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)**
	:	**Re: Docket No. 4644**

DEBTORS' OBJECTION TO RENEWED MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS IN SUPPORT OF ORDER DIRECTING APPOINTMENT OF AN EXAMINER UNDER 11 U.S.C. § 1104(C)

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), as and for their objection to the renewed motion, dated June 8, 2010 [D.I. 4644] (the "Renewed Motion"), of the Official Committee of Equity Security Holders (the "Equity Committee") for appointment of an examiner pursuant to section 1104(c) of title 11 of the United States Code (the "Bankruptcy Code"), respectfully represent as follows:

PRELIMINARY STATEMENT[2]

1. The Equity Committee has filed the Renewed Motion requesting the Court reconsider its original refusal to appoint an examiner. Affording the Equity Committee the most liberal definitions as to what may constitute "new facts" warranting reconsideration of the May 5 Order, the only basis for the Renewed Motion is the Debtors' refusal to turn over their attorney

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[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 925 Fourth Avenue, Seattle, Washington 98104.

[2] Defined terms used but not defined in the Preliminary Statement shall have the meanings ascribed to them herein.

work product as of the June 3 hearing before this Court. However, after negotiating an appropriate FRE 502(d) order, the Debtors have resolved to give the Equity Committee what it has requested – their privileged work product. Thus, the ongoing production to the Equity Committee and its advisors of information and materials renders appointment of an examiner unnecessary, and accordingly, the Revised Motion should be denied.

2. Additionally, on its face, the Renewed Motion suffers from significant jurisdictional issues. The Renewed Motion amounts to a request for relief from the Court's May 5 Order denying the First Examiner Motion. Although the Renewed Motion was filed upon the Court's invitation, given the pending Third Circuit appeal of the Equity Committee's original examiner request, and even as acknowledged by the Court on June 3, 2010, this Court lacks jurisdiction to grant the Renewed Motion. And, contrary to the Equity Committee's efforts to dress up the Renewed Motion as something else, "a new motion," it is not, and all parties including the Court, must see it for what it is, an attempt to reargue the First Examiner Motion. Likewise, despite the Equity Committee's repeated offer, this defect cannot be remedied by the Equity Committee merely withdrawing the appeal. In order for this Court to grant the Renewed Motion, the currently pending appeal must be withdrawn pursuant to a stipulation or motion, or it must be remanded to this Court by the Third Circuit – something that has not occurred nor even requested.

3. But, assuming the Equity Committee could overcome these procedural hurdles, and it cannot, the Renewed Motion fails on its face for, while boldly constructed and rhetorically infused, it is without merit. Whether styled as a motion for relief from the May 5

Order or a "new" request, the Equity Committee cannot point to any fact to refute this Court's determination "that this debtor has been investigated to death" (May 5 hearing transcript at 98) and, therefore, appointment of an examiner is not warranted. And, the Equity Committee's argument that this Court based its May 5 Order on the assumption "that the Debtors and Creditors' Committee would be sharing their work product with the Equity Committee" is without consequence. (Renewed Motion ¶ 14). The May 5 transcript does not mention work product, and, at the June 3, 2010 hearing, the Court ruled that it does not have the authority to compel the Debtors to turn over work product to the Equity Committee. Nevertheless, as noted above, the Debtors have agreed to turn over their work product, have negotiated a FRE 502(d) order, and upon the Court's entry of such order, prepared to deliver such work product to the Equity Committee in addition to continuing to populate a depository with other documents.[3] So, although off-base, the Debtors have removed the Equity Committee's primary justification for the appointment of an examiner, eliminating the Court's lone stated justification as to why an examiner might be necessary.

BACKGROUND

4. On September 26, 2008 (the "Commencement Date"), each of the Debtors commenced with this Court a voluntary case pursuant to chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On

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[3] Attached hereto as Exhibit B is the Debtors' Proposed Discovery Plan, which lists the documents that the Debtors propose to turn over to the Equity Committee and other interested parties.

October 3, 2008, the Court entered an order, pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing the joint administration of the Debtors' chapter 11 cases.

5. On October 15, 2008, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors (the "Creditors' Committee"). On January 11, 2010, the U.S. Trustee appointed the Equity Committee.

6. On March 26, 2010, the Debtors filed their *Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* and a related disclosure statement. A hearing to consider the adequacy of the information contained in the disclosure statement was set for May 19, 2010, with objections to be filed before such date. In response to objections, and to address certain minor changes, on May 16, 2010, the Debtors filed their *First Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* and a related disclosure statement. On May 19, 2010, the Court held a status conference, scheduled a hearing for June 3, 2010 to consider approval of the Debtors' disclosure statement, and requested that the Debtors file a revised plan and disclosure statement by May 21, 2010. The Debtors filed their *Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* on May 21, 2010, and a related revised disclosure statement. On June 2, 2010, the Debtors filed their *Third Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* (as it may be further amended, the "Plan"), and a related disclosure statement (as it may be further amended,

the "Disclosure Statement"). At the June 3 hearing, the Court further continued consideration of the Disclosure Statement until the hearing scheduled on June 17, 2010. Contemporaneously herewith, the Debtors filed their *Fourth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, and a related disclosure statement.

7. On April 26, 2010, the Equity Committee filed its Motion and Supporting Memorandum of the Official Committee of Equity Security Holders for the Appointment of an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code [D.I. 3579] (the "First Examiner Motion"). By order, dated May 5, 2010, this Court denied the First Examiner Motion [D.I. 3663] (the "May 5 Order"). On May 19, 2010, the Equity Committee filed a notice of appeal of this decision [D.I. 3924] and a petition [D.I. 3929] seeking certification of the appeal to the United States Court of Appeals for the Third Circuit (the "Third Circuit"). On June 2, 2010, the U.S. Trustee filed a notice of appeal of the May 5 Order [D.I. 4496]. By order, dated June 7, 2010, the Court granted the certification petition [D.I. 4639]. On June 8, 2010, the Equity Committee filed the Renewed Motion. On June 2, 2010, the Equity Committee filed its Designation of the Record and Statement of Issues on Appeal [D.I. 4490]. On June 10, 2010, the Debtors filed their Counter-Statement of Issues and Counter-Designation of Record on Appeal [D.I. 4662], and on the same day, the signed order for certification to the Third Circuit was transmitted to the District Court and the Third Circuit [D.I. 4659]. The appeal was docketed by the Delaware District Court on June 10, 2010, and assigned case number 10-00504.

ARGUMENT

I. The Court Does Not Have Jurisdiction to Grant the Renewed Motion

8. Although cloaked as a "new motion" in order to avoid the jurisdictional bars, which the Equity Committee and the U.S. Trustee constructed, the Equity Committee's Renewed Motion really is either a motion to alter or amend the May 5 Order, which is time barred, or a motion for relief from judgment or order pursuant to Bankruptcy Rule 9024 and, as such, cannot be granted while the appeal of the First Examiner Motion is pending. Specifically, the Equity Committee cannot move under Bankruptcy Rule 9023 to alter or amend the order denying the First Examiner Motion because, pursuant to the requirements of Bankruptcy Rule 9023, such motion would have had to have been filed no later than 14 days after entry of judgment. Fourteen days after entry of the May 5 Order was May 19, 2010. Similarly, Bankruptcy Rule 9024 incorporates the provisions of Rule 60(b) of the Federal Rules of Civil Procedure, which lists six grounds on which a court may relieve a party from an order:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

9. While the Renewed Motion is vague with respect to the legal basis for relief, the Equity Committee's argument centers on allegations that, subsequent to the Court's denial of the First Examiner Motion and issuance of the May 5 Order, the Equity Committee discovered that the factual premises on which that denial are based allegedly are not true. (Renewed Motion ¶ 22 ("[T]he issue here concerns whether <u>new information</u> in the record since

May 5 . . . now provides sufficient grounds for appointment of an Examiner.")) (emphasis added). Specifically, the Equity Committee contends that the two assumptions on which this Court (in the Equity Committee's interpretation) predicated its denial – the fact that there have been adequate investigations and that the Debtors and Creditors' Committee would share work product with the Equity Committee – "have now proven to be incorrect." (Id. ¶ 14). While the Debtors do not necessarily agree with the latter half of this interpretation, and certainly dispute the Equity Committee's allegation that such facts are not true, the Debtors contend that, framed in this manner, it is clear that the Renewed Motion is a motion for relief from judgment or order on the basis of newly discovered evidence pursuant to Rule 60(b)(2). The Court does not, however, have jurisdiction to grant a Rule 60(b) motion while an appeal is pending.

10. As a general rule, the timely filing of an appeal "immediately confer[s] jurisdiction on a Court of Appeals and divest[s] a district court of its control over those aspects of the case involved in the appeal." Venen v. Sweet, 758 F.2d 117, 120 (3d Cir. 1985). "The divestiture rule applies to appeals of bankruptcy proceedings." In re Trimble, Case No. 07-2115, 2008 WL 782581, at *2 (Bankr. D.N.J. Mar. 18, 2008) (quoting Bauer v. Chatterton (In re Bauer), 305 B.R. 468, 470-71 (W.D. Wis. 2002)). This is particularly true with respect to the district court's ability to grant a Rule 60(b) motion. The Third Circuit has held that:

> while an appeal is pending, a district court, without permission of the appellate court, has the power both to entertain and to deny a Rule 60(b) motion. If a district court is inclined to grant the motion or intends to grant the motion . . . it should certify its inclination or its intention to the appellate court which can then entertain a motion to remand the case. Once remanded, the district court will have power to grant the motion, but not before.

Ginsburg v. Birenbaum, Case No. 05-2506, 2008 WL 2073975, at *1-2 (W.D. Pa. May 14, 2008) (quoting Venen v. Sweet, 758 F.2d 117, 123 (3d Cir. 1985)) (emphasis added); see also TA Instruments, Inc. v. Perkin-Elmer Corp., Case No. 95-545-SLR, 2000 WL 152130 at *3 (Jan. 24, 2000 D. Del. 2000) ("With respect to motions made pursuant to Rule 60(b), the Third Circuit has indicated that the pendency of an appeal leaves a district court with jurisdiction to entertain, determine the merits of, and deny such motions, but without jurisdiction to grant such motions."); Harris v. City of Phila., Case No. 82-1847, 1994 WL 408231 at *4 (June 28, 1994 E.D. Pa. 1994) ("Unless the Court of Appeals remands so that this court can consider the motion, this court is without jurisdiction to grant the Rule 60(b) motion. The court encourages defendants-appellants to make a motion in the Court of Appeals for a remand of the case in order that the District Court may grant the motion."). Unless the case is remanded, this Court "is without jurisdiction to grant the Rule 60(b) motion and address the merits of the appeal." Ginsburg, 2008 WL 2073975, at *2.

11. The Equity Committee and, for that matter, the U.S. Trustee, cannot disregard this procedure. See Venen v. Sweet, 758 F.2d 117, 123 (3d Cir. 1985) ("Nevertheless, jurisdictional requirements may not be disregarded for convenience sake."). The Equity Committee cites Mitchell v. Henry, 255 Fed. Appx. 684, 686 (3d Cir. 2007) for the proposition that this Court can grant the Renewed Motion because the divestiture doctrine can in essence be waived in the interest of justice. However, while this may be true in other circumstances, as discussed above, the Third Circuit, and nearly every other Circuit has explicitly and repeatedly held that, in circumstances identical to these, a lower court cannot grant a Rule 60(b) motion

while an appeal is pending. See, e.g., Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992) ("the district court may *grant* a rule 60(b) motion after an appeal is taken only if the moving party obtains permission from the circuit court.") (emphasis in original); Fobian v. Storage Tech. Corp., 164 F.3d 887, 892 (4th Cir. 1999) (holding that a district court cannot grant a Rule 60(b) motion while an appeal is pending); Winchester v. United States Attorney for S. Dist. of Texas, 68 F.3d 947, 949 (5th Cir. 1995) ("When the district court is inclined to *grant* the 60(b) motion, . . . then it is necessary to obtain the leave of the court of appeals. *Without obtaining leave, the district court is without jurisdiction, and cannot grant the motion.*") (emphasis in original, citations omitted); Brown v. United States, 976 F.2d 1104, 1110-11 (7th Cir. 1992) ("Parties may file motions under Rule 60(b) in the district court while an appeal is pending . . . [and] if the court is inclined to grant relief, [the district court should] so indicate so that we may order a speedy remand"); Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069, 1073 (8th Cir. 1991) ("If the district court wishes to grant the Rule 60(b) motion, movant's counsel should request the court of appeals to remand the case so that a proper order may be entered"); Aldrich Enter., Inc. v. United States, 938 F.2d 1134, 1143 (10th Cir. 1991) ("Although [the district court] lacked jurisdiction to *grant* the Rule 60(b)(2) motion due to the appeal [ ], the court was free to consider the motion, and the court could then either deny it on the merits, or the court could have notified us of its intention to grant the motion upon proper remand.") (emphasis in original); Hoai v. Vo, 935 F.2d 308, 311-12 (D.C. Cir. 1991) ("At the same time, the District Court may consider the 60(b) motion and, if the District Court indicates

that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.").

12. The main justifications for this divestiture rule – preventing confusion and inefficiency – are aptly illustrated by the facts of the instant case. See Venen v. Sweet, 758 F.2d 117, 120-21 (3d Cir. 1985) (stating that the purpose of the divestiture rule is to avoid "the confusion and inefficiency which would of necessity result were two courts to be considering the same issue or issues simultaneously."). The purpose of the rule prevents the Debtors from having to litigate the same issue in two different courts, with the attendant possibility of inconsistent judgments and the waste of both courts' time and resources. Thus, it is inefficient for the Debtors to litigate the Renewed Motion while the exact same issue is currently pending in the Third Circuit.

13. The Equity Committee does not cite, and the Debtor is not aware of, even a single case in which the divestiture rule has been dispensed with in the context of a Rule 60(b) motion. The Mitchell case, relied upon by the Equity Committee, concerned an attorney who filed a motion to withdraw as counsel with the district court, instead of the Third Circuit, after an appeal had been taken from the district court. See Mitchell v. Henry, 255 Fed. Appx. 684 (3d Cir. 2007). The motion to withdraw was granted by the district court and the Third Circuit subsequently declined to enforce the divestiture doctrine because of "judicial economy," as the order granting the attorney's motion to withdraw was entered over four years prior to the Third Circuit deciding the issue. See Mitchell, 255 Fed. Appx. at 686 ("Under the circumstances of this

case, applying the rule to void the long-ago reasoned ruling of the District Court would not promote judicial economy."). Thus, this case is inapposite here.

