IN THE UNITED STATES BANKRUPTCY COURT
FOR DISTRICT OF DELAWARE

In re: WASHINGTON MUTUAL, INC., et al.,[1] Debtors.	Chapter 11 Case No. 08-12229 (MFW) (Jointly Administered) **Ref. No. 4644**

JPMORGAN CHASE BANK, N.A.'S RESPONSE AND OBJECTION TO MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR AN ORDER DIRECTING APPOINTMENT OF AN EXAMINER UNDER SECTION 1104(c)

On May 5, 2010, this Court denied the motion of the Official Committee of Equity Security Holders (the "Equity Committee") to appoint an examiner in these proceedings. After filing a notice of appeal with the U.S. District Court for the District of Delaware and after obtaining certification to appeal that denial to the U.S. Court of Appeals for the Third Circuit, the Equity Committee has filed a new motion, again seeking the appointment of an examiner. JPMorgan Chase Bank, National Association, respectfully submits this response and objection to the Equity Committee's motion.

Although questions were raised regarding the need for an examiner to review to certain privileged information of the Debtors, we understand that the Debtors have fully answered those questions by providing the Equity Committee with the relevant materials. Accordingly, the reasons why the appointment of an examiner was unwarranted in May, hold true today. The Equity Committee's request to investigate (and presumably provide grounds for

[1] The Debtors in these chapter 11 cases and 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 continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.

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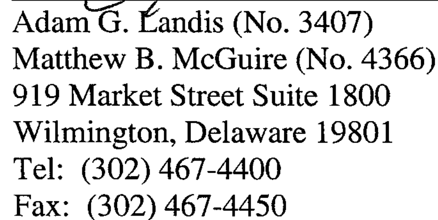
the Equity Committee to challenge) the pending proposed plan and Global Settlement Agreement is not a proper basis for appointment of an examiner. As the court recognized in *Spansion*, a proposed inquiry such as this amounts to nothing more than "a classic confirmation dispute, rather than grounds for an investigation by an examiner." *In re Spansion, Inc.*, No. 09-10690, 2010 WL 1292837, at *8 (Bankr. D. Del. April 1, 2010) (Carey, J.). The confirmation process is adequately designed to enable the Equity Committee to express its views on the claims being settled and released, including the claims raised in the pending adversary proceedings and the purported "business tort" claims already investigated by Debtors and the Official Committee of Unsecured Creditors.

Therefore, JPMC respectfully incorporates by reference, as if fully set out here, its prior Response and Objection to 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 No. 3627), which is attached hereto as Exhibit 1.

Dated: June 14, 2010
Wilmington, Delaware

LANDIS RATH & COBB LLP



Adam G. Landis (No. 3407)
Matthew B. McGuire (No. 4366)
919 Market Street Suite 1800
Wilmington, Delaware 19801
Tel: (302) 467-4400
Fax: (302) 467-4450

– and –

Robert A. Sacks
Hydee R. Feldstein
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
Tel: (310) 712-6600
Fax: (310) 712-8800

Bruce E. Clark
Stacey R. Friedman
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Tel: (212) 558-4000
Fax: (212) 558-3588

Counsel for JPMorgan Chase Bank, N.A.

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	: Chapter 11
WASHINGTON MUTUAL, INC., et al.,[1]	: Case No. 08-12229 (MFW)
Debtors.	: Jointly Administered
	: Ref. Docket No. 3579

JPMORGAN CHASE BANK, N.A.'S RESPONSE AND OBJECTION TO MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR THE APPOINTMENT OF AN EXAMINER PURSUANT TO SECTION 1104(c) OF THE BANKRUPTCY CODE

JPMorgan Chase Bank, National Association ("JPMC"), submits this response and objection to the Motion of The Official Committee of Equity Security Holders (the "Equity Committee") of Washington Mutual, Inc. ("WMI", together with WMI Investment Corp., the "Debtors") for the Appointment of an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code (the "Motion").

1. The Equity Committee requests the appointment of an examiner to inquire into three areas: (1) the Proposed Global Settlement Agreement,[2] (2) the Disputed Assets already at issue in the Debtors' Turnover Action and the JPMC Adversary Proceeding (as

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[2] *See* Topic 5 (the reason behind Debtors' decision to agree to and support the terms of the proposed Global Settlement), Topic 8 (the valuation of claims held by the parties released under the proposed Global Settlement), and Topic 9 (the nature and valuation of assets held by the Debtors that would be conveyed to JPMC and the Federal Deposit Insurance Corporation ("FDIC") under the settlement agreement).

DKT. NO. 3627
DT. FILED 5-4-10

defined below and collectively, the "Adversary Proceedings"),[3] and (3) other potential claims belonging to the Debtors' estates.[4] As set forth below, all of these topics are already before the Court in the ongoing litigation and Debtors' proposed Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan"). The appointment of an examiner under these circumstances is unwarranted.

