lewis, No. 93-3893, 1994 U.S. Dist. LEXIS 4492, at *8-9 (N.D. Cal. Mar. 31, 1994) (quashing subpoena where no legitimate reason for conducting exam existed).

5. OTS is not the subject of any claim the Committee is seeking to investigate, and it was not involved in the negotiations that led to the Proposed Settlement. Moreover, there has been no waiver of sovereign immunity that would permit the assertion of a damages claim against OTS in connection with the placement of WMB in receivership. See 12 U.S.C. § 1464(d)(1)(A). The sole remedy for such agency action is a receivership challenge action by the thrift, which has not been brought and is now time-barred. See 12 U.S.C. § 1464(d)(2)(B).

**B. The Balancing Test the Court Must Perform Confirms That the Motion Should be Denied as to OTS.**

6. If the Committee had met its initial burden of demonstrating "good cause," which it has not, the Court would be obliged to weigh the interests of each proposed examinee (in this case OTS) against those of the Committee to determine whether a Rule 2004 examination is proper. See In re Countrywide Home Loans, Inc., 384 B.R. 373, 393 (Bankr. W.D. Pa. 2008) (finding that a balancing test is required in Rule 2004 to ensure that the intrusiveness to the proposed examinee is not greater than the putative benefit to the party seeking the discovery). Here, the discovery the Committee seeks from OTS is voluminous, burdensome, and of no real relevance to the Proposed Settlement. Moreover, the unnecessary cost and disruption it would visit upon OTS would far outweigh any apparent benefit that might accrue to the Committee. See In re Express One Int'l, 217 B.R. 215, 217 (Bankr. E.D. Tex. 1998) ("[I]f the cost and disruption to the examinee attendant to a requested examination outweigh the benefits to the

examiner, the request should be denied."); In re Eagle-Picher Indus., Inc., 169 B.R. 130, 134-35 (S.D. Ohio 1994) (quashing a Rule 2004 subpoena where the proposed discovery was "extremely broad and would clearly be disruptive and costly" to the examinee "while the benefit to movants in assessing the proposal is far from clear").

7. Contrary to the Committee's statements in Paragraph No. 8 of the Motion, the proposed subpoena to OTS is not narrowly tailored to the potential claims the Committee is seeking to investigate. For example, Request No. 14 seeks copies of all Washington Mutual documents OTS has produced to any governmental entity, including Congress. During the period covered by the Committee's requests to OTS, the Agency produced approximately 577,000 documents concerning Washington Mutual to the U.S. Senate Permanent Subcommittee on Investigations.

8. Contrary to the Committee's statements in Paragraph No. 4 of the Motion, as the preceding paragraph of this objection demonstrates, the requests to OTS are also not limited to the subject matter of the claims that would be released by the Proposed Settlement.

9. The Committee's request would require OTS to make a production that in part would duplicate the one already made to the Debtors, and to do so within 15 days of the Court's order granting permission for the discovery.

10. Rule 2004 is not intended for use as a vehicle to generate litigation leverage with respect to the Proposed Settlement and Plan.

### C. Fed. R. Bankr. P. 1001 and Fed. R. Civ. P. 1 Require Denial of the Motion.

11. The Federal Rules of Civil and Bankruptcy Procedure provide that they "shall be construed to secure the just, speedy, and inexpensive determination of every . . . proceeding." Fed. R. Bankr. P. 1001;[4] Fed. R. Civ. P. 1. The reasons and policies underlying these rules are obvious, and compliance with them requires denial of the Motion.

## II. Because the Debtors' Scheduling and Procedures Motion Provides a Much Preferable Approach to Discovery Concerning the Proposed Settlement and Plan, the Court Should Deny the Committee's Motion as to OTS.

12. The Debtors' previously filed Motion for Establishment of Procedures and Deadlines Concerning Objections to Confirmation and Discovery in Connection Therewith [Docket # 4376] ("Debtors' Motion") provides a much preferable mechanism for addressing the discovery needs of entities concerned with the Proposed Settlement and the Debtors' Proposed Plan. The Court should therefore deny the Committee's Motion as to OTS.

## CONCLUSION

For the foregoing reasons, the Court should deny the Committee's Motion as to OTS.

Date: June 2, 2010

Respectfully submitted,

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[4] The Advisory Committee Note concerning this portion of Fed. R. Bankr. P. 1001 states, in pertinent part:

> The final sentence of the rule is derived from former Bankruptcy Rule 903. The objective of 'expeditious and economical administration' of cases under the Code has frequently been recognized by the courts to be 'a chief purpose of the bankruptcy laws.' See Katchen v. Landy, 382 U.S. 323, 328 (1966). The rule also incorporates the wholesome mandate of the last sentence of Rule 1 of the Federal Rules of Civil Procedure. (Citations omitted).

/s/_Martin Jefferson Davis_____
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