14. Nor can the Equity Committee overcome this jurisdictional hurdle by, as they suggest, merely withdrawing their appeal. The time for that has passed. Pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, once an appeal has been docketed, it may only be dismissed pursuant to a stipulation among the parties or by motion filed with the appellate court. And, as noted above, the docketing has occurred.

II. There Is No Basis for Relief from the May 5 Order

15. Even if this Court were to maintain jurisdiction to grant the Equity Committee's request for relief from the May 5 Order, and the Debtors submit it does not, the Equity Committee is not entitled to such relief. Relief under Rule 60(b) is an extraordinary remedy. Moolenaar v. Gov't of Virgin Islands, 822 F.2d 1342, 1346 (3d Cir. 1987) (the remedy provided by Rule 60(b) is "extraordinary, and special circumstances must justify granting relief under it."); In re Design Classic, Inc., 788 F.2d 1384 (8th Cir. 1986). Furthermore, as explained by the Third Circuit:

> Rule [60(b)] must be applied '[s]ubject to the propositions that the finality of judgments is a sound principle that should not lightly be case aside. . . . It is intended to be a means for accomplishing justice in extraordinary situations; and so confined, does not violate the principle of the finality of judgments.

TA Instruments, Inc. v. Perkin-Elmer Corp., Case No. 95-545-SLR, 2000 WL 152130 at *3 (Jan. 24, 2000 D. Del. 2000) (citing Kock v. Gov't of the Virgin Islands, 811 F.2d 240, 246 (3d Cir. 1987)) (internal citations omitted) (emphasis added). No such "extraordinary" circumstances exist here.

16. It appears, based upon the arguments made in the Renewed Motion, that the Equity Committee specifically seeks relief pursuant to Rule 60(b)(2) – "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." As an initial matter, the Equity Committee cannot demonstrate that there exists any newly discovered evidence warranting relief under this provision. In order to obtain relief under Rule 60(b)(2), the Equity Committee must not only point to new evidence, but also must demonstrate that the purported newly discovered evidence: (1) is material and not merely cumulative; (2) was not discoverable before trial through the exercise of reasonable diligence; and (3) would probably have changed the outcome of the trial. Compass Tech., Inc. v. Tseng Labs., Inc., 71 F.3d 1125, 1130 (3d Cir. 1995). The Equity Committee bears a "heavy burden," which requires "more than a showing of the potential significance of the new evidence." Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991) (quoting Plisco v. Union R. Co., 379 F.2d 15, 17 (3d Cir. 1967)).

17. In reality, however, there is no newly discovered evidence, and the Equity Committee has not met the "high standard of proof required to substantiate Rule 60(b)(2) relief." TA Instruments, Inc., 2000 WL 152130, at *5. The Equity Committee alleges that facts "have developed since entry of the May 5 Order." (Renewed Motion ¶ 3). Specifically, the Equity Committee alleges that its analysis of the produced documents reveals that the scope of the Debtors' investigations "was minimal at best." (Id. ¶ 3). The Debtors dispute the veracity of these allegations and, more importantly for these purposes, note that the state of the Debtors' investigations have been known for months. After the Equity Committee was appointed, in

January 2010, Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), the Debtors' special litigation and conflicts counsel, shared with the Equity Committees' counsel (i) the entirety of JPMC's production of documents – over 40,274 pages, and (ii) all documents produced by other third parties, to the extent Quinn Emanuel was able to procure the consent of the producing third parties. The Equity Committee has had more than sufficient time to review these documents and cannot argue that they recently discovered anything new in such documents.

18. To the extent the Equity Committee alleges "new facts" based on the Debtors' purported "flawed investigations," the Equity Committee raised the same facts in its First Examiner Motion:

> Certainly, the investigative steps that the Debtors sought to pursue through their December Rule 2004 motion never happened. It also appears clear that after filing that motion the Debtors obtained little, if any, formal discovery through the then-pending litigation (the DC Action, the JPMC Adversary Litigation, and the Turnover Action). It is not apparent that the Debtors have taken any testimony through depositions, either before or after filing their second Rule 2004 motion in December 2009, on the subject of the events that led to the seizure and sale of WMB.

(See, e.g., First Examiner Motion at 20-21). These allegations were argued by the Equity Committee at the May 5 hearing and were refuted by this Court's determination that the Debtors, Creditors' Committee, and others conducted thorough examinations in these cases. The Creditors' Committee and its professionals have "devoted more than 10,000 hours doing an extensive investigation in these cases and in actively litigating all of the issues that an examiner would be tasked with investigation." (May 5 hearing transcript at 62). In that regard, the Creditors' Committee has investigated, among others, (i) the financial condition of the Debtors

and Washington Mutual Bank pre-seizure, (ii) the issues surrounding the OTS decision to seize Washington Mutual Bank, (iii) the history of capital contributions from WMI to Washington Mutual Bank, (iv) the assets held by the Debtors, (v) the issues surrounding the tax refunds and other tax assets, (vi) WMI's various investments, (vii) the litigations surrounding the Debtors, (viii) the potential litigation claims against JPMC and the FDIC, (ix) WMI's intellectual property, and (x) the Debtors' settlement agreement with the FDIC and JPMC. (See id. at 62-70).

19. The extent of these investigations was also described in a multitude of court filings and at the May 5 hearing. (See May 5 hearing transcript at 98).

> The investigations have been conducted not only by the debtor and the creditors' committee, but by . . . the Office of Thrift Supervision; the FDIC; the government task force, including the U.S. Attorney for the Western District of Washington; the Department of Labor; the Department of Justice; the FBI; the IRS; the SEC; the Attorney General for the State of New York; the class action plaintiffs; Congress; the U.S. Treasury; and the President's Financial Fraud Task Force have all taken a look at Washington Mutual [and] [i]t is true that their investigations exceeded the scope of what this Court need concern itself with.

(Id. at 98-99). Despite the Equity Committee's allegations about the lack of investigation of the Debtors, in this Court's own words, "this debtor has been investigated to death." (Id. at 98).

20. Moreover, the other "new evidence" alleged by the Equity Committee is not new at all. The Equity Committee states that the Debtors "have not followed through on the Rule 2004 discovery this Court authorized against JPMC." (Renewed Motion ¶ 18). Yet, this same issue is raised in the Equity Committee's First Examiner Motion. See First Examiner Motion at 98 ("Certainly, the investigative steps that the Debtors sought to pursue through their December Rule 2004 motion never happened."). The Equity Committee also states that the

Debtors "have not received a single document in discovery from the FDIC." (Renewed Motion ¶ 18). Again, this issue has been in the public arena for months, and thus, is not "new evidence." This point about discovery was specifically discussed at length at this Court's January 28, 2010 hearing. Lastly, the Equity Committee alleges that "no governmental agency has opened any investigation regarding JPMC's conduct during its acquisition of WMB." (Renewed Motion ¶ 19). Yet again, this assertion is factually incorrect. It is public record that, in October 2008, the U.S. Attorney's office set up a task force to look into WMB's failure. It is public record that this task force included investigators from the FBI, Federal Deposit Insurance Corporation Office of Inspector General, Securities and Exchange Commission and the IRS.

21. It is disingenuous for the Equity Committee to now contend that it suddenly has become aware of alleged "gaps" in these investigations. The Equity Committee cannot say that the alleged new evidence "was not discoverable before trial through the exercise of reasonable diligence."

22. The Equity Committee also alleges "new evidence" based on the Debtors refusal to turn over "work product." (Renewed Motion ¶ 3). The Debtors submit that a refusal to turn over its attorneys' work product cannot be a circumstance to entitle a party to allege "new evidence." The Debtors have consistently refused to turn over their work product; this fact is nothing new. The Equity Committee has known of the Debtors' position on this matter for months. Thus, it is insincere of the Equity Committee to allege that this fact is "new evidence."

23. Nevertheless, the Debtors have agreed, subject to the entry of an agreed upon Rule 502(d) order, to turn over their work product to the Equity Committee, thus

eliminating this alleged ground for the appointment of an examiner. Since the June 3, 2010 hearing, the Debtors have had multiple conversations with the Equity Committee concerning the turnover of work product and other documents. On June 10, 2010, the Equity Committee attended the "meet and confer" held at the Debtors' counsels' offices. The Debtors made clear that they will be providing not only their work product, but various other documents requested by the Equity Committee. The documents that the Debtors propose to turn over to the Equity Committee and other interested parties is embodied in the Debtors' Proposed Discovery Plan, a copy of which is attached hereto as Exhibit B.

24. Rule 60(b)(2) makes clear that a motion based upon such rule is only proper if, with reasonable diligence, the newly discovered evidence "could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 59(b), in turn, states that "[a] motion for a new trial must be filed no later than 28 days after the entry of judgment." While such deadlines have passed, the Equity Committee has not alleged, and cannot establish, that the purported "new evidence" could not have been discovered within the requisite 28-day period. Thus, notwithstanding the other reasons discussed above, on this fact alone, the Renewed Motion should be denied as untimely.[4]

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[4] The Equity Committee cannot rely on Rule 60(b)(6), the so-called "exceptional circumstances" exception, to skirt the time requirements of Rule 60(b)(2) because relief under Rule 60(b)(6) "is only available where the other subsections of Rule 60(b) do not apply." In re Subramanian, 245 Fed. Appx. 111 (3d Cir. 2007) (citing Medunic v. Lederer, 533 F.2d 891, 893 (3d Cir. 1976)). Moreover, Rule 60(b)(6) cannot be utilized to circumvent the time periods of the other clauses. Cf. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863, n.11 (1988) ("Rather, "extraordinary circumstances" are required to bring the motion within the "other reason" language and to prevent clause (6) from being used to circumvent the 1-year limitations period that applies to clause (1).) (internal citations omitted).

III. The Equity Committee's Renewed Motion Is Barred by Res Judicata

25. Even if the Court were to construe the Renewed Motion as a "new" motion, the relief requested therein is barred by *res judicata* by virtue of the First Examiner Motion and the May 5 Order. *Res judicata*, or claim preclusion, is a judicial doctrine that precludes a party from relitigating claims that were or could have been asserted in an earlier action. In re Mariner Post-Acute Network, Inc., 267 B.R. 46, 52 (Bankr. D. Del. 2001). Notably, when applicable, preclusion extends to all grounds for recovery that were available to parties, regardless of whether they were asserted or determined in a prior proceeding. Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 111 (3d Cir. 1988). The purpose of *res judicata* is to avoid the expense and vexation attendant to participating in multiple lawsuits, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions. See EEOC v. United States Steel Corp., 921 F.2d 489, 492 (3rd Cir. 1990) (quoting Montana v. United States, 440 U.S. 147, 153-54 (1979)). For *res judicata* to apply, three elements must be established:

(1) a final judgment on the merits of a prior action;

(2) involving the same parties or their privies; and

(3) a subsequent suit based on the same cause of action.

In re Mariner Pose-Acute Network, 267 B.R. 46 (Bankr. D. Del. 2001) (citing Bd. of Trustees of Trucking Employees v. Centra, 983 F.2d 495, 504 (3d Cir. 1992)). Each and every element of *res judicata* is satisfied here.

26. First, the May 5 Order denying the First Examiner Motion was a final judgment on the merits.[5] Second, the instant action and the First Examiner Motion involve the same parties – the Debtors and the Equity Committee. Furthermore, both motions are based on the same cause of action – the appointment of an examiner pursuant to section 1104(c) of the Bankruptcy Code.

27. In deciding whether two suits are based on the same "cause of action," the Third Circuit takes a "broad view," and looks to whether there is an "essential similarity of the underlying events giving rise to the various legal claims." CoreStates Bank, N.A. v. Huls America, Inc., 176 F.3d 187, 194 (3d Cir. 1999) (citing United States v. Athlone Indus., 746 F.2d 977, 984 (3d Cir. 1984)). Utilizing this test, the two examiner motions are undoubtedly based upon the same cause of action as the "underlying events" giving rise to need for an examiner are identical in both motions – the Debtors alleged lack of investigations of JPMC, the FDIC, and various other third parties. This test was utilized and cited with approval by this Court in Kaiser Group Int'l Inc. v. Nova Hut a.s. (In re Kaiser Group Intern., Inc.), 375 B.R. 120, 126 (Bankr. D. Del. 2007) (J. Walrath).

28. In E. Minerals & Chems. Co. v. Mahan, 225 F.3d 330, 337 (3d Cir. 2000), the Third Circuit stated that "the 'essential similarity' test, when literally construed, is ideally

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[5] In the Third Circuit, the pendency of an appeal does not change a judgment from being final for *res judicata* purposes. See Public Utility District No. 1 of Clark County v. Kaiser Aluminum Corp. (In re Kaiser Aluminum Corp.), 365 B.R. 447, 452 (D. Del. 2007) (citing Cohen v. Superior Oil Corp., 90 F.2d 810, 811-812 (3d Cir. 1937)).

suited for litigation that has been generated by discrete events." There, the Third Circuit stated that

> [d]ifficult as it may be to define the contours of a cause of action in a bankruptcy setting, we conclude that a claim should not be barred unless the factual underpinnings, theory of the case, and relief sought against the parties to the proceeding are so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have brought them both at the same time in the bankruptcy forum.

Id. at 337-38 (emphasis added).[6] As discussed below, the factual underpinnings, the theory of the case, and the relief sought in the First Examiner Motion are identical to the factual underpinnings, the theory of the case, and the relief sought in the Renewed Motion.

29. First, the Equity Committee alleges the same facts in their First Examiner Motion and Renewed Motion: that the Debtors have failed to adequately investigate potential claims and causes of action against JPMC and the FDIC. The Equity Committee cannot defeat *res judicata* by asserting minor differences in the facts underlying the two examiner motions. Ingebrethsen v. Ingebrethsen (In re Ingebrethsen), Case No. 97-7115, 1998 WL 351730, at

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[6] This Eastern Minerals test is a slight variation of the Athlone test, and attempts to take into account the unique issues presented in the bankruptcy context. Eastern Minerals & Chemicals Co. v. Mahan, 225 F.3d 330 (3d Cir. 2000) ("This [test], after all, [is] essentially the test that we actually applied in Athlone."). Pursuant to the Athlone test, to determine whether two causes of action are identical for *res judicata* purposes, one must determine:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same.