2. As recent decisions in this District have made clear, this Court retains the discretion to determine whether appointment of an examiner under Section 1104(c)(2) is appropriate under the circumstances. *See, e.g., In re Spansion, Inc.*, No. 09-10690, 2010 WL 1292837, at *7 (Bankr. D. Del. April 1, 2010) (Carey, J.) (holding that Section 1104(c)(2) "requires appointment of an examiner to conduct an investigation of the debtor *as is appropriate* if the debtor's unsecured debts exceed $5 million.") (emphasis in original) (quotations omitted); *In re Am. Home Mortgage Holdings, Inc.*, No. 07-11047 (Bankr. D. Del.) (Sontchi, J.), Transcript of Oct. 31, 2007 proceedings at 76-77 (attached hereto as Exhibit A) (denying motion to appoint examiner under section 1104(c) where there was no appropriate investigation to be undertaken); *In re SA Telecomm's, Inc.*, Nos. 97-2395 through 97-2401 (Bankr. D. Del.) (Walsh, J.), Transcript of Mar. 27, 1998 proceedings at 23, 82 (attached hereto as Exhibit B) (denying

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[3] *See* Topic 3 (the "disputes at issue in the [Debtors'] Turnover Action"), Topic 4 (the "proper ownership" of all assets at issue in the JPMC Adversary Proceeding), and Topic 6 (claims belonging to the Debtors for fraudulent conveyance or for the recovery of preferential transfers).

[4] *See* Topic 1 (the merit and value of claims arising from the circumstances leading to the Office of Thrift Supervision's ("OTS") closure of Washington Mutual Bank ("WMB") and appointment of FDIC as receiver, and the FDIC's sale of WMB assets to JPMC), Topic 7 (details surrounding Debtors' Rule 2004 examination requests, which sought the information identified in Topic 1), and Topic 2 (potential claims held by the Debtors' estates "arising from the breach of fiduciary duty or other legal duties by WMI officers, directors, and employees").

motion to appoint while noting that "this Court has for years consistently viewed 1104(c)(2) as not being a mandatory provision").[5]

3. The appointment of an examiner is not necessary or appropriate here, in a case that has already spawned litigations and investigations in multiple venues, including this Court, the U.S. District Court for the District of Columbia (the "D.C. District Court"), the Texas state court and various investigatory bodies. Any investigation by an examiner would be wholly-duplicative of the work done by the Debtors, the Official Committee of Unsecured Creditors and other parties in interest over the past nineteen months. Virtually all, if not all, of the subjects identified by the Equity Committee have been subject to litigation and investigation during the course of the past nineteen months (and counting). The Equity Committee has intervened in the pending Adversary Proceedings and, through that, can pursue any additional avenues for appropriate inquiry (if any exist that are unexplored by the legions who are already litigating). The remaining matters the Equity Committee wants an examiner to investigate could not result in claims held by the Debtors because of the jurisdictional bar contained in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), as explained in the D.C. District Court's April 13, 2010 decision dismissing the same claims by Washington Mutual debt holders. *Am. Nat'l Ins. Co.* v. *JPMorgan Chase & Co.*, No 09-1743 (RMC), 2010 U.S. Dist. LEXIS 36487 (D.D.C. Apr. 13, 2010). And with respect to the Proposed Global Settlement Agreement, the Equity Committee has the right to object to the proposed Plan and test the value

[5] Several courts outside this District share the view that judges retain discretion as to whether to appoint an examiner under Section 1104(c)(2). *See, e.g., In re Rutenberg*, 158 B.R. 230, 233 (Bankr. M.D. Fla. 1993) (refusing to appoint examiner where debtor's unsecured debts exceeded $5 million after considering the "totality of the factors"); *In re Shelter Res. Corp.*, 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983) (denying motions to appoint an examiner and noting that "to slavishly and blindly follow the so-called mandatory dictates of [Section 1104] is needless, costly and non-productive and would impose a grave injustice on all parties herein").

of the claims referenced in their Motion through the Plan confirmation process that is provided by statute. At that time, the Court will determine the validity of the objection pursuant to its statutory mandate. *See* 11 U.S.C. § 1129.

4. Topics Related to the Proposed Global Settlement Agreement.[6] The Equity Committee has been vocal in its opposition to the Proposed Global Settlement Agreement, but that opposition is not a basis for appointing an examiner to investigate the negotiations and process that resulted in the Proposed Global Settlement Agreement. As the court recently reasoned in *Spansion*, this proposed inquiry amounts to nothing more than "a classic confirmation dispute, rather than grounds for an investigation by an examiner." *Spansion*, 2010 WL 1292837 at *8. Courts should not appoint an examiner where, as here, the movant is seeking an investigation that amounts to "little more than the normal objections that it will make at the confirmation hearing." *In re Schepps Food Stores, Inc.*, 148 B.R. 27, 31 (S.D. Tex. 1992). *See also Spansion*, 2010 WL 1292837 at *8 (finding that "deep and heated differences of opinion about the value of the Debtor" to be an inappropriate basis for the appointment of an examiner).