United Steel Workers of America, AFL-CIO-CLC v. PPG Indus., Inc., 154 Fed. Appx. 288, 290 (3d Cir. 2005) (citing U.S. v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984)).

*3 (E.D. Pa. June 24, 1998) ("*Res judicata* will not be defeated by minor differences of form, parties or allegations where the controlling issues have been resolved in a prior proceeding in which the present parties had an opportunity to appear and assert their rights.").

30. Second, the Equity Committee's theories as to why an examiner should be appointed are identical in both motions. The Equity Committee's Renewed Motion is premised largely on two grounds: (i) the necessity of an independent person or entity to examine the Debtors' settlement agreement with JPMC and the FDIC; and (ii) the lack of information relied upon by the Debtors in reaching such settlement. The First Examiner Motion is premised on nearly the same grounds. Compare First Examiner Motion at 2 ("the Debtors have not obtained the information they told the Court they vitally needed . . . [yet] they have recently proposed . . . a 'Global Settlement Agreement' . . . that in its current form would compromise and release known and unknown claims against JPMC, the FDIC, and others, without the benefit of further investigation."); id. at 21 ("Instead of following through on the investigative efforts that the Debtors themselves had initiated but never completed, or in fact never started, the Debtors instead made the surprise announcement [of the Global Settlement Agreement] in late March 2010 . . ."), with Renewed Motion ¶ 2 ("Appointment of an Examiner at this time will allow a full and transparent accounting of the assets of the Estates . . . as well as an independent review of Debtors' claimed basis for the proposed Global Settlement Agreement and the Plan"); ¶ 18 ("the Debtors and Creditors' Committee have not undertaken the necessary investigation here.").

31. Moreover, the relief sought in both motions is identical – the appointment of an examiner. The Debtors submit that the Equity Committee's Renewed Motion is an attempt

to relitigate an issue where there has been a final judgment on the merits, involving the same parties, based upon the same cause of action. Accordingly, *res judicata* applies, and the Renewed Motion must be denied.

IV. Independent of the Reasons Cited in Parts I-III *Supra*, the Appointment of an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code is Not Warranted and is Not in the Interests of the Estate and Its Various Constituencies[7]

32. The Debtors do not intend to burden the Court's time by detailing the massive efforts and investigations in these cases undertaken by the Debtors, Creditors' Committee, governmental agencies and others, which preclude the need for an examiner. Instead, the Debtors incorporate by reference the Debtors' Objection to Motion and Supporting Memorandum of the Official Committee of Equity Security Holders for the Appointment of an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code, dated May 4, 2010 [D.I. 3626], and attached hereto as Exhibit A, which explains in great detail the reasons as to why an examiner should not be appointed generally. Based upon these investigations, the Court determined an examiner is not warranted. The Equity Committee's suggestion that they now have reason to believe these investigations were deficient is, as set forth above, not true and not based upon any new or previously undiscovered evidence. And certainly, any previous refusal by the Debtors to turn over work product, as blessed by the Court on June 3, 2010, (i) is not the basis for appointment of an examiner, and (ii) is now remedied by the provision of such documents. Indeed, as set forth in the Debtors' Proposed Discovery Plan, a copy of which is

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[7] The Renewed Motion fails to even address the elements required to appoint an examiner pursuant to section 1104(c) of the Bankruptcy Code.

attached hereto as Exhibit B, the Debtors will be providing the Equity Committee with a significant amount of information regarding the Debtors' investigations, including work product.

CONCLUSION

33. The Renewed Motion should be denied. Not only does the Court lack jurisdiction to enter an order granting the Renewed Motion, but, equally as important, the Equity Committee has failed to establish any changed facts or circumstances that warrant the appointment of an examiner less than five weeks after the denial of its First Examiner Motion. The Equity Committee's Renewed Motion fails to establish facts sufficient for the appointment of an examiner pursuant to section 1104(c) of the Bankruptcy Code and should be denied.

WHEREFORE the Debtors request the Court deny the Renewed Motion and grant the Debtors such other and further relief as is just.

Dated: June 14, 2010
Wilmington, Delaware

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ATTORNEYS TO THE DEBTORS
AND DEBTORS IN POSSESSION

EXHIBIT A

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)**
	:	**Re: Docket No. 3579**

DEBTORS' OBJECTION TO MOTION AND SUPPORTING MEMORANDUM OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR THE APPOINTMENT OF AN EXAMINER PURSUANT TO SECTION 1104(c) OF THE BANKRUPTCY CODE

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), as and for their objection to the motion, dated April 26, 2010 [Docket No. 3579] (the "Motion"), of the Official Committee of Equity Security Holders (the "Equity Committee") for appointment of an examiner pursuant to section 1104(c) of title 11 of the United States Code (the "Bankruptcy Code"), respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Motion is a desperate attempt by the Equity Committee to throw any and every allegation against the wall in the hope that something will stick. Its intent is disruption and delay, not investigation or illumination. The transparent motive for the belated request to appoint an examiner is to derail nineteen (19) months of work in these chapter 11 cases on the

[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 925 Fourth Avenue, Suite 2500, Seattle, Washington 98104.

off chance that the prospect of delay will cause the parties with the real economic stake in these cases – creditors – to throw something to or "pay off" holders of equity interests.

2. The circumstances leading to the federal takeover and immediate sale of Washington Mutual Bank ("WMB"), precipitating these chapter 11 cases, are well known. These events already are among the most heavily investigated of any financial failure in history. The entities and agencies that have investigated these matters, or have authority to do so, are legion and include the Debtors themselves, the official committee of unsecured creditors (the "Creditors' Committee"), the Equity Committee, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Department of Labor, the Department of Justice, the Federal Bureau of Investigation, the Internal Revenue Service, the Securities and Exchange Commission , the United States Attorney for the Western District of Washington, the Attorney General of the State of New York, numerous class action law firms pursuing claims on behalf of shareholders, and the United States Congress. The Equity Committee now asks the Court to appoint one more. No further investigation is "appropriate" and no examiner is required or warranted under section 1104(c) of the Bankruptcy Code.

3. From the outset of these chapter 11 cases, the Debtors recognized that they hold certain claims and causes of action against third parties, and needed to conduct appropriate investigations to evaluate others. Almost immediately, the Debtors – with the assistance of their bankruptcy counsel, financial advisor, and the Creditors' Committee – began pursuing certain identified causes of action and examining other potential, undeveloped claims. Subsequently, the Debtors hired special litigation and conflicts counsel to represent the Debtors with respect to certain of such matters, to ensure that no conflict of interest would preclude or restrain the vigor with which the Debtors would pursue such claims. And, all along the way, the Debtors

consulted with the Creditors' Committee and their professionals, and provided them with access to the information and discovery received. When the Equity Committee was appointed, the Debtors likewise met and consulted with the Equity Committee's counsel and shared analyses and discovery.

4. These efforts have been lengthy, time consuming, expensive and, notwithstanding the Debtors' recent decision to compromise and settle such claims, remain ongoing. Yet, in another attempt to sidetrack the Debtors' attention, cause delay and additional expense, and extract value for equity holders from an insolvent estate, the Equity Committee filed the Motion, seeking appointment of an examiner to investigate a laundry list of issues and questions already under thorough examination by the Debtors, Creditors' Committee, and others. Even a cursory review of the Motion reveals that its purpose and effect is to interfere with these proceedings and impose a "third opinion" not contemplated by the Bankruptcy Code on the reasonableness of the proposed settlement embodied in the Debtors' recently filed plan of reorganization.

5. The Debtors have acted in accord with their fiduciary duties and, after a thorough examination and analysis of the relevant factual and legal issues, have decided, in conjunction with the Creditors' Committee, to take the road that they deem best serves those duties and settle. The Motion does not allege any postpetition fraud, wrongdoing, mismanagement or misconduct by the Debtors in carrying out their duties as estate fiduciaries. Instead, it merely states that, because the Debtors have decided to settle certain existing and potential claims and causes of action, the Court should appoint an examiner to investigate such claims. What the Equity Committee seeks is to saddle the Debtors' estates with millions of dollars in the fees and expenses of yet another party and its professionals to evaluate the

reasonableness of the proposed settlement – a task that the various constituencies involved in these cases, including the Equity Committee, should undertake, and one that ultimately will be decided by the Court. This is not an "appropriate" investigation under section 1104(c) and will provide no benefit to these estates. All it will do is needlessly drain the Debtors' already limited resources, to the detriment of all creditors.

6. Most importantly, when the proposed settlement is finalized and its prosecution placed squarely before the Court, it will be tested by the customary chapter 11 processes. In that regard, the Equity Committee will have a full opportunity to test the settlement under well-settled standards governing court approval of compromises and, additionally, pursuant to section 1129 of the Bankruptcy Code. The Equity Committee and its professionals will have all discovery mechanisms available. Conversely, if the settlement does not come to final fruition or is not approved by the Court, the Debtors will continue to pursue their claims aggressively. Either way, there are no grounds for appointment of an examiner. Given the work undertaken by the Debtors, the Creditors' Committee, and other parties, there is no benefit or basis – in the Bankruptcy Code or elsewhere – to have an examiner serve this role.

BACKGROUND

General Background

7. On September 26, 2008 (the "Commencement Date"), each of the Debtors commenced with this Court a voluntary case pursuant to chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On October 3, 2008, the Court entered an order, pursuant to Rule 1015(b) of the Federal Rules of

Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing the joint administration of the Debtors' chapter 11 cases.

8. On October 15, 2008, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Creditors' Committee. On January 11, 2010, the U.S. Trustee appointed the Equity Committee.

9. Prior to the Commencement Date, WMI operated as a savings and loan holding company that owned WMB and, indirectly, such bank's subsidiaries, including Washington Mutual Bank fsb ("WMBfsb"). WMI still owns all of the outstanding stock of WMB, and WMI also has certain non-banking, non-debtor subsidiaries. Like all savings and loan holding companies, WMI was subject to regulation by the Office of Thrift Supervision (the "OTS"). WMB and WMBfsb, in turn, like all depository institutions with federal thrift charters, were subject to regulation and examination by the OTS. In addition, WMI's banking and nonbanking subsidiaries were overseen by various federal and state authorities, including the Federal Deposit Insurance Corporation ("FDIC").

10. On September 25, 2008, the Director of the OTS, by order number 2008-36, appointed the FDIC as receiver for WMB and advised that the receiver was immediately taking possession of WMB (the "Receivership"). Immediately after its appointment as receiver, the FDIC purportedly sold substantially all the assets of WMB to JPMorgan Chase Bank, National Association ("JPMC"), pursuant to that certain Purchase and Assumption Agreement, Whole Bank, dated as of September 25, 2008 (the "Purchase and Assumption Agreement").

11. In the wake of the Receivership, the sale of WMB's assets to JPMC, and the commencement of these chapter 11 cases, a multitude of disputes arose among the Debtors, JPMC, and the FDIC. In connection therewith, as set forth in more detail below, the Debtors and

their professionals immediately undertook investigations of such issues, in certain circumstances resulting in the commencement of lawsuits and/or pursuit of discovery or examinations.

Debtors' Analysis and Pursuit of Claims Against the FDIC

12. Immediately after institution of the Receivership, the Debtors, in consultation with their attorneys and WMI's Board of Directors, as well as the Creditors' Committee, considered whether to challenge, pursuant to 12 U.S.C. § 1464(d)(2)(B), the OTS order seizing WMB and appointing the FDIC as receiver. This lawsuit would have had to have been commenced within thirty (30) days of the seizure. Based upon careful analysis of many factors, including, without limitation, the legal and practical implications of the lawsuit, its attendant risks and costs, and the limited benefit to be derived from instituting the litigation, the Debtors ultimately determined that it was not in the best interests of their estate to pursue this action. The Debtors did, however, decide to pursue certain other claims and causes of action.

13. After a careful review of the Debtors' rights with respect to WMB and the Receivership, the Debtors determined that they hold certain claims against WMB. On December 30, 2008, the Debtors filed a proof of claim against the FDIC in the Receivership requesting, among other things, (i) compensation for the Debtors' equity interest in WMB, (ii) recognition of WMI's ownership interest in certain WMI assets claimed by the FDIC, (iii) allowance of a protective claim for payment of the Debtors' deposits, (iv) payment of amounts owed to WMI by WMB, and (v) the avoidance of certain transfers made by WMI to WMB as a preference or fraudulent transfer (the "Debtors' FDIC Claims"). On January 23, 2009, the FDIC summarily disallowed the Debtors' FDIC Claims in their entirety and notified the Debtors that any challenge to the disallowance should be made by commencing a lawsuit within sixty (60) days of the notice of disallowance.

14. Accordingly, on March 20, 2009, the Debtors commenced litigation against the FDIC, styled Washington Mutual, Inc. and WMI Investment Corp. v. FDIC, Case No. 09-00533 (the "WMI Action"), in the United States District Court for the District of Columbia (the "D.C. District Court"). The Debtors' complaint alleges, among other things, that the FDIC breached its statutory duty under the Federal Deposit Insurance Act to maximize the net present value of WMB's assets and that the FDIC's failure to compensate the Debtors for what they would have received in a straight liquidation of WMB constituted (i) a taking of property without just compensation in violation of the Fifth Amendment of the U.S. Constitution and (ii) a conversion of the Debtors' property in violation of the Federal Tort Claims Act. The D.C. District Court permitted JPMC and certain WMB bondholders to intervene in the WMI Action. The Creditors' Committee moved to intervene as well, but the D.C. District Court has not yet ruled on this motion.

15. By motions, dated June 11, 2009 and June 15, 2009, the FDIC filed motions to dismiss the WMI Action and also filed counterclaims against the Debtors. The Debtors opposed the motions to dismiss and, thereafter, moved to (i) dismiss the counterclaims and (ii) stay the WMI Action, in favor of then-pending adversary proceedings in this Court. On January 7, 2010, the D.C. District Court granted the Debtors' request to stay the WMI Action. Upon staying the case, the D.C. District Court denied the FDIC's motion to dismiss, but the Equity Committee incorrectly implies that this decision was on the merits and therefore constitutes judicial approval of the causes of action alleged in the complaint. (Motion 6.) In fact, the D.C. District Court simply denied the motion to dismiss without prejudice to renewal. While the Debtors do believe their claims have merit, the reality is that they would still face substantial legal challenges by the FDIC if they were to proceed to judgment.