5. The Equity Committee's request for an examiner to investigate (and presumably provide grounds for the Equity Committee to challenge) the pending Proposed Global Settlement Agreement is not a proper basis for appointment of an examiner. *See In re Gliatech, Inc.*, 305 B.R. 832, 836 (Bankr. N.D. Ohio 2004) (denying motion seeking an examiner

[6] On March 26, 2010, the Debtors submitted the Plan that included a Proposed Global Settlement Agreement consistent with material terms agreed upon and read into the record at the hearing before the Court on March 12, 2010. The Debtors noted that, as of March 26, the provisions of the Proposed Global Settlement Agreement had been agreed to by WMI, JPMC and significant creditor groups but that the FDIC-Receiver and FDIC-Corporate had not agreed to all of the agreement's provisions. The FDIC has repeatedly made clear that it "is working with all parties involved to reach agreement with respect to all terms of the proposed settlement." *See* Transcript of April 6, 2010 proceedings at 113.

where creditor "merely questions whether the [] claim was settled fairly"). Section 1104(c)(2) "was not intended and should not be relied upon to permit [such] blatant interference with the Chapter 11 case or the plan confirmation process." 7 Collier on Bankruptcy ¶ 1104.03[2][b] (16th ed. 2010). This is particularly true where Debtors "do not forecast that [recovery for the equity interest holders] is possible." Transcript of April 21, 2010 proceedings at 56-57. *Cf. In re Adelphia Commc'ns Corp.*, 371 B.R. 660, 673 (S.D.N.Y. 2007) (withdrawing standing where Equity Committee is "so far out of the money" that it "would always have the incentive to do nothing but swing for the fences"). To the extent the Equity Committee seeks to oppose approval of the Proposed Global Settlement Agreement and confirmation of the Plan based upon it, the plan confirmation process provides the proper mechanism and procedures for doing so. Appointment of an examiner for that purpose, by contrast, is not appropriate.

6. Topics Related to the Disputed Assets and Pending Litigation Claims. The Equity Committee's request for appointment of an examiner to investigate both the merits and value of the claims pending in the Adversary Proceedings,[7] and to even provide an opinion as to ownership of the Disputed Assets (Motion at 28) is neither appropriate nor necessary. In addition to being duplicative of what the Debtors, with the assistance of special litigation counsel, have been doing for the past nineteen months, the Plan confirmation process is designed to enable the Equity Committee to express its views on the claims being settled and released. Absent a settlement, the claims asserted in the Adversary Proceedings and the D.C. Action[8] will

[7] The Debtors, the FDIC, JPMC and other parties in interest are actively litigating, among other things, ownership of and interests in numerous assets (the "Disputed Assets"). *See JPMorgan Chase Bank, N.A.* v. *Washington Mutual, Inc.*, No. 09-50551 (MFW), D.I. 1, 23 (the "JPMC Adversary Proceeding") and *Washington Mutual, Inc.* v. *JPMorgan Chase Bank, N.A.*, No. 09-50934 (MFW), D.I. 1, 66 (the "Debtors' Turnover Action").

[8] *Washington Mutual, Inc.* v. *F.D.I.C.*, No. 09-533 (RMC) (D.D.C.) (the "D.C. Action").

be litigated. The Equity Committee is an intervenor in the Adversary Proceedings and, as such, has the ability to participate fully in those proceedings. There is nothing more an examiner could conceivably add to litigation that would not be "duplicative, needless and wasteful." *In re Bradlees Stores, Inc.*, 209 B.R. 36, 39 (Bankr. S.D.N.Y. 1997). Indeed, having urged the United States Trustee and the Court to appoint an official committee to serve as the voice of equity shareholders in these proceedings, it is puzzling that the Equity Committee would seek to have an examiner perform an investigation of which the Equity Committee is capable, and to report to the Court in place of actual parties in interest.

7. Furthermore, in the event that litigation continues, there simply is no appropriate role for an examiner. The investigatory mechanism available to an examiner is Federal Rule of Bankruptcy Procedure 2004. *In re Fibermark, Inc.*, 339 B.R. 321, 324 (Bankr. D. Vt. 2006) (noting that "[a]n examiner's investigation is conducted under Fed. R. Bankr. P. 2004"). As this Court has recognized, a party to an adversary proceeding cannot in lieu of discovery in that proceeding instead undertake a Rule 2004 examination with respect to matters related to the pending proceeding. (D.I. 1219, Rule 2004 Opinion at 11-12.) *See, e.g., In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) (holding that Rule 2004 discovery is not available when discovery is available through related, pending litigations). Accordingly, to the extent that the parties are actively litigating the claims in the Adversary Proceedings, appointing an examiner to investigate the claims pending in those Adversary Proceedings, and to take Rule 2004 discovery, is inappropriate. *See SA Telecomm's*, Transcript of Mar. 27, 1998 proceedings at 81 (denying appointment of examiner and stating that "my view is the best way to develop facts is in an adversary proceeding").

8. Topics Related to Debtors' Other Potential Claims. The Equity Committee's request for an examiner to investigate other potential claims of the Debtors' estates against third parties that are the subject of the ANICO Action also is inappropriate.[9] Again, at best this is completely duplicative of an investigation the Debtors have already been conducting at tremendous expense to both the Debtors' estates and JPMC. This Court has previously addressed two Rule 2004 motions directed to precisely this issue, granting one and denying the other.[10] The Debtors already have conducted their own investigation into the ANICO claims and JPMC has produced a significant amount of documents and information to the Debtors in accordance with this Court's order authorizing Rule 2004 discovery. The Equity Committee has not established why an examiner is appropriate, given the actual exploration of these claims by the Debtors and given the Equity Committee's full and fair opportunity to participate in the process (whether that is through plan confirmation, continued litigation or otherwise). *See In re Wilcher*, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985) (quashing examiner's Rule 2004 subpoena