Debtors' Analysis and Pursuit of Claims Against JPMC

16. On March 24, 2009, JPMC commenced an adversary proceeding in this Court against the Debtors, captioned, JPMC Bank, N.A. v. Washington Mutual, Inc., Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del) (the "JPMC Adversary Proceeding"). Recognizing that they needed separate counsel to represent them in this proceeding, the Debtors engaged in a competitive "pitch process" in which several law firms participated, including Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel") and Susman Godfrey LLP ("Susman Godfrey"). After obtaining the consent and approval of the Creditors' Committee, the Debtors selected Quinn Emanuel to serve as the Debtors' special litigation and conflicts counsel. In large part, Quinn Emanuel was retained to represent the Debtors in litigation against JPMC, and other parties, because it has both the requisite expertise and capabilities, while at the same time possessing no conflict of interest that would preclude or restrain the vigor with which it was to pursue these claims. In fact, Quinn Emanuel has been adverse to JPMC on previous occasions.

17. Thereafter, in the JPMC Adversary Proceeding, the Debtors answered JPMC's complaint and filed eighteen counterclaims seeking (i) to avoid certain preferential and/or constructively fraudulent pre-petition transfers of Debtor assets to JPMC, and (ii) a determination that certain assets were property of the Debtors' estates and were not transferred pursuant to the Purchase and Assumption Agreement.

18. Separately, on April, 27, 2009, the Debtors commenced an action pursuant to section 542 of the Bankruptcy Code, captioned Washington Mutual, Inc. v. JPMC Bank, N.A., Adv. Proc. No. 09-50934 (MFW) (Bankr. D. Del) (the "Turnover Action" and, together with the JPMC Adversary Proceeding, the "Adversary Proceedings"). By the Turnover Action, the

Debtors sought to recover approximately $4 billion in deposits assumed and maintained by JPMC (the "Deposits").

19. With respect to both Adversary Proceedings, the Debtors successfully defended against challenges by JPMC and the FDIC to the Court's jurisdiction to adjudicate such matters and the Court entered orders to this effect on July 6, 2009. Additionally, the Debtors overcame JPMC's motions to dismiss each Adversary Proceeding and the Court entered orders dated July 6, 2009 and September 14, 2009 to that effect with respect to the Turnover Action and the Debtors' counterclaims asserted in the JPMC Adversary Proceeding, respectively.

20. Subsequently, the Debtors filed a motion for summary judgment in the Turnover Action to recover the Deposits. On October 22, 2009, Quinn Emanuel argued the motion before the Court. Each of JPMC, the FDIC and certain WMB bondholders (collectively, the "Parties") participated in the litigation. The Deposits represent one of the most significant assets of the Debtors' estates. The matter remains sub judice.

21. With respect to the Adversary Proceedings, discovery requests have been served and, after protracted, multi-party negotiations, the Debtors have successfully negotiated a confidentiality stipulation and substantially negotiated a "Scheduling Order" to govern the production of documents and other aspects of the Adversary Proceedings.

22. Further, in connection with discovery and data presentation efforts, the Debtors and their advisors have undertaken a collection and review of the documents in their possession (or provided to the Debtors under information access arrangements with JPMC). In this regard, the Debtors and their advisors have collected approximately 7.6 million pages of documents.

23. Separately, on May 1, 2009, pursuant to Bankruptcy Rule 2004, the Debtors filed a motion seeking authority to conduct examinations to investigate the prepetition activities of JPMC, in order to assess certain potential estate causes of action related to the devaluing of the Debtors' businesses (the "Business Tort Investigation"). The Court entered an order on June 24, 2009 authorizing the Business Tort Investigation.

24. Since that time, the Debtors have obtained and comprehensively reviewed over 40,274 pages of documents produced by JPMC (the "JPMC Production"). Seeking to expand the Business Tort Investigation, on December 14, 2009, the Debtors filed a supplemental Bankruptcy Rule 2004 application seeking the examination of witnesses and the production of documents from parties other than JPMC (the "Supplemental Rule 2004 Motion"). Although the Court denied that motion, the Debtors were able to obtain and review approximately 37,370 pages of additional documents produced by several third parties, including the OTS, Moody's Investor Service, TPG, Blackstone Group, the OB-C Group, and Citigroup (the "Third-Party Production"). The Debtors have also engaged in extensive negotiations with Sullivan & Cromwell, LLP, the Office of the Comptroller of the Currency (the "OCC"), the Board of Governors of the Federal Reserve System (the "Federal Reserve"), the U.S. Department of the Treasury (the "DOT"), Cerberus Capital Management, L.P., Lehman Brothers, and Morgan Stanley for further documents related to the Business Tort Investigation. Supplementing the Business Tort Investigation, the Debtors also issued information requests pursuant to the Freedom of Information Act to the FDIC, OTS, the Securities Exchange Commission, the DOT, the Federal Reserve and the OCC.

25. After the appointment of the Equity Committee, Quinn Emanuel met with three of the Equity Committee's attorneys from Venable LLP ("Venable") for several hours.

During the course of the meeting, counsel discussed, inter alia, the claims asserted by and against the Debtors in the Adversary Proceedings and the WMI Action, as well as contemplated by the Business Tort Investigation. On several occasions thereafter, Quinn Emanuel attorneys discussed strategic considerations with Venable attorneys. Moreover, with respect to the Business Tort Investigation, Quinn Emanuel shared with Venable, for the benefit of the Equity Committee, the entirety of the JPMC Production and, to the extent Quinn Emanuel was able to procure the consent of the producing third parties, the Third-Party Production. Moreover, Quinn Emanuel attempted to get consent from third parties to deliver to the Equity Committee the remaining Third-Party Production.

26. Subsequently, the Equity Committee informed the Debtors that it was terminating its relationship with Venable and retaining the law firm of Dewey & LeBoeuf ("Dewey"). Quinn Emanuel assisted Dewey in obtaining the consent of JPMC and coordinating with Venable in order to facilitate the transfer of the JPMC Production and the Third-Party Production from Venable to Dewey. Thereafter, the Equity Committee changed (or attempted to change) counsel at least two (2) more times, first, to Munger Tolles & Olson LLP and, ultimately, their present counsel, Susman Godfrey.

27. Since the announcement of the Global Settlement, the Debtors, through Quinn Emanuel, have continued to prepare for the next steps of litigation in the event that the Global Settlement is not finalized.

Creditors' Committee Involvement With the Investigation

28. The Creditors' Committee, which has been extremely active since its formation, has conducted its own investigations in these cases as well as joined the Debtors in theirs, and has engaged in countless conversations with the Debtors regarding each side's

respective analysis of potential claims and causes of action at issue. As set forth in more detail in the Objection of the Official Committee of Unsecured Creditors of Washington Mutual, Inc. et al. to the Official Committee of Equity Security Holders' Motion for the Appointment of an Examiner, filed concurrently herewith, the Creditors' Committee – with the assistance of its counsel and financial advisor – has (i) examined the Debtors' available assets (including potential causes of action that could be asserted by or on behalf of the Debtors' estates), (ii) analyzed the claims asserted in the WMI Action and the Adversary Proceedings, consulted with the Debtors regarding these claims, and moved to intervene in and participated in these litigations, (iii) reviewed documents produced pursuant to the JPMC Production and the Third-Party Production, and (iv) analyzed the reasonableness of, and engaged in negotiation of, the Global Settlement.

Third Party Investigations/Oversight

29. In October 2008, an inter-governmental task force (the "Government Task Force"), comprised of the Department of Labor, Department of Justice, Federal Bureau of Investigations, FDIC, Internal Revenue Service, and Securities and Exchange Commission (the "SEC"), formed to investigate the failure of WMB. The United States Attorney for the Western District of Washington (the "Wash. USA") heads the Government Task Force. Pursuant to this directive, the Wash. USA launched a criminal investigation and, among other things, served WMI with several grand jury subpoenas seeking documents from a variety of record custodians formerly employed by WMB and/or WMI, as well as documents relating to corporate finance, employee compensation, and home loan operations. In order to assess whether any party is criminally culpable, WMI and its counsel have cooperated with the Wash. USA to respond to these requests, and consistently have apprised the Creditors' Committee of developments with

respect thereto. Additionally, WMI and its counsel have coordinated extensively and at significant expense with JPMC and its counsel in connection with producing responsive materials to the Wash. USA.

30. On November 1, 2007, the Attorney General of the State of New York ("NYAG") filed a lawsuit styled The People of the State of New York by Andrew Cuomo v. First American Corporation and First American eAppraiseIT, No. 07-406796, in the New York Supreme Court, alleging that WMB conspired with First American eAppraiseIT to falsely increase valuations done by appraisers retained to perform appraisals of real property securing WMB loans. Although neither WMI nor WMB is a defendant in this lawsuit, in connection therewith, both the NYAG and the SEC issued subpoenas to WMB regarding the bank's appraisal practices.

31. Thereafter, on November 17, 2009, by Executive Order No. 13519, President Obama established the Financial Fraud Enforcement Task Force to investigate and prosecute significant financial crimes and violations. Although WMI has not yet been asked to participate in this investigation, the sale of WMB's assets to JPMC has been the subject of review by this task force.

32. Furthermore, as discussed in the Motion, the U.S. Senate Permanent Subcommittee on Investigations recently conducted hearings regarding the collapse of WMB and issued related investigative reports. These hearings and reports were conducted and issued publicly. Inspectors general of the U.S. Treasury Department and the FDIC also publicly issued a separate joint report of investigation.

33. In addition to the foregoing, there are ongoing shareholder class action lawsuits against officers and directors of WMI. Plaintiffs' counsel in these cases is investigating,

and pursuing claims relating to, the conduct that the Equity Committee now wants an examiner to investigate. If the shareholder plaintiffs are successful, holders of equity interests may be able to recover some of their losses.

34. Finally, as a savings and loan holding company prior to the commencement of these cases, WMI was subject to regulation by the OTS and, because they were depository institutions with federal thrift charters, prior to the Receivership, WMB and WMBfsb were subject to stringent OTS and FDIC regulation. The level of regulatory scrutiny of WMI and WMB makes it inappropriate to appoint an examiner to revisit the circumstances of the takeover of WMB all over again.

Proposed Settlement and Plan

35. On March 26, 2010, the Debtors filed their Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, as may be amended [Docket No. 2622] (the "Plan"), and the disclosure statement related thereto, as may be amended [Docket No. 2623] (the "Disclosure Statement"). The Plan incorporates, and is expressly conditioned upon the compromise and settlement of the disputes among the Debtors, JPMC, the FDIC and certain noteholders (the "Global Settlement"), including, without limitation, the Debtors' FDIC Claims, the WMI Action, the JPMC Adversary Proceeding, and the Turnover Action, and contemplates releases among and for the benefit of these parties. The Debtors intend to seek approval of the Global Settlement in connection with confirmation of the Plan.

Equity Committee Actions

36. Since its formation, the Equity Committee has launched multiple attacks on the Debtors which, if successful, would disrupt these bankruptcy proceedings and, ultimately, force the Debtors to proceed with litigation to pursue claims that represent what the equity

holders perceive as their only hope of recovery, without regard to any cost-benefit analysis. In this regard, on March 3, 2010, the Equity Committee commenced an adversary proceeding, Adversary Proceeding Case No. 10-50731 (the "Equity Committee Adversary Proceeding"), by filing a complaint against the Debtors requesting that WMI be compelled to hold a WMI shareholders' meeting [EC Docket No. 1[2]] (the "Equity Committee Complaint"). Shortly thereafter, on March 11, 2010, the Equity Committee filed The Official Committee of Equity Security Holders' Motion for Summary Judgment, or in the Alternative, for Relief from the Automatic Stay [EC Docket No. 3] (the "Summary Judgment/Stay Relief Motion"), requesting that the Court either grant the relief requested in the Equity Committee Complaint or permit the Equity Committee to pursue such complaint in state court in the State of Washington. On April 7, 2010, the Debtors filed (i) an Answer and Counterclaim to the Equity Committee Complaint [EC Docket No. 8], and (ii) an Opposition to the Summary Judgment/Stay Relief Motion [EC Docket No. 9]. At a hearing held on April 21, 2010, the Court heard argument with respect to the Equity Committee's stay relief request only, and overruled the Debtors' objection to such relief. Pursuant to an Order, dated April 26, 2010, the Court ordered that the automatic stay does not bar the Equity Committee from taking action in Washington state court to seek to compel WMI to hold an annual shareholders' meeting (without expressing any view on the merits of any such potential action) [EC Docket No. 20]. That same day, the Equity Committee initiated an action in the Superior Court of the State of Washington for the County of Thurston.

37. Also on April 26, 2010, the Equity Committee filed the Motion. In general, the Motion seeks appointment of an examiner to investigate (i) potential claims and

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[2] References to "EC Docket No." are to the docket numbers of the court docket for the Equity Committee Adversary Proceeding.

causes of action held by the Debtors against any person or entity arising from the closure and Receivership of WMB and the sale of WMB's assets to JPMC, (ii) potential claims and causes of action held by the Debtors against officers, directors and employees for prepetition conduct related to WMB, (iii) the disputes at issue in the Turnover Action, including related tax issues, (iv) the proper ownership and value of assets at issue in the JPMC Adversary Proceeding, (v) the communications and negotiations that led to the Global Settlement and the factors that produced the Global Settlement and the Debtors' decision to agree to it, (vi) potential fraudulent transfer and preference claims, (vii) the subjects and proposed information sources identified in the Debtors' Bankruptcy Rule 2004 motions, (viii) the merit and valuation of claims that would be released pursuant to the Global Settlement, and (ix) a valuation of the Debtors' postpetition assets, including those to be conveyed to JPMC and the FDIC pursuant to the Global Settlement. (See Motion 27-28.) For the reasons set forth below, the Debtors request the Court deny the Motion.