[9] In February 2009, various purported holders of Washington Mutual debt and equity commenced an action against JPMC in Texas state court asserting various claims, including business tort claims, seeking recovery related to losses they claim to have suffered as a result of the seizure of WMB by the OTS, and the subsequent sale of WMB's assets by the FDIC to JPMC pursuant to a purchase and assumption agreement (the "ANICO Action"). The FDIC-Receiver intervened and removed the case to federal court in Texas, after which the action was transferred to the D.C. District Court. On April 13, 2010, the D.C. District Court granted motions by JPMC and the FDIC to dismiss the ANICO Action for lack of subject matter jurisdiction and entered a final order dismissing the case. The Court held that the jurisdictional bar contained in FIRREA precludes plaintiffs' claims against JPMC. *Am. Nat'l Ins. Co.*, 2010 U.S. Dist. LEXIS 36487 at *8. *See* 12 U.S.C. § 1821(d)(13)(D).

[10] While the Equity Committee repeatedly refers to the unfulfilled Rule 2004 discovery sought from numerous parties in December 2009 (Motion at 2, 10-11, 28) as a basis for needing an examiner, this Court made clear in denying Debtors' motion that Rule 2004 is not the proper way to obtain wide-ranging discovery from those parties, including the FDIC and the OTS. The Court held that the purported requests are "really trying an end run against, around the rules" and that "issuing subpoenas against dozens of third parties just goes too far." *See* Transcript of Jan. 28, 2010 proceedings at 89-90. That wide-ranging discovery is no more appropriate for an examiner to obtain through Rule 2004 discovery, than it was for the Debtors themselves.

served on non-debtor and noting that "examination of third parties is at best ancillary to the main purpose").

9. More significantly, the proposed investigation into Topics 1 and 7, matters relating to the closure of WMB by the OTS and the sale of WMB assets by the FDIC, is inappropriate because it could not lead to viable claims or causes of action and there is no legal basis to appoint an examiner for claim that are not cognizable. The purported claims the Equity Committee seeks to have an examiner investigate are not meaningfully different from the claims in the ANICO Action brought against JPMC and dismissed in accordance with FIRREA. The claims are premised on alleged misconduct associated with FDIC's sale of WMB's assets to JPMC. *See Am. Nat'l Ins. Co.*, 2010 U.S. Dist. LEXIS 36487 at *11. The D.C. District Court recently held that debt holders of Washington Mutual could not pursue such claims (even claims against JPMC), if not properly preserved through the FIRREA's administrative process. *Id.*

10. The D.C. District Court explained that although the plaintiffs (holders of Washington Mutual debt) "argue[d] that their lawsuit [sought] damages only from JPMorgan Chase for injuries that were caused only by JPMorgan Chase," the "Plaintiffs' claims against JPMorgan Chase depend on harm caused by the FDIC-Receiver when it 'sold the crown jewels' of Washington Mutual Bank to JPMorgan Chase for a 'fire sale price.'" *Id.* at *8 (quoting Complaint). The plaintiffs were not permitted to "circumvent the Act's jurisdictional bar by aiming their claims at the assuming bank of the failed bank's assets." *Id.* at 11-12 (citing *Vill. of Oakwood* v. *State Bank & Tr. Co.*, 539 F.3d 373, 386 (6th Cir. 2008) (applying the Act's jurisdictional bar to claims against assuming bank because the claims were "directly related to acts or omissions of the FDIC as the receiver of" the failed bank)). Therefore, because the "claims against JPMorgan Chase directly 'relate' to an 'act' of the FDIC-Receiver," the court

held that due to the plaintiffs' "fail[ure] to invoke and exhaust this administrative process, Plaintiffs' claims are barred by the Act." *Am. Nat'l Ins. Co.*, 2010 U.S. Dist. LEXIS 36487 at *11-12.

11. Likewise here, the Equity Committee seeks to have an examiner investigate the Debtors' purported claims against the FDIC, JPMC and others relating to "the FDIC's sale of WMB's assets to JPMC." (Motion at 26.) Because Debtors did not file a proof of claim with the FDIC in WMB's receivership concerning these allegations, these claims are barred. Said differently, "Section 1821(d)(13)(D) thus acts as a jurisdictional bar to claims or actions by parties who have not exhausted their § 1821(d) administrative remedies," *Freeman* v. *FDIC*, 56 F.3d 1394, 1400 (D.C. Cir. 1995), and Debtors accordingly "have no further rights or remedies with respect to such claim." 12 U.S.C. § 1821(d)(6)(B)(ii). Because these claims are barred from being asserted in any court, there is no legal basis for the appointment of an examiner to consider such "potential claims and causes of action held by the Debtors' estates against any person or entity." (*See* Motion at 26.)

12. Alternatively, if the Court determines that Section 1104(c)(2) requires the appointment of an examiner or that an examiner is otherwise proper, Section 1104(c) requires that the examiner only investigate "as appropriate," and the Court still "retains broad discretion to direct the examiner's investigation, including its nature, extent, and duration." *In re Revco D.S., Inc.*, 898 F.2d 498, 501 (6th Cir. 1990). If any examiner is appointed, the scope of the examiner's inquiry should be narrowly circumscribed for the reasons described above.

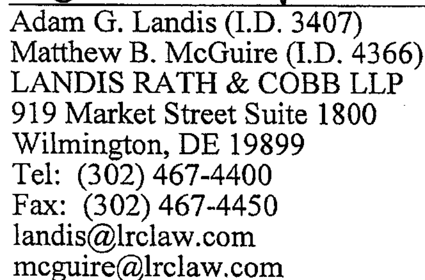
13. Moreover, if an examiner is appointed, the examination should include an investigation into any entity or committee representing more than one creditor or equity security holder with undisclosed holdings to determine compliance with Rule 2019 of the Federal Rules

of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 2019. This Court recently reiterated its holding that "a group of creditors being represented by counsel as a group comply with [Bankruptcy Rule] 2019 and specifically state when the position was acquired and the amount paid for it." Transcript of April 6, 2010 proceedings at 35. Despite this, it appears that creditor groups remain out of compliance with this Court's December 2, 2009 order. (*See* D.I. 1953.) Therefore, it would be appropriate for an examiner, if appointed, to investigate the nature and circumstances regarding the acquisition of debt by parties subject to Bankruptcy Rule 2019, including without limitation, whether any holders of undisclosed debt have traded on confidential or other non-public information during the course of these proceedings or have otherwise advocated positions to exploit events in this case and to speculate by buying and selling securities based on those events.

WHEREFORE, JPMC respectfully requests that the Court deny the Equity Committee's Motion.

Dated: May 4, 2010
Wilmington, Delaware

Respectfully submitted,



Adam G. Landis (I.D. 3407)
Matthew B. McGuire (I.D. 4366)
LANDIS RATH & COBB LLP
919 Market Street Suite 1800
Wilmington, DE 19899
Tel: (302) 467-4400
Fax: (302) 467-4450
landis@lrclaw.com
mcguire@lrclaw.com

– and –

Robert A. Sacks
Hydee R. Feldstein
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067
Tel: (310) 712-6600
Fax: (310) 712-8800
sacksr@sullcrom.com

feldsteinh@sullcrom.com

Bruce E. Clark
Stacey R. Friedman
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Tel: (212) 558-4000
Fax: (212) 558-3588
clarkb@sullcrom.com
friedmans@sullcrom.com

Counsel for JPMorgan Chase Bank, N.A.

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
AMERICAN HOME MORTGAGE HOLDINGS, INC., a Delaware corporation, *et al.*,	.	Case No. 07-11047(CSS) (Jointly Administered)
	.	
Debtors.	.	Oct. 31, 2007 (10:09 a.m.) (Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1 budget. Her view was that if the Code required the
2 appointment of an examiner, she would appoint one and have
3 the examiner ready to go if an issue arose later in the case
4 that required an examination, but because there was no
5 examination required at that time, she would merely put the
6 examiner in place to satisfy some reading of 1004©)(2) and
7 keep that examiner in place until or unless an issue arose in
8 the case that required some examination. So, we've seen
9 through the treatises and case law and largely this is
10 unreported in how courts have dealt with this, courts
11 applying a practical approach to 1104©)(2) because again,
12 Your Honor, burdening this estate with an examiner where
13 there is no apparent need or no established need for an
14 examination would simply waste the creditors' money. So with
15 that, we would ask that the Court deny the request.
16 THE COURT: All right. Thank you, Mr. Brady. You
17 read from the elements of <u>Colliers</u> that I have actually up
18 here on the bench and marked, and I think it's important -
19 Clearly, and I'm dealing here with the narrow issue of
20 1104©)(2) because I don't think the appointment of an
21 examiner would be in the best interest of the creditors or
22 the equity security holders or the interests of the estate.
23 So, I would deny, as I said earlier, I would deny the motion
24 for appointment of an examiner under ©)(1), and I'd like to
25 pick up before I sort of speak more on, I think, Mr. Brady's

1 comment earlier in connection with the trustee motion and I
2 think it's equally applicable to the examiner motion, I
3 didn't see any real factual allegations contained in the
4 motion when it came to these issues. I felt that the movants
5 basically parroted the language of the statute and sort of
6 said, Because I just said what the statute says, a trustee or
7 an examiner should be appointed, and obviously, you need to
8 do more than that. The problem of course is that shall means
9 shall, and the courts require, when I see something like that
10 it obviously means the court's required to appoint an
11 examiner if the criteria are met. I think it's important to
12 look at ©)(2) though as - not on its own, but as it relates
13 to the rest of the sentence. So, the Court shall order the
14 appointment of an examiner to conduct such an investigation
15 of the debtor as is appropriate if the financial criteria are
16 met. The problem isn't so much shall, it's that if and
17 whether if means, you know, if the financial criteria are met
18 you have to appoint an examiner. Well, if you read it that
19 way, the first part of the sentence doesn't make any sense.
20 So I think you have to read it as a whole, and I think - I
21 have tons of respect for Judge Fitzgerald, but I think, you
22 know, appointing an examiner and then giving that examiner no
23 budget and no duties is tantamount to not appointing an
24 examiner, and having one ready to go, I mean, the process of
25 appointing an examiner is not particularly onerous, it