OBJECTION

Appointment of an Examiner Is Not Mandatory Pursuant to Section 1104(c)(2)

38. Contrary to the Equity Committee's assertion, based upon the plain language of section 1104(c)(2) of the Bankruptcy Code and recent jurisprudence of this Court (including two recent bench decisions issued by this Court), it is clear that, even if the debt threshold in section 1104(c)(2) is met, appointment of an examiner is not mandatory but rather, is discretionary and justified only when there is evidence demonstrating that an investigation is truly warranted. See, e.g., U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.), Case No. 09-10960 (KJC), 2010 WL 1292837, at *8 (Bankr. D. Del. Apr. 1, 2010) (concluding that appointment of an examiner pursuant to section 1104(c)(2) only is warranted if the Court

finds evidence of conduct that would make an investigation of the debtors appropriate); In re HSH Delaware GP LLC, Case No. 10-10187 (MFW) (Bankr. D. Del. Apr. 23, 2010) (Walrath, J.), Hr'g Tr. 31:18-22 ("I do agree that there is some discretion in 1104(c)(2) that the Court must exercise, not only in determining whether and the amount of the unsecured non-trade debt but also in determining whether, in fact, any investigation is appropriate."); In re Magna Entm't Corp., Case No. 09-10720 (MFW) (Bankr. D. Del. Apr. 20, 2010) (Walrath, J.), Hr'g Tr. 13:4-14:14; 14:22-23 (refusing to appoint an examiner, notwithstanding the fact that the debt threshold had been met); see also In re IdleAire Techs. Corp., Case No. 08-10960 (KG) (Bankr. D. Del. June 13, 2008) (Gross, J.), Hr'g Tr. 45:11-14 ("I don't think that it is mandatory based upon my reading of the legislative history, and just as the parties have pointed out, the language of the statute itself and, particularly, the as appropriate clause."); In re Am. Home Mortgage Holdings, Inc., Case No. 07-11047 (CSS) (Bankr. D. Del. Oct. 31, 2007) (Sontchi, J.), Hr'g Tr. 76:9-16 ("I think the financial criteria are important, and obviously, they're met in this case, but that's only one piece of the puzzle, and the other piece of the puzzle is that there has to be an investigation to perform that's appropriate. . . . I think that's a more nuance approach than sort of saying it is what it is, and if you cry 'examiner' in a crowded case, you get one."); In re SA Telecomms., Inc., Case Nos. 97-2395 through 97-2401 (PJW) (Bankr. D. Del. Mar. 27, 1998) (Walsh, J.), Hr'g Tr. 23:16-18 ("[T]his Court has for years consistently viewed 1104(c)(2) as not being a mandatory provision."); In re Webcraft Techs., Inc., Case No. 93-1210 (HSB) (Bankr. D. Del. Nov. 4, 1993) (Balick, J.), Hr'g Tr. 104:3-19 (stating that appointment of an examiner is not mandatory even where the debt threshold is satisfied); see also In re ACandS, Inc., Case No. 02-12687 (Bankr. D. Del. Dec. 19, 2002) (Newsome, J.), Order [Docket No. 234] (effectively refusing to appoint examiner by ordering that the "examiner is not to perform any task or take up

any duty or in any way perform any work or incur cost to the estate without further order of the Court").[3]

39. Accordingly, even though the Debtors' unsecured liabilities far exceed the threshold listed in section 1104(c)(2), the Court should only appoint an examiner pursuant to that provision if the Court determines that there is an "appropriate" investigation to be conducted. Alternatively, pursuant to section 1104(c)(1), the Court may only appoint an examiner if doing so is in the best interests of *all* parties in interest. Given the circumstances of these cases, no additional investigation is warranted or would be beneficial at this time. To the contrary, it would be highly disruptive, wasteful and harmful to the estate and its creditors.

Exercising Its Discretion, This Court Should Find that Appointment of an Examiner Is Not Appropriate Pursuant to Either Section 1104(c)(2) or (c)(1)

40. Except with respect to certain documents requested pursuant to the Supplemental Rule 2004 Motion – which related to matters substantially identical to those covered by the Debtors' original Bankruptcy Rule 2004 application, and which supplemental motion the Court denied – all of the issues identified by the Equity Committee as requiring investigation by an examiner already have been thoroughly explored and analyzed by the Debtors and other parties in interest and, therefore, appointment of an examiner to research the same issues would be futile and wasteful. As set forth in detail above, the Debtors and their professionals, in concert with the Creditors' Committee, have spent thousands of hours reviewing the events that led to the filing of these cases and parties' conduct in connection with such events; identifying potential claims against the FDIC and JPMC; preparing pleadings and other documents necessary to pursue certain of such claims; seeking, conducting, and reviewing

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[3] Copies of the relevant pages from these hearing transcripts and order are attached hereto as Exhibit C.

discovery in connection with asserted and potential causes of action; and assessing the validity and strength of such claims. The Debtors shared information concerning the foregoing with the Equity Committee upon its formation. In addition, as referenced above, various governmental agencies and other third parties have conducted, and continue to conduct, examinations of the Debtors, WMB, and JPMC, including with respect to many of the same issues that the Debtors themselves have reviewed. In certain circumstances, such as the investigation conducted by the U.S. Senate Permanent Subcommittee on Investigations, the examination has been conducted entirely publicly.

41. Appointment of an examiner to conduct an investigation duplicative of these collective efforts merely would constitute an unnecessary drain on the Debtors' resources and, accordingly, is not appropriate. See, e.g., In re Spansion, Inc., 2010 WL 1292837, at *8 (noting that the official creditors committee and various *ad hoc* committees had "vigorously represented" the interests of unsecured creditors, conducted extensive discovery, and investigated the debtors, rendering appointment of an examiner unnecessary);[4] In re HSH Delaware GP LLC, Hr'g Tr. 31:23-32:5 (concluding that appointment of an examiner to conduct an investigation already underway would be a "futile act . . . wasteful of assets of the estate and [would] not serve the creditors and other constituents in the case"); In re Magna Entm't Corp., Hr'g Tr. 14:11-14 ("[S]ince all of the roles that an Examiner would play in this case have already been fulfilled, I find it's a futile act and will not appoint an Examiner."); In re IdleAire Techs. Corp., Hr'g Tr. 46:4-6 (determining that appointment of an examiner would be "inappropriate given the speed with which the case is progressing and the work that's already been done by the

[4] The Equity Committee attempts to distinguish the Spansion decision by noting that, in that case, the parties already had conducted discovery, the issues raised in the examiner motion were plan confirmation disputes, and the motion had been filed so late it would cause the estate more harm than benefit. (See Motion 18.) As discussed below, the Debtors believe that each one of these factors is present here.

Committee"); In re Am. Home Mortgage Holdings, Inc., Hr'g Tr. 77:1-21 (refusing to appoint an examiner where the committee was actively involved in the case and governmental entities, including Congress, already were examining the issues in question). As the court noted in Bradlees, where a debtor's professionals engage in a lengthy investigation of potential claims and share the results of their analysis with the creditors' committee and other parties in interest, it does not make sense to then appoint an examiner to repeat such work at significant expense to the debtor. In re Bradlees Stores, Inc., 209 B.R. 36, 39 (Bankr. S.D.N.Y. 1997) ("[T]he [movants] have allowed the entire thirteen-month investigation surrounding the Acquisition to be conducted by the Debtors' professionals, at significant cost to the estates, without seeking the appointment of an independent third party. The appointment of an examiner to conduct a new investigation at this time would be duplicative, needless and wasteful."). Interestingly, the Equity Committee acknowledges that the Debtors and other interested parties already have gathered a significant amount of information about the potential claims and causes of action at issue in these cases, but notes that the examiner would "make full use" of such information. (See Motion 23.) Even so, it will still take time for the examiner and its professionals to review and analyze this information, including engaging in discussions with the Debtors and their professionals, which will result in significant expense to the estate. The Debtors already have discussed the claims involved in the Adversary Proceedings and the WMI Action and shared much of the document production associated with the Business Tort Investigation with the Creditors' Committee and the Equity Committee and have incurred, and will continue to incur, the cost of these entities and their professionals to analyze such information. The Debtors should not be obligated to pay for yet another person and his/her professionals to do the same exact work.

42. Although, as the Equity Committee points out, there may be additional examinations that the Debtors sought but were not able to obtain with respect to their investigation of potential claims against JPMC, this does not mean that the investigation was incomplete or insufficient to enable the Debtors to make a reasoned decision as to whether to compromise and settle such claims. The Debtors, in conjunction with the Creditors' Committee, assessed the legal strength of all potential causes of action held by the estate and, in the Debtors' business judgment, with support of the Creditors' Committee, determined it would be in the best interests of the estate to settle. Moreover, significant creditor groups were involved with the negotiation of, and agree with, the Global Settlement.

43. Similarly, the Debtors conducted a thorough cost-benefit analysis and decided there would be no benefit to the estate from investigating and asserting claims against the Debtors' current and former directors and officers with respect to the collapse of WMB. The Creditors' Committee actually conducted an initial investigation of such claims, but similarly determined not to pursue them based upon the committee's own cost-benefit analysis. Because equity holders do not stand to benefit from any recovery on account of such claims if they were pursued, the Equity Committee should not be the party driving that decision. From a practical standpoint, any recovery on account of claims against directors and officers would be limited to available insurance proceeds. Even if there were no restrictions on the Debtors' ability to access such proceeds, the funds available – $250 million in the aggregate, less any advancements already made – would be far from sufficient to bridge the estimated $1.3 billion deficit before preferred shareholders receive a distribution and over $9.6 billion deficit before common equity holders recover. The Equity Committee's suggestion that there needs to be an "independent, objective" person with no "conflicts of interest" to review potential claims of misconduct by the

Debtors' directors and officers is unpersuasive. (Motion 24.) First, the Debtors and the Creditors' Committee owe fiduciary duties to the estate and have acted in accord with those duties, and certainly the Creditors' Committee has no conflict of interest with respect to this issue. Moreover, third parties already are investigating the Debtors' directors and officers, including shareholders who have representation in ongoing stock-drop litigations. See In re Washington Mutual Securities Litigation, Case No. 08-md-1919 MSP (W.D. Wash.); South Ferry LP No 2 v. Killinger, Case No. 04-1599C (W.D. Wash.). Nothing prevents equity holders from continuing to pursue such actions.

44. It is hard to imagine that the Equity Committee – which only had one meeting with the Debtors prior to substituting counsel three times and whose financial advisor just signed a confidentiality agreement with the Debtors last week – has had a sufficient amount of time even to have reached the conclusion that an examiner is warranted. If, however, the Equity Committee nonetheless doubts the integrity or thoroughness of the work conducted by the Debtors and other parties, the Equity Committee may (i) exercise its authority, pursuant to section 1103(c) of the Bankruptcy Code, to pursue its own investigation, as it has or should have been doing with respect to the Business Tort Investigation, (ii) intervene in any of the ongoing litigations (as it has done in these cases) and seek discovery in connection therewith, or (iii) request authority to conduct one or more examinations pursuant to Bankruptcy Rule 2004. See Winston Indus., Inc. v. Lancer Homes, Inc. (In re Shelter Res. Corp.), 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983) ("There is currently in place a Debenture Holders' Committee with powers under section 1103(c) of the Bankruptcy Code to carry on, if necessary, an investigation as may be appropriate. The appointment of an examiner under these circumstances, with the possibility of duplicated effort, is not in the spirit of economy of administration in the handling of

bankruptcy estates."). And, of course, all of this work could be done at no expense to the Equity Committee.

45. The real intent behind the Motion is the Equity Committee's desire to derail the Global Settlement. Aside from public statements made by members of the Equity Committee and its counsel in this regard (and in advance of having any significant involvement in these proceedings), see Official Committee of Equity Security Holders of Washington Mutual, Inc. Deliver Statement Regarding Proposed Agreement, PRNewswire (Mar. 17, 2010) ("The Committee . . . does not support, the Proposed Agreement . . . . At this time, the Committee intends to object to the Proposed Agreement.")[5]; Hr'g Tr. 45:8-15, Apr. 21, 2010 (Susman, S., Counsel for the Equity Committee) ("And I don't mean to suggest, Your Honor, that the proposed settlement, which certainly isn't an executed agreement yet, isn't of serious concern to the equity committee. It is. And that underscores the reasons why the equity committee believes it is imperative to have an opportunity for new corporate governance for the debtors. The legal claims of the debtors that would be released through settlement are among the debtors' most valuable assets."); 48:5 (Willingham, M., Chairman of the Equity Committee) ("I don't like the settlement the way it looks now . . . ."); 51:4-6 (Willingham, M.) (answering question regarding the equity committee's position with respect to the proposed settlement by stating, "I think it would be a safe characterization to say that we were not 100 percent in favor of the settlement or the plan"); 51:8-9 (Willingham, M.) ("I think I can speak for the committee that we disagree with both [the settlement and the plan]."), this is evident by the timing of the filing of the Motion and based upon a casual review of the issues the Equity Committee wants an examiner to investigate.

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[5] Available at http://www.prnewswire.com/news-releases/official-committee-of-equity-security-holders-of-washington-mutual-inc-deliver-statement-regarding-proposed-settlement-88237597.html.

(See, e.g., Motion 28 (requesting that an examiner be directed to investigate "[t]he communications and negotiations that led to the Debtors' proposed 'Global Settlement' and the factors that produced the settlement and the Debtors' decision to agree to and support its terms").) The purpose of an examiner, however, is not to investigate facts to support a plan objection. See In re Gliatech, Inc., 305 B.R. 832, 836 (Bankr. N.D. Ohio 2004) (refusing to appoint an examiner where it was clear that the movant – an out-of-the money equity holder – merely sought evidence to substantiate its objection to a settlement embodied in the debtors' plan). "Classic confirmation disputes" do not serve as grounds for appointment of examiners. See In re Spansion, Inc., 2010 WL 1292837, at *8.

46. The Debtors and the Creditors' Committee – each of which are fiduciaries incentivized and legally obligated to maximize value for all stakeholders – have concluded that the proposed settlement is in the best interests of the estate. When the Global Settlement is finalized and brought before the Court for approval, it will be subject to review by all parties in interest, including the Equity Committee, pursuant to the Plan objection process, during which the Equity Committee will have the opportunity to take discovery, file pleadings, and argue in this Court, all at the expense of the Debtors' estates. It is in that forum that parties may question the reasonableness of the Global Settlement. Indeed, this Court has acknowledged that, in analyzing the merits of a proposed course of action, it is more effective to permit parties in interest to litigate the issue than to appoint a third party examiner to investigate and render a report. See In re SA Telecomms., Inc., Hr'g Tr. 81:7-15 ("I take a different approach from the U.S. Trustee's position. He claims we need someone independent who will look at the facts without bias and report accordingly. . . . I think it's equally effective, if not more effective, to have the fighting parties look at the facts and take their positions . . . .") Appointing an examiner

to make a determination on the reasonableness of the Global Settlement not only will replace advocacy by the real parties in interest, but also would be a particularly inappropriate intrusion on the Court's role. The appointment of a "neutral" party to opine on the legal or factual merits of the disputes to be resolved pursuant to the Global Settlement would, in essence, arrogate the examiner above the judiciary. The Court should reject this unprecedented usurpation of its place as the ultimate decision maker.[6]

47. On the other hand, if the proposed settlement is not consummated (e.g., the Court does not approve it), then the Debtors will immediately continue their litigation efforts, aggressively pursuing claims asserted in the various pending litigations. If this is the case, an examiner certainly is not warranted because it is the existence of the proposed Global Settlement that serves as the basis for the Equity Committee's Motion.

48. Appointment of an examiner is not justified pursuant to section 1104(c)(1). Based upon the language of section 1104(c)(1), which provides that the Court may appoint an examiner if "such appointment is in the interests of creditors, any equity security holders, and other interests of the estate," the appointment of an examiner pursuant to this provision clearly is discretionary. 11 U.S.C. § 1104(c)(1). In order to justify appointment of an examiner under this provision, "the protection must be needed, and the costs and expenses must not be disproportionately high." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977), U.S. Code Cong. & Admin. News 1978, p. 5787, 6359; In re Table Talk, Inc., 22 B.R. 706, 713-14 (Bankr. D. Mass. 1982) ("I cannot see how it is in the best interests of creditors to place another functionary in this case when no one has satisfactorily explained what an examiner could do that

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[6] At least one court has issued an order specifically stating that this is not an appropriate role for an examiner. See, e.g., In re Lyondell Chemical Co., Case No. 09-10023 (Bankr. S.D.N.Y. Oct. 28, 2009) (J. Gerber) [Docket No. 3148] ("[T]he examiner shall not investigate on or report on the Debtors' business judgment or merits of any party's plan proposals . . .") (a copy of which is attached hereto as Exhibit B).

present functionaries could not do. The legislative history clearly states the standard: the protection must be needed and the costs must not be disproportionately high."). As set forth above, the Debtors submit there is no need for an examiner and no justification for the significant costs resulting from appointment of one. Moreover, the Equity Committee cannot demonstrate, as required by section 1104(c)(1), that appointment of an examiner will benefit *all* interests of the estate. See In re Sletteland, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001) ("[A] creditor group, no matter how dominant, cannot justify the appointment of a trustee or examiner simply by alleging that it would be in its interests. It must show that the appointment is in the interests of all those with a stake in the estate.").

49. Many of the Debtors' creditor constituencies, including the Creditors' Committee, oppose appointment of an examiner in these cases and support the Global Settlement and Plan. Furthermore, given the fact that multiple governmental entities, including Congress, the Wash. USA, the FDIC, and the OTS, have investigated (or are investigating) the Debtors, WMB, and JPMC, no public interest would be served by appointing an examiner to replicate these efforts. Indeed, the appointment of an examiner might compromise certain of these pending investigations. The Equity Committee does not represent the true economic stakeholders in these cases. Equity holders in these cases are out of the money and have nothing to lose from not settling claims and "swinging for the fences" in the hope of forcing a recovery. Therefore, it is of no concern to the Equity Committee whether their desired actions put at risk significant value represented by the Global Settlement. Moreover, it is easy for the Equity Committee to claim that the costs of an examiner is "certainly money worth spending" (Motion 24), when such costs will in fact be borne by the creditors whose distributions will be reduced dollar-for-dollar by the expenses of an examiner. It is clear that appointment of an examiner to

further the Equity Committee's litigation tactics and efforts to oppose the Plan would serve only equity holders' parochial interests and, therefore, is not appropriate. See In re Gliatech, Inc., 305 B.R. at 836 (denying appointment of an examiner where doing so would benefit only the equity holder who sought the appointment).

If an Examiner Were Appointed, Its Role Should Be Severely Limited

50. It is well-settled that "the bankruptcy court 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); see also In re Loral Space & Comm'ns, Ltd., 2004 WL 2979785, at *5 (S.D.N.Y. Dec. 23, 2004) (noting that because "it is the court's duty to fashion the role of an examiner to avoid substantial interference with the ongoing bankruptcy proceedings . . . the Bankruptcy Court may exercise its discretion to limit the scope of the examiner's investigation and the compensation and expenses available to the examiner"); In re Schepps Food Stores, Inc., 148 B.R. 27, 30 (S.D. Tex. 1992) ("While the statute states that the court may appoint an examiner any time before the plan is confirmed, a creditor cannot use the provision to disrupt the proceedings."). As the statute itself makes clear, any examiner-conducted investigation must be "appropriate." 11 U.S.C. § 1104(c). Thus, if this Court were to determine that it is appropriate to appoint an examiner, the examiner's role and timeline should be narrowly tailored and designed to avoid interference with the ongoing bankruptcy proceedings. Loral Space, 2004 WL 2979785, at *5.

51. With respect to scope of investigation, several of the areas the Equity Committee would like to see investigated overlap with the scope of the investigation that the Debtors sought Court-authority to conduct pursuant to its Supplemental Rule 2004 Motion. (See Motion 26-27 (proposing to investigate "[d]iscussions between JPMC, the FDIC, the OTS, other

officials at the Department of Treasury, the SEC, and any other government agencies during 2008 concerning WMB or WMI . . . [and] [t]he decisions of OTS and FDIC regarding the seizure and the sale of WMB assets, the bases for those decisions, the communications of OTS and FDIC with other governmental or private personnel about those decisions in advance of making and acting on them, and whether the FDIC's sale of WMB's assets satisfied its statutory obligations"). Although the Debtors have received and reviewed the Third-Party Production, if an examiner were to investigate third parties further, as referenced above, at least the scope would not be entirely duplicative of the already-conducted Business Tort Investigation.

52. In any event, it is critical that, to the extent the Court is inclined to appoint an examiner, the Court should tailor the timeline for the examiner's investigation and issuance of a report to avoid substantial interruption of the Plan confirmation process. The Equity Committee has suggested 150 days for issuance of a report – no doubt with an eye towards derailing confirmation of the Plan. However, the parties have made substantial progress in these cases, reaching the Global Settlement on the heels of fourteen months of contentious litigation. With the Disclosure Statement and Plan on file, the Court should take steps to ensure that any examination of the estate not sacrifice this progress. The most appropriate way to accomplish this would be to establish a dual-track construct and limit the time by which an examiner's report would be issued to 60 days so as not to interfere with the Plan confirmation process. See, e.g., In re Tribune Co., Case No. 08-13141 (Bankr. D. Del. Apr. 20, 2010) (J. Carey) Order [Docket No. 4120] at ¶ 5 (a copy of which is attached as Exhibit A) (limiting examiner investigation to less than three months where plan and disclosure statement were already on file). If the Court were compelled to appoint an examiner, by fashioning relief as discussed herein and as implemented

in Tribune, the potential cost and harm to the parties in interest in the Debtors' bankruptcy cases would be mitigated.

53. Based upon the foregoing, the Debtors submit that there is no basis on which the Court should appoint an examiner but, if it does, the examiner's role should be strictly limited.

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

Dated: Wilmington, Delaware
May 4, 2010

By: _____

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EXHIBIT A

TRIBUNE ORDER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
TRIBUNE COMPANY, et al.,[1]	Case No. 08-13141 (KJC)
Debtors.	Jointly Administered
	Related to Docket No. 3062, 4112

AGREED ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER

Upon the Motion[2] of Wilmington Trust Company ("WTC") in the above-captioned chapter 11 cases for appointment of an examiner pursuant to § 1104(c) of the Bankruptcy Code; the Court having reviewed the objections, responses and/or statements related to the Motion filed

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Tribune Company (0355); 435 Production Company (8865); 5800 Sunset Productions Inc. (5510); Baltimore Newspaper Networks, Inc. (8258); California Community News Corporation (5306); Candle Holdings Corporation (5626); Channel 20, Inc. (7399); Channel 39, Inc. (5256); Channel 40, Inc. (3844); Chicago Avenue Construction Company (8634); Chicago River Production Company (5434); Chicago Tribune Company (3437); Chicago Tribune Newspapers, Inc. (0439); Chicago Tribune Press Service, Inc. (3167); ChicagoLand Microwave Licensee, Inc. (1579); Chicagoland Publishing Company (3237); Chicagoland Television News, Inc. (1352); Courant Specialty Products, Inc. (9221); Direct Mail Associates, Inc. (6121); Distribution Systems of America, Inc. (3811); Eagle New Media Investments, LLC (6661); Eagle Publishing Investments, LLC (6327); forsalebyowner.com corp. (0219); ForSaleByOwner.com Referral Services, LLC (9205); Fortify Holdings Corporation (5628); Forum Publishing Group, Inc. (2940); Gold Coast Publications, Inc. (5505); GreenCo, Inc. (7416); Heart & Crown Advertising, Inc. (9808); Homeowners Realty, Inc. (1507); Homestead Publishing Co. (4903); Hoy, LLC (8033); Hoy Publications, LLC (2352); InsertCo, Inc. (2663); Internet Foreclosure Service, Inc. (6550); JuliusAir Company, LLC (9479); JuliusAir Company II, LLC; KIAH Inc. (4014); KPLR, Inc. (7943); KSWB Inc. (7035); KTLA Inc. (3404); KWGN Inc. (5347); Los Angeles Times Communications LLC (1324); Los Angeles Times International, Ltd. (6079); Los Angeles Times Newspapers, Inc. (0416); Magic T Music Publishing Company (6522); NBBF, LLC (0893); Neocomm, Inc. (7208); New Mass. Media, Inc. (9553); Newscom Services, Inc. (4817); Newspaper Readers Agency, Inc. (7335); North Michigan Production Company (5466); North Orange Avenue Properties, Inc. (4056); Oak Brook Productions, Inc. (2598); Orlando Sentinel Communications Company (3775); Patuxent Publishing Company (4223); Publishers Forest Products Co. of Washington (4750); Sentinel Communications News Ventures, Inc. (2027); Shepard's Inc. (7931); Signs of Distinction, Inc. (3603); Southern Connecticut Newspapers, Inc. (1455); Star Community Publishing Group, LLC (5612); Stemweb, Inc. (4276); Sun-Sentinel Company (2684); The Baltimore Sun Company (6880); The Daily Press, Inc. (9368); The Hartford Courant Company (3490); The Morning Call, Inc. (7560); The Other Company LLC (5337); Times Mirror Land and Timber Company (7088); Times Mirror Payroll Processing Company, Inc. (4227); Times Mirror Services Company, Inc. (1326); TMLH 2, Inc. (0720); TMLS I, Inc. (0719); TMS Entertainment Guides, Inc. (6325); Tower Distribution Company (9066); Towering T Music Publishing Company (2470); Tribune Broadcast Holdings, Inc. (4438); Tribune Broadcasting Company (2569); Tribune Broadcasting Holdco, LLC (2534); Tribune Broadcasting News Network, Inc., n/k/a Tribune Washington Bureau Inc. (1088); Tribune California Properties, Inc. (1629); Tribune CNLBC, LLC, f/k/a/ Chicago National League Ball Club, LLC (0347); Tribune Direct Marketing, Inc. (1479); Tribune Entertainment Company (6232); Tribune Entertainment Production Company (5393); Tribune Finance, LLC (2537); Tribune Finance Service Center, Inc. (7844); Tribune License, Inc. (1035); Tribune Los Angeles, Inc. (4522); Tribune Manhattan Newspaper Holdings, Inc. (7279); Tribune Media Net, Inc. (7847); Tribune Media Services, Inc. (1080); Tribune Network Holdings Company (9936); Tribune New York Newspaper Holdings, LLC (7278); Tribune NM, Inc. (9939); Tribune Publishing Company (9720); Tribune Television Company (1634); Tribune Television Holdings, Inc. (1630); Tribune Television New Orleans, Inc. (4055); Tribune Television Northwest, Inc. (2975); ValuMail, Inc. (9512); Virginia Community Shoppers, LLC (4025); Virginia Gazette Companies, LLC (9587); WATL, LLC (7384); WCWN LLC (5982); WDCW Broadcasting, Inc. (8300); WGN Continental Broadcasting Company (9530); WLVI Inc. (8074); WPIX, Inc. (0191); and WTXX Inc. (1268). The Debtors' corporate headquarters and the mailing address for each Debtor is 435 North Michigan Avenue, Chicago, Illinois 60611.

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Motion.

or made by the above-captioned debtors and debtors in possession (the "Debtors"), the Official Committee of Unsecured Creditors appointed in the Debtors' cases (the "Committee"), JPMorgan Chase Bank, N.A. ("JPMC"), Merrill Lynch Capital Corporation ("MLCC"), the Credit Agreement Lenders (the "Credit Agreement Lenders"), certain retirees (the "TM Retirees"), Citicorp North America, Inc./Citigroup Global Markets Inc. (together, "Citigroup"), Bank of America, N.A. and Banc of America Securities LLC (together, "BofA"), Law Debenture Trust Company of New York, as Indenture Trustee ("Law Debenture"), Centerbridge Credit Advisors LLC ("Centerbridge") (collectively the "Parties"), and the Office of the United States Trustee (the "U.S. Trustee"), and considered the arguments and representations of counsel made thereon; and due and proper notice having been given under the circumstances; and it appearing that this is a core proceeding under 28 U.S.C. § 157(b)(2); and the Parties having consented to appointment of an examiner, it is hereby ORDERED as follows:

1. The U.S. Trustee is directed to appoint an examiner (the "Examiner") pursuant to 11 U.S.C. § 1104(c)(1).

2. The Examiner shall (i) evaluate whether there are potential claims and causes of action held by the Debtors' estates in connection with the leveraged buy-out of Tribune that occurred in 2007 (the "LBO") which may be asserted against any entity which may bear liability, including, without limitation, the Debtors, the Debtors' former and/or present management, including former/present members of Tribune's Board, the Debtors' lenders and the Debtors' advisors, said potential claims and causes of action including, but not being limited to, claims for fraudulent conveyance (including both avoidance of liability and disgorgement of payments), breach of fiduciary duty, aiding and abetting the same, and equitable subordination and whether

there are any potential defenses which may be asserted to such potential claims and causes of action, (ii) evaluate whether Wilmington Trust Company violated the automatic stay under 11 U.S.C. § 362 by its filing, on March 3, 2010, of its Complaint for Equitable Subordination and Disallowance of Claims, Damages, and Constructive Trust (docketed at Adv. No. 10-50732, D.I. 1), (iii) evaluate the assertions and defenses made by certain of the Parties in connection with the Motion of JPMorgan Chase Bank, N.A., for Sanctions Against Wilmington Trust Company for Improper Disclosure of Confidential Information in Violation of Court Order (D.I. 3714), and (iv) otherwise perform the duties of an examiner set forth in 11 U.S.C. §§ 1106(a)(3) and (4) (as limited by this Order) (collectively, the "Investigation").