1 doesn't take a ton of time. So - and I'm sensitive to this
2 issue and I know the Office of the United States Trustee is
3 sensitive, and I understand their position in connection with
4 shall meaning shall, and I think that's true, but I think in
5 order for - I would draw a bit of a distinction between what
6 Judge Walsh and Judge Balick have appeared to rule which is
7 simply that it's a best interest test. I don't think that's
8 correct. The best interest is in ©)(1). It's not in ©)(2).
9 I think the financial criteria are important, and obviously,
10 they're met in this case, but that's only one piece of the
11 puzzle, and the other piece of the puzzle is that there has
12 to be an investigation to perform that's appropriate. I
13 think the cases cited in the Colliers treatise discuss that.
14 I think that's a more nuance approach than sort of saying it
15 is what it is, and if you cry "examiner" in a crowded case,
16 you get one. In this case, reading the motion carefully, I
17 really didn't see a request for any investigation. There was
18 a complaint about practices. A 2004 request for information
19 about individual loan files that we've already discussed, but
20 no real articulation of what it was that the movants wanted
21 to be investigated by an examiner, and even if one were to
22 sort of assume, okay, they want someone to examine the
23 debtors' practices in connection with loan origination and
24 servicing that may be violations of state or federal law, I
25 don't think that at this time giving someone sort of carte

1 blanche to look into that issue will be appropriate. Again,
2 the Committee is extremely involved in this case. There are
3 ongoing investigations, possibly by other governmental
4 entities. There's obviously a lot of issues going on in
5 Congress right now in connection with these types of
6 practices that allegedly the debtor participated in, so I'm
7 not - I don't think in this case there would be anything to
8 be gained by appointing an examiner and giving that examiner
9 a budget and saying, I'd like you to investigate the debtors'
10 loan origination and servicing policies in connection with
11 whether it may have violated state or federal law. I think
12 that's asking for a $20 million report, and I'm not sure what
13 it would accomplish. So, with regard to the temporal
14 requirement, again, I'm not - I understand there are those
15 cases. I think it would be more appropriate to deny the
16 motion without prejudice than to sort of say, Okay, I'm
17 granting the motion, but I'm not at this point going to
18 appoint an examiner. Again, I think that's just tantamount
19 to denying the motion. So, I'm going to do that. I'm going
20 to deny the motion without prejudice to be brought again if
21 new facts arise or if the status of the case changes. And
22 just an aside, I mean, I don't know what this case ultimately
23 ends up with, whether we end up in with a liquidating plan,
24 whether we convert to 7. I mean, I know - I'm sure there are
25 discussions that I'm very happy to not be participating in

1 that may be focused on that, but my instincts tell me that to
2 the extent there's some real issues out here, that they are
3 going to be investigated by somebody in the future, and if
4 turns out that that's not the case, I'm certainly open to
5 hearing someone ask me to appoint someone to do that on
6 behalf of the debtors' estate at the appropriate time. All
7 right? Are there any other issues? I'm going to - So, I
8 think we've addressed the issues raised by - Oh, there was
9 the issue of the injunction. I think that's very easily
10 dealt with. You can't get an injunction by filing a motion.
11 I've said it many times before. You have to file an
12 adversary proceeding under Rule 7001, and you need to meet
13 the criteria to get an injunction and you have to support it
14 by evidence, and without that, I'll deny that. So I'm going
15 to deny - For the foregoing reasons, I'm going to deny all
16 three motions, and I'd ask the debtors to submit a form of
17 order, please, under certification of counsel.
18 MR. BRADY: Your Honor, we will prepare forms of
19 order for each motion.
20 THE COURT: I think that turns me to cash
21 collateral. I don't have those papers. I know they came
22 over yesterday in connection with the motion to shorten,
23 which I granted, but I didn't actually save them, so -
24 MR. WAITE: Your Honor, I can hand up - I have a
25 copy of the motion and a copy of the order; is that helpful

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In the matter of	)	
	)	
SA TELECOMMUNICATIONS, INC., et al.,	)	
	)	Case Nos. 97-2395
	)	through 97-2401(PJW)
Debtors.	)	

U.S. Bankruptcy Court
Sixth Floor
824 Market Street
Wilmington, Delaware

Friday, March 27, 1998
1:00 p.m.

BEFORE: HONORABLE PETER J. WALSH
United States Bankruptcy Judge

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1330 King Street - Wilmington Delaware 19801
(302) 655-0477

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1 these debtors, then how do you know if you need more
2 than one. The answer is you don't. You put an
3 examiner in there, you get the information you need,
4 you get an independent report, versus three different
5 stacks of discovery, that you can work off of.
6 And even if Your Honor concludes that
7 you can only appoint an examiner in the case of SA
8 Tel, if you for some reason, take their representation
9 that this debt only relates to SA Tel, well, then,
10 wouldn't it be efficient to, since the same issues
11 relate to all the other estates, since the same issues
12 are going to relate to the proposal of the plan, to
13 let the examiner examine all of the books and records,
14 finances of those related entities?
15 THE COURT: Well, first of all, I'm
16 going to point out that this Court has for years
17 consistently viewed 1104(c)(2) as not being a
18 mandatory provision. So we're only talking about
19 whether it's in the interests of the creditors and any
20 equity holders and the interests of the estate to
21 appoint an examiner. I assume that nobody challenges
22 the proposition that there's no value for equity here,
23 so that interest is --
24 MR. ASTIN: I would ask Your Honor to