3. The Examiner shall, before commencing the Investigation, meet and confer with the Parties, and the U.S. Trustee, if the U.S. Trustee requests participation. The Parties shall use their respective best efforts to coordinate with the Examiner and to avoid unnecessary interference with, or duplication of, the Investigation, and the Examiner, in his or her conduct of the Investigation, shall use best efforts to utilize relevant materials obtained by the Parties via informal and/or formal discovery to avoid unnecessary duplication of work performed to date. Nothing in this Order shall be deemed to require any Party to waive any applicable privilege.

4. Within seven (7) days after the later of entry of this Order or the date on which the U.S. Trustee files a notice of the Examiner's appointment, the Examiner shall propose a work and expenses plan (the "Work and Expenses Plan"), which shall include a good faith estimate of the fees and expenses of the Examiner and the Examiner's proposed professionals for conducting the Investigation (the "Budget"). The Court will hold a status conference on May 10, 2010 at 11:00 a.m. to (i) consider the Work and Expenses Plan (along with any responses thereto.

including an opportunity for any of the Parties to be heard on the appropriateness of the Budget) and (ii) order, if appropriate, further relief as will aid the Examiner in the performance of the Examiner's duties and/or to accommodate the needs of the estates. Notwithstanding the foregoing, the Examiner is authorized to commence the Investigation after the "meet and confer" referenced in the prior paragraph of this Order.

5. The Examiner shall prepare and file a report (the "Report"), as required by 11 U.S.C. § 1106(a)(4), on or before July 12, 2010, unless such time shall be extended by order of the Court upon application by the Examiner on notice to the Parties.

6. Until the Examiner has filed the Report, neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures concerning the performance of the Examiner's duties, except in hearings before the Court; provided, however, that neither any information asserted to be confidential pursuant to applicable agreement or treated as confidential pursuant to court order, nor any evaluation of the strengths or weaknesses of any potential claim or right of action the estates may have or suggested litigation strategy in connection therewith, shall be disclosed publicly without further order of this Court.

7. The Examiner may retain counsel and other professionals if the Examiner determines that such retention is necessary to discharge the Examiner's duties, with such retention to be subject to Court approval after notice under standards equivalent to those set forth in 11 U.S.C. § 327.

8. The Examiner and any professionals retained by the Examiner pursuant to order of this Court shall be compensated and reimbursed for their expenses pursuant to any procedures for interim compensation and reimbursement of expenses of professionals which are established

in these cases. Compensation and reimbursement of the Examiner shall be determined pursuant to 11 U.S.C. § 330, and compensation of the Examiner's professionals shall be determined pursuant to standards equivalent to those set forth in 11 U.S.C. § 330.

9. The Examiner shall have the standing of a party in interest with respect to matters that are within the scope of the Investigation, and shall be entitled to appear and be heard at any and all hearings in these cases.

10. The Debtors and all of the Debtors' affiliates, subsidiaries and other companies and the Examiner shall mutually coordinate and cooperate in connection with the performance of the Examiner's duties. In addition to full access to the documents in the depository as set forth below, the Debtors shall provide to the Examiner all other non-privileged documents and information relevant to the Investigation that the Examiner requests. Nothing herein shall prohibit the Debtors from objecting to requests, including, without limitation, on the ground that the documents or information requested are beyond the scope of the Investigation. If the Examiner seeks the disclosure of documents or information as to which the Debtors assert a claim of privilege or have objected and the Examiner and the Debtors are unable to reach a resolution on whether or on what terms such documents or information should be disclosed to the Examiner, the matter may be brought before the Court for resolution. The Debtors' and the Committee's privileges, including, but not limited to, the attorney-client privilege and attorney work-product privilege, remain and are not deemed waived or in any way impaired by this Order.

11. Subject to any applicable confidentiality agreement and orders entered by this Court, the Parties will as promptly as practicable take all necessary and appropriate steps to give

the Examiner and professionals retained by the Examiner access to the document depository referenced in the Order (i) Authorizing the Debtors to Establish a Document Depository and Directing the Committee to Deliver Certain Documents to the Depository and (ii) Establishing Settlement Negotiation Protections (D.I. 2858) (the "Depository Order"). The Examiner and professionals retained by the Examiner shall have full and complete access to all documents in the depository, notwithstanding the rights of Producing Parties (as that term is defined in the Depository Order) to object to the review of documents produced by such Producing Party. Notwithstanding any other provision of this Order, documents in the Depository and other information subject to orders of this Court relating to confidentiality shall not be disclosed by the Examiner, except in accordance with such orders or further order of this Court. The Parties shall reasonably cooperate with the Examiner.

12. Subject to the requirements for mutual cooperation and coordination set forth herein, nothing contained in this Order shall diminish the powers and authority of the Debtors or the Committee under the Bankruptcy Code, including the powers to investigate transactions and entities, to commence adversary proceedings and contested matters, and to object to claims.

13. Nothing in this Order shall impede the rights of the U.S. Trustee, the Parties (including WTC), or any other party in interest to request any other lawful relief, including but not limited to a request to further expand the scope of the Investigation, if during such Investigation other relevant matters are revealed which the Examiner or other party believes should be brought to the attention of the Court, or to have the Report (or parts thereof) filed under seal.

Dated: Wilmington, Delaware
April 20, 2010

THE HONORABLE KEVIN J. CAREY
CHIEF UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

LYONDELL ORDER

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
LYONDELL CHEMICAL COMPANY, et al.,	**Case No. 09-10023 (REG)**
Debtors.	**Jointly Administered**

ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER AND SPECIFYING SCOPE OF EXAMINER'S INVESTIGATION AND DUTIES PURSUANT TO SECTIONS 1104(c) AND 1106(b) OF THE BANKRUPTCY CODE[1]

Upon the motion (the "Motion") of the Official Committee of Unsecured Creditors (the "Committee") for appointment of an examiner pursuant to section 1104(c) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"); and upon the objection (the "Objection") of the Debtors to the Motion, as well as the response of the United States Trustee, the objection of the Ad Hoc Group of Senior Secured Lenders, the Access Parties' opposition, the limited joinder of UBS AG, Stamford Branch in the Debtors' Objection, the statement of UBS Securities LLC, the Committee's reply in support of the Motion, and the joinder of Bank of New York Mellon to the Committee's reply; and it appearing that the Court has jurisdiction over this matter and the relief requested in the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b); and due and sufficient notice of the Motion having been provided; and upon all the proceedings before the Court including the record of the hearing held on October 26, 2009; and after due

[1] Terms used but not defined herein have the meaning ascribed to them in the Final DIP Order (March 1, 2009) [Docket No. 1002].

deliberation the Court having directed the United States Trustee to appoint an examiner who is financially sophisticated and has substantial experience in chapter 11 mega-cases, in corporate finance, and has familiarity with the practice in the bankruptcy community in connection with DIP financings, exit financings, and equity rights offerings; it is hereby

ORDERED that, pursuant to section 1104(c) of the Bankruptcy Code and for the reasons set forth on the record at the hearing on the Motion, on or before October 30, 2009, the United States Trustee shall appoint an examiner (the "Examiner") in these jointly administered cases solely to conduct the investigation (the "Investigation") set forth herein and to prepare and transmit a written report thereon (the "Report") under section 1106(b) of the Bankruptcy Code as described herein; and it is further

ORDERED that the scope of the Investigation shall be solely to determine whether the Debtors have done anything out of the ordinary in connection with their decisions regarding: (1) the selection of a sponsor of the equity rights offering contemplated by the Debtors as part of their exit financing package required for emergence from chapter 11; (2) whether or not to get new DIP facility financing; and (3) proposing a litigation reserve in the Debtors' proposed plan of reorganization, in each case solely by reason of a conflict of interest or other breach of fiduciary duty or by acting in bad faith; and it is further

ORDERED that the Examiner shall not investigate on or report on the Debtors' business judgment or merits of any party's plan proposals; and it is further

ORDERED that the Examiner is authorized to comment on, but not to affirmatively investigate, whether and to what extent any party has used leverage in these cases to put pressure on the Debtors in connection with any plan proposal; and it is further

ORDERED that the Examiner shall not interfere with or delay the Debtors' confirmation process; and it is further

ORDERED that, pursuant to Federal Rule of Bankruptcy Procedure 9031, the Examiner is not a "master" and shall not have the powers of a "master" with respect to any matters; and it is further

ORDERED that the Examiner shall complete the Investigation and Report and file the Report under seal with the Court within 30 days of the date of entry of an order of this Court affirming the appointment and identity of the Examiner; and it is further

ORDERED that prior to filing the Report under seal with the Court, the Examiner shall provide a copy of the unredacted Report on a highly confidential basis, not to be distributed to any third parties, simultaneously to the Debtors, their professionals, and to the following parties in interest and their professionals: (i) the United States Trustee; (ii) the Committee; (iii) the Ad Hoc Group of Senior Secured Lenders; (iv) Bank of New York Mellon; (v) Wilmington Trust Company; (vi) Law Debenture Trust Company of New York; (vii) the DIP Agents (including the administrative agents); (viii) the Administrative Agent for the Bridge Facility; (ix) LeverageSource III, S.à.r.l.; and (x) Access Industries, Inc. and their affiliates; provided however that any parties (and their professionals) receiving copies of the report must ensure that any of their trading activity is fully consistent with applicable law and prior orders of this Court; and it is further

ORDERED that the parties receiving the Report as described above shall have 5 Business Days after receipt of the Report to file a reply (collectively, the "Replies") under seal with the Court, with unredacted copies to the other parties who have received the unredacted Report as described above, and that each Reply shall, among other things, address to what extent that party contends that the

Report, with or without redactions, should be made a public document or conversely, could not be made public without damage to the estates' ability to maximize value for all creditors, ***in each case*** in accordance with section 107 of the Bankruptcy Code ***and the caselaw thereunder***; and it is further

ORDERED that, after receipt of the Report and any Replies, a hearing or chambers conference shall be held (with appropriate confidentiality restrictions) to address further proceedings that might flow from the substance of the Report; and it is further

ORDERED that the Examiner shall not make any public disclosures concerning the performance of the Investigation or the Examiner's duties; and it is further

ORDERED that the Examiner shall have a budget of ***up to*** $200,000.00 for all fees and costs with which to conduct the Investigation and prepare and file the Report. The Examiner shall file a fee application with the Court and notice and a hearing shall be held upon such application. The Debtors' estates shall pay the Examiner such amounts as are approved by the Court; and it is further

ORDERED that if necessary, the Examiner is permitted to retain professionals to assist in performing the duties described herein, provided that the Examiner's budget shall not be increased for such purpose; and it is further

ORDERED that no materials provided to or produced by the Examiner shall be subject to discovery in any matter unless such documents would be otherwise discoverable; and it is further

ORDERED that the appointment of the Examiner is not based on, and does not represent, a finding by the Court that an examiner is needed because of any wrongdoing or impropriety by the Debtors or any other party, or that there is probable cause of any such wrongdoing or impropriety; and it is further

ORDERED that all parties shall reasonably cooperate with the Examiner in the investigation; and it is further

ORDERED that this Order shall be without prejudice to the right of any party, for cause, to seek or oppose, after the filing of the Report by the Examiner, a further investigation; and it is further

ORDERED that the Court shall retain jurisdiction to determine any disputes with regard to the implementation of this Order.

Dated: New York, New York
October ***28***, 2009

s/ Robert E. Gerber
HON. ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

HEARING TRANSCRIPTS/ORDER

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)
	.	
	.	Oct. 31, 2007 (10:09 a.m.)
Debtors.	.	(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 Colliers 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

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 10-10187-MFW

- -x

In the Matter of:

HSH DELAWARE GP LLC, ET AL.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

April 23, 2010

11:30 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

1 independent motion for an examiner along with its response to
2 the trustee motion. If my memory serves correctly, when we
3 filed the motion we weren't aware at that time that the trustee
4 motion had been continued to June. So we intended that at the
5 April -- early April hearing, if that was the trustee motion
6 hearing, that if a trustee wasn't granted we would then seek,
7 you know, the appointment of an examiner at that hearing. So
8 it's our position that an examiner can be heard -- a motion for
9 an examiner can be heard even while a trustee motion is
10 pending. Thank you.
11 THE COURT: Thank you.
12 Well, I agree with the U.S. Trustee on that last
13 point. I think that I don't buy the argument that simply
14 because a trustee motion is pending the Court cannot or should
15 not appoint an examiner until after that motion is decided,
16 especially where the trustee motion is continued. I think that
17 could lead to some gaming the system, if you will.
18 But I do agree that there is some discretion in
19 1104(c)(2) that the Court must exercise, not only in
20 determining whether and the amount of the unsecured non-trade
21 debt but also in determining whether, in fact, any
22 investigation is appropriate.
23 I think it is a futile act to appoint a trustee where
24 no proper investigation or appropriate investigation needs to
25 be done. It's wasteful of assets of the estate and does not

1 serve the creditors and other constituents in the case.
2 And I agree that at this stage it appears that the appropriate
3 investigation that the Court would order an examiner to conduct
4 is already being conducted by the lenders in connection with
5 their pending trustee motion.
6 So at this point I don't see that there's any need for
7 an examiner. However, I will continue this to the trustee
8 motion hearing and it may be appropriate at that time depending
9 on the outcome of that motion. Okay.
10 MR. STEARN: Thank you, Your Honor. We'll settle on a
11 form of order and provide one.
12 THE COURT: All right. Then we'll stand adjourned.
13 MR. STEARN: Thank you, Your Honor.
14 MR. DORSEY: Thank you, Your Honor.
15 (Proceedings concluded at 12:07 p.m.)
16
17
18
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25

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 08-10960(KG)
	.	
IDLEAIRE TECHNOLOGIES CORPORATION,	.	824 North Market Street
	.	Wilmington, DE 19801
	.	
	.	
Debtor.	.	June 13, 2008
. . . . .		4:03 p.m.

TRANSCRIPT OF EXAMINER MOTION
BEFORE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Sullivan Hazeltine Allinson, LLC
By: WILLIAM D. SULLIVAN, ESQ.
4 East 8th Street, Suite 400
Wilmington, DE 19801

Holland & Knight, LLP
By: JOHN J. MONAGHAN, ESQ.
10 St. James Avenue
Boston, MA 02116

Audio Operator: Leslie Murin

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(609) 586-2311 Fax No. (609) 587-3599

1 THE COURT: Good afternoon.

2 MS. CHRISTIAN: Good afternoon. We are counsel for
3 Wells Fargo Bank National Association as Indenture Trustee and
4 Collateral Agent for the debtors' 13 percent senior secured
5 notes.

6 THE COURT: Yes.

7 MS. CHRISTIAN: Your Honor, we join in the Majority
8 Secured Noteholder Group's objection, and respectfully request
9 that the U.S. Trustee's motion for appointment of an examiner
10 be denied or, alternatively, that the motion be adjourned until
11 a sale process is complete.

12 THE COURT: Thank you.

13 MS. CHRISTIAN: Thank you.

14 THE COURT: Thank you for that. Well, I have read
15 all of the submissions, a lot of the underlying cases. We have
16 a very and unusually, I think, complete record in this case at
17 this point. I even went back and read legislative history, and
18 I am going to deny the motion for the appointment of the
19 examiner.

20 I do take note of the fact that on the first day of
21 this case Mr. Buchbinder stood here all alone virtually and
22 heroically, I think, argued the points that have made the way
23 now for a Creditors' Committee to step in and continue, I don't
24 want to say necessarily the fight, but certainly, the
25 investigation, and I think the one thing that's clear is it's

1 somewhat unclear whether or not from the cases Section
2 1104(c)(2) of the Code mandatorily requires the appointment of
3 an examiner whereas here the debts exceed $5 million. There
4 are some persuasive decisions on both sides.
5 In fact, in one case that I read I thought that was
6 particularly well written, Judge Wedoff of the Northern
7 District of Illinois in the In re: UAL case found that it was
8 mandatory. But in this district the cases have almost
9 consistently held otherwise. Judge Walsh in S.A.
10 Telecommunications found that the provision is not mandatory.
11 I don't think that it is mandatory based upon my reading of the
12 legislative history, and just as the parties have pointed out,
13 the language of the statute itself and, particularly, the as
14 appropriate clause.
15 And I also noted that in another case we had a
16 visiting judge, Judge Newsome, it was the AC&S case in which
17 Judge Newsome, although he found that the appointment of an
18 examiner in these circumstances is mandatory, he told the
19 examiner that he wasn't going to do any work, and, in fact, I
20 think he used the expression not a penny for the examiner.
21 So I'm not about to really undertake a futile act or
22 appointment someone who is not going to be taking action,
23 because we have, I think, highly competent counsel, and now
24 I've learned a financial advisor -- highly competent financial
25 advisor representing the Creditors' Committee and doing the

1 very investigation that an examiner would be doing under these
2 circumstances, and I'm similarly persuaded by the fact that not
3 only is an examiner appropriate here, but it probably would be
4 inappropriate given the speed with which the case is
5 progressing and the work that's already been done by the
6 Committee, and the fact that negotiations are about to begin.
7 I just think the record is just full, replete with evidence
8 that the Committee's doing a very, very capable job.
9 In addition, I will also note that the Court
10 recently, at the request of the debtor, appointed counsel for
11 outside directors, and I think that may have some significance,
12 and perhaps the Court will hear from the outside directors as
13 to their views on the transactions.
14 And the bottom line is this. We're going to have a
15 sale hearing. It's going to be a strenuous sale hearing, I
16 suspect. And to the extent the Committee and any other
17 interested parties have not been provided cooperation in their
18 investigation, to the extent there hasn't been a very
19 significant shopping of this, marketing of this company, all of
20 that is going to make it much more difficult for the Court to
21 approve a sale, and the Court's agenda, speaking of agendas, in
22 this case is that there be a complete record upon which the
23 Court is able to make a determination that the sale is fair.
24 That will be happening, and, obviously, the more cooperation
25 that there is with the Committee and the United States Trustee

1 and between the debtor and the bondholders, on the one hand,
2 and them on the other, I think the more likely it may be that
3 the Court is in a position upon reviewing all of the facts to
4 approve a sale.
5 So the expense of an examiner is unwarranted here,
6 and I will, therefore, deny the motion with great respect for
7 the United States Trustee's Office and its maintenance really
8 of the integrity of the bankruptcy system here, and -- but all
9 in all, I think the motion has to be denied under these
10 circumstances and will be. And I will enter an order denying
11 the motion. Mr. Minuti, anything further, sir?
12 MR. MINUTI: Your Honor, if I could, just one
13 housekeeping matter.
14 THE COURT: Yes.
15 MR. MINUTI: Counsel for the noteholders had touched
16 on this, and I wanted to put it on the record and get Your
17 Honor's approval. Your Honor, in light of Your Honor's denial,
18 we will be preparing a stipulation that increases the carve out
19 as --
20 THE COURT: Yes.
21 MR. MINUTI: -- as well as changes some of the dates
22 in the interim financing order subject to us having further
23 negotiations before the final. But there were two dates, Your
24 Honor, that we were concerned of, and we wanted to put on the
25 record the continuance of those and ask Your Honor to so order

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Chapter 11
MAGNA ENTERTAINMENT CORP., *et al.*,	Case No. 09-10720(MFW)
Debtors.	April 20, 2010(10:37 a.m.) (Wilmington)

. . . . . .

REDROCK ADMINISTRATIVE SERVICES LLC, RACING AND GAMING SERVICES, LTD., AMWEST ENTERTAINMENT, LLC, BETTOR RACING, INC.,D/B/A ROYAL RIVER RACING, AND THE ELITE TURF CLUB, N.V.,	
Plaintiffs,	
v.	Adv.Proc.No. 09-51155(MFW)
MAGNA ENTERTAINMENT CORP., PACIFIC RACING ASSOCIATION, INC., MEC LAND HOLDINGS (CALIFORNIA), INC.,GULFSTREAM PARK RACING ASSOC., INC., LOS ANGELES TURF CLUB, INC., AND THE SANTA ANITA COMPANIES, INC.,	
Defendants.	

. . . . . .

MAGNA ENTERTAINMENT CORP.,	
Plaintiff,	
v.	Adv.Proc.No. 09-52212(MFW)
PA MEADOWS, LLC, PA MEZZCO, LLC, and CANNERY CASINO RESORTS, LLC,	
Defendants.	

. . . . . .

1 finance it through the Preakness, then I think we have a
2 different issue, which is a breach of fiduciary duty issue
3 that really calls for an Equity Committee at that point.
4 THE COURT: Well, let me make this ruling on the
5 motion for the appointment of an Equity Committee or in the
6 alternative for appointment of an Examiner. I agree with the
7 Committee and the debtors that this is just too late in the
8 game for such a motion to be filed. It should have been
9 filed more promptly. Clearly, at the time the settlement was
10 announced, if the equity had a problem with that, they should
11 have acted more promptly. With respect to the request for
12 discovery, I'm going to reserve on that. I think we'll hear
13 testimony today, and I think the shareholders who have filed
14 an objection will have ample time to contest the debtors' and
15 Committee's submissions on valuation and other issues, but I
16 will not foreclose if we do not finish today the opportunity
17 for some discovery. With respect to the Examiner, I will
18 make the same ruling I did previously. I think that the
19 Committee has acted in whatever role the Examiner would have
20 been instructed to act, namely they have investigated the
21 serious allegations regarding the interested parties and the
22 secured lenders' position. I am fully aware of the extensive
23 work done by the Committee in this regard, and that that was
24 ultimately settled. I make no comment on the settlement
25 because that's what I'll hear at the confirmation hearing.

1 But I think at this late date to appoint an Examiner to do
2 the same thing would just be a waste of assets of the estate.
3 With respect to the request to appoint an examiner just to do
4 a valuation, again, I will hear the valuation testimony and
5 the Equity Committee's objection to that, I assume, they will
6 be cross-examining on that point, but at this point, I just
7 don't think the appointment of an Examiner is warranted,
8 although I do agree that the Bankruptcy Code Section, because
9 of the amount of non-trade unsecured debt, would suggest it's
10 mandatory, I think the Court does have discretion with
11 respect to what the role of an Examiner would be, and since
12 all of the roles that an Examiner would play in this case
13 have already been fulfilled, I find it's a futile act and
14 will not appoint an Examiner.
15 MS. HARRIS: Your Honor, simply with respect to the
16 issue of the actions of the equity holders from the point
17 that the settlement was announced, I do have a witness here
18 who can tell the Court exactly what was done and how things
19 proceeded before - in order to maybe enlighten the Court with
20 respect to that issue, if the Court is so inclined, before
21 making that ruling.
22 THE COURT: No, I think just based on the timing of
23 it, I think too long of a delay has occurred. Okay?
24 MS. HARRIS: Thank you, Your Honor.
25 THE COURT: I do not foreclose any 503(b)(3) declaim

1 IN THE UNITED STATES BANKRUPTCY COURT

2 FOR THE DISTRICT OF DELAWARE

3

4 In the matter of)
5)
SA TELECOMMUNICATIONS, INC.,)
6 et al.,) Case Nos. 97-2395
) through 97-2401(PJW)
7 Debtors.)

8

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

12

13 Friday, March 27, 1998
14 1:00 p.m.

15

16 BEFORE: HONORABLE PETER J. WALSH
17 United States Bankruptcy Judge

18

19

20

21

22 WILCOX & FETZER
23 1330 King Street - Wilmington Delaware 19801
(302) 655-0477
24

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

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In the matter of	)	
	)	
WEBCRAFT TECHNOLOGIES, INC.,	)	Case No. 93-1210
et al.,	)	
	)	
Debtor.	)	

Bankruptcy Courtroom
Room 2 - Fourth Floor
U. S. Courthouse
844 King Street
Wilmington, Delaware

Thursday, November 4, 1993
10:05 a.m.

BEFORE: HONORABLE HELEN S. BALICK,
United States Bankruptcy Judge

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

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Registered Professional Reporters

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ORIGINAL

1 disclosure statement. Even the disclosure statement
2 indicates to the contrary.
3 JUDGE BALICK: I have a motion to
4 dismiss New York Life Insurance Company and New York
5 Life Insurance Annuity Corporations motion for an
6 order directing the United States Trustee to appoint
7 an examiner in the Webcraft cases. I understand New
8 York Life's response to that motion to rest on the
9 fact of the language of 1104(b)(2), which suggests
10 the mandatory appointment of an examiner, period. I
11 do not read the statute in that sense. I read the
12 statute as it begins following subsection (b). And
13 there has been a reference to different parts of
14 subsection (b) and not its entirety. But it is
15 obviously necessary to consider the appointment of
16 an examiner if appropriate.
17 The motion to dismiss is granted. New
18 York Life has not presented any information or any
19 evidence which satisfies its burden.
20 Now, are you going to draft me an
21 order?
22 MS. JONES: I will, Your Honor.
23 JUDGE BALICK: Then we stand in
24 recess.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ACANDS, INC.,	Case No. 02-12687 (RJN)
Debtor.	**Re: D. I. Nos. 73, 213 and 214**

ORDER

Upon consideration of Travelers Casualty and Surety Company's motion for the appointment of an examiner, pursuant to 11 U.S.C. §§ 1104(c) and 105(a) (the "Motion), appropriate notice having been provided to parties in interest, and good cause appearing therefore, it is hereby

ORDERED that the Motion is granted in part only, for the reasons set forth on the record at the hearing on November 18, 2002; it is further

ORDERED that the United States Trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person to serve as examiner in this case; it is further

ORDERED that the examiner is not to perform any task or take up any duty or in any way perform any work or incur cost to the estate without further order of the Court.

SO ORDERED.

Dated: 12/19, 2002

Hon. Randall J. Newsome
United States Bankruptcy Judge

324639

EXHIBIT B

Washington Mutual

WASHINGTON MUTUAL, INC., CASE NO. 08-12229 (MFW)
PROPOSED DISCOVERY PLAN REGARDING PLAN CONFIRMATION

Attorney Work Product and Privileged Communications (for the benefit of the Equity Committee, subject to entry into acceptable FRE 502(d) order)

1. Materials prepared by counsel:

   1.1 Draft complaint asserting claims against JPMC under "business tort" theories

   1.2 Selection of "hot docs" culled from the entirety of the discovery obtained by the Debtors pursuant to Bankruptcy Rule 2004

   1.3 Summaries of the Rule 2004 Production

   1.4 Custodian interview notes and summaries of document locations (concerning post-WMI independence documents)

   1.5 All memoranda, presentations, and formal analyses prepared by QE pertinent to the claims and causes of action to be settled

   1.6 All memoranda, presentations, and formal analyses prepared by WGM pertinent to the claims and causes of action to be settled

   1.7 Witness interview memoranda to the extent they exist

2. Materials prepared by other professionals:

   2.1 Solvency review prepared by A&M

   2.2 Global Settlement worksheet prepared by A&M

   2.3 Tax Basis summary and supporting detail prepared by A&M

   2.4 Tax Accounting summary and supporting detail prepared by A&M

   2.5 Preference Analysis Overview and supporting detail prepared by A&M

   2.6 401(k) Plan Summary, Pension Plan Summary, and Medical Plan Summary prepared by A&M

   2.7 Blackstone Report (when complete)

   2.8 Draft Consor Report regarding intellectual property assets (subject to Consor's consent, which the Debtors have requested)

3. Continued access to QE and WGM personnel who will make themselves available to discuss legal theories at issue in the various litigations with JPMC and the FDIC

Washington Mutual

WASHINGTON MUTUAL, INC.
CASE NO. 08-12229 (MFW)
PROPOSED DISCOVERY PLAN REGARDING PLAN CONFIRMATION

(subject to entry into acceptable confidentiality stipulation and protective order)

1. Documents Already Provided

   1.1 All JPMorgan Chase Rule 2004 production

   1.2 All third-party Rule 2004 production for which third-party consent was obtained

   1.3 All formal correspondence between the Debtors/QE and JPMorgan Chase/S&C during the course of the litigation

   1.4 All pleadings and transcripts as requested

   1.5 VISA Shares valuation prepared by A&M

   1.6 All materials listed on the document index attached as