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1 consider the Revco case. But if Your Honor knows the
2 court's position, I will acknowledge that there are
3 other cases out there that think "shall" doesn't mean
4 shall. The U.S. Trustee believes it does and I think
5 Revco and the Morganstern case is right on point.
6 THE COURT: My view doesn't turn on the
7 word "shall" and I've ruled a number of times to this
8 effect, Judge Balick has, and I think I'm not going to
9 change this Court's view of that section.
10 MR. ASTIN: So if you look at the best
11 interests of the creditors I will acknowledge that
12 everyone here today is going to argue that their
13 interests are best served by the stipulation. But, of
14 course -- the answer is of course. Not everybody in
15 this room represents all of the interests in this
16 case.
17 The Committee I think will acknowledge
18 that you can't -- the Court shouldn't consider the
19 vote of the Committee to be representative of the
20 large body of creditors out there because it's
21 lopsided. If it wasn't, then committee counsel long
22 ago and far away between November, when this case was
23 filed, and this hearing would have looked at the issue
24 of substantive consolidation. The bottom line is,

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1 period and hopefully we will never have to address it
2 because the parties will have been able to work it
3 out. Thank you.
4 THE COURT: Anyone else?
5 MR. DeNATALE: Your Honor, I do have a
6 copy of the stipulation that was actually executed by
7 each of the parties and that I would hand up for the
8 Court to so order if the Court is so inclined.
9 THE COURT: Let me look at it. I
10 haven't ruled yet.
11 Interesting debate and I'm going to
12 approve the stipulation and deny the U.S. Trustee's
13 motion for the appointment of an examiner for the
14 following reasons:
15 First of all, Section 1104(c)(1)
16 authorizes the appointment of an examiner where it is
17 in the interest of the creditors, the equity holders,
18 or other interests of the estate. We're all agreed
19 that there's no equity interests here. And I don't
20 think there's really an interest of the estate in the
21 sense that this is a liquidation case. This company
22 is going nowhere, it's over. The only interests are
23 those of the creditors and in amount we have 90
24 percent of those people opposing the relief that the

1 trustee says they need. That doesn't make any sense
2 to me to appoint an examiner when the U.S. Trustee
3 says it's needed to protect the creditors when 90
4 percent in amount of those creditors say we don't want
5 this relief.
6 Secondly, particularly in light of the
7 comment that Mr. DeNatale just made regarding Jay
8 Alix's assessment of what it would cost to find out
9 what the intercompany claims are and whether the eggs
10 can be unscrambled so as to have to avoid substantive
11 consolidation, we have the U.S. Trustee in order to
12 achieve his result putting a 30 day and $40,000 cap on
13 the examiner's effort. I think if you buy it that
14 cheaply and permit that short a time, I think you're
15 going to get what you pay for and that is nothing that
16 would be of any value to the proceedings that we're
17 engaged in. I think it will be a waste of $40,000 and
18 an unnecessary delay in the proceedings.
19 Thirdly, based upon my experience with
20 examiners what you're going to do with an examiner is
21 produce a document which is only going to continue the
22 combat that the creditors have been engaged in for
23 some time, because as sure as we're all sitting here
24 whatever the examiner says one or more of these three

1 major creditors are going to disagree with it. And so
2 the examiner's report would simply serve as perhaps a
3 convenient and concise statement of what the parties
4 will be litigating over and it's not going to solve
5 anything. I think an examiner's report is an
6 invitation to litigation and we already have that.
7 Fourth, I take a different approach from
8 the U.S. Trustee's position. He claims we need
9 someone independent who will look at the facts without
10 any bias and report accordingly. My view is the best
11 way to develop facts is in an adversary proceeding and
12 that's what we do all the time in this Court. And so
13 I think it's probably equally effective, if not more
14 effective, to have the fighting parties look at the
15 facts and take their positions, and if we're lucky it
16 will result in a settlement. If not, we will be back
17 here and pick up where we would leave off today.
18 So for those reasons I don't think that
19 appointing an examiner would be in the best interests
20 of these proceedings, certainly not in the best
21 interests of the creditors. And parties have observed
22 and it went without saying that this has been an
23 acrimonious four months since the case was filed. And
24 to pile on an examiner shackled by a limited budget

1 and time frame I just think would be a waste.
2 Finally, this is not the beginning of
3 this case, it's the end of the case. And we're
4 looking at $44 million chasing a million and a half.
5 And I think it's time the parties realistically looked
6 at this nominal dividend that they are going to get
7 and reach an agreement that is going to settle it
8 without further debate about consolidation or
9 intercompany claims, because if we get to those issues
10 and we have hearings on the merits, the million and a
11 half is going to be spent in a matter of weeks.
12 In addition to the reasons I've already
13 given, in my view this is the wrong time and the wrong
14 case for the appointment of an examiner. So I'll deny
15 that motion.
16 MR. ASTIN: Your Honor, to clarify Your
17 Honor's ruling, is Your Honor ruling as to
18 1104(c)(2)? You mentioned best interests of the
19 creditors under (c)(1). Our request for relief was
20 pursuant to (c)(2), (c)(1) in the alternative.
21 THE COURT: My view is that (c)(2) is
22 not mandatory and for the same reasons I've already
23 given I'll deny the relief to the extent it is
24 premised on (c)(2).

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1 MR. ASTIN: Thank you, Your Honor.
2 MR. GWYNNE: With respect to the two
3 motions being continued, motion to appoint trustee and
4 the motion for reconsideration on consolidation of the
5 schedules, we are going to continue them to some time
6 after the settlement period which would end on May
7 11?
8 MR. DeNATALE: What we would ask is if
9 your chambers could give us a date, say, 40 days out
10 for a settlement conference with the Court, kind of
11 report back on the results of this process and maybe
12 we will carry those motions to that date -- until
13 after the settlement, 50 days out maybe for the
14 motions that Mr. Gwynne wants to adjourn over and
15 maybe 40 days out for settlement conference with Your
16 Honor, if that's possible.
17 May 11th is the end of the settlement
18 period I'm told.
19 THE COURT: So the first date you are
20 looking for is --
21 MR. DeNATALE: Would be a few days
22 before the 11th, if that's available.
23 THE COURT: How about 4:00 on the 7th?
24 MR. DeNATALE: That would be fine.

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1 THE COURT: Now, there's a hearing at
2 3:30, I don't know how long that's going to go, but we
3 will put it on for 4:00 on the 7th and we will get to
4 it when we do that day.
5 MR. DeNATALE: Then I think Mr. Gwynne
6 needs a holding date for the other two motions that
7 would be some time after the 11th.
8 THE COURT: I don't think I have
9 anything until May 29th.
10 MR. DeNATALE: That would be fine.
11 THE COURT: In fact, there's an SA
12 Telecom pretrial on that date, 9:30. I don't know
13 what that is.
14 MR. DeNATALE: That's with Cap Rock.
15 THE COURT: Let's put it on for 9:30,
16 then, your two continued matters.
17 MR. DeNATALE: Thank you, Your Honor.
18 The only other item would be extension
19 of exclusivity. I believe the order for that has been
20 submitted with the motion. You should have that among
21 the papers. Basically the debtors have asked to
22 extend the period to file a plan until June 17 and
23 exclusive period to solicit acceptances until August
24 16. My understanding is there have been no objections

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1 filed to that. We would ask the Court grant that. To
2 the extent the order is not before the Court, we will
3 get a copy to you of a duplicate original.
4 THE COURT: I'll grant the motion.
5 There's no debate about this issue given the context
6 of the sale transaction.
7 MR. DeNATALE: Thank you, Your Honor.
8 THE COURT: Is there anything else?
9 MR. DeNATALE: No.
10 THE COURT: We stand in recess.
11 (The proceedings concluded at 3:00 p.m.)
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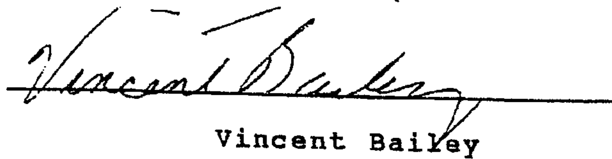
1
2 State of Delaware)
3 County of New Castle)
4
5
6 CERTIFICATE
7
8 I, Vincent Bailey, Registered
9 Professional Reporter, do hereby certify that the
10 foregoing record, pages 2 to 87 inclusive, is a true
11 and accurate transcript of my stenographic notes taken
12 on Friday, March 27, 1998, in the above-captioned
13 matter.
14 IN WITNESS WHEREOF, I have hereunto set
15 my hand and seal this 9th day of April, 1998,
16 at Wilmington.
17
18
19
20 
21 Vincent Bailey
22
23
24

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File an answer to a motion:

08-12229-MFW Washington Mutual, Inc.

Type: bk	Chapter: 11 v	Office: 1 (Delaware)
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51d53059c34d7fc836f6f059a224b7eb3f25e360ae4618ead6863bc5230]]

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Tara B. Annweiler on behalf of Creditor American National Insurance Company
tannweiler@greerherz.com

Elizabeth Banda Calvo on behalf of Creditor Arlington ISD
rgleason@pbfcm.com, ebcalvo@pbfcm.com

Christopher R. Belmonte on behalf of Interested Party Moody's Investors Service
cbelmonte@ssbb.com, pbosswick@ssbb.com

Michael J. Bennett on behalf of Creditor Andrew Eschenbach
mbennett@lhlawfirm.com, nkutcher@lhlawfirm.com

Mark M. Billion on behalf of Interested Party Bank Bondholders
mbillion@pszjlaw.com

Hilary B Bonial on behalf of Creditor Nationstar Mortgage
notice@bkcylaw.com

William Pierce Bowden on behalf of Creditor Fir Tree Value Master Fund, L.P. and Fir Tree Capital Opportunity Master Fund, L.P.
wbowden@ashby-geddes.com

Robert S. Brady on behalf of Defendant Federal Deposit Insurance Corporation
bankfilings@ycst.com

James L. Bromley on behalf of Interested Party Barclays Capital, Inc.
jbromley@cgsh.com, maofiling@cgsh.com

Charles J. Brown on behalf of Creditor AT&T
cbrown@archerlaw.com, dabernathy@archerlaw.com

Lisa Zwally Brown on behalf of Creditor MARTA/ATU Employees Retirement Plan
lzbrown@mmwr.com

Jacob A. Brown on behalf of Creditor Tata American International Corporation and Tata Consultancy Services Limited
jacob.brown@akerman.com, jennifer.meehan@akerman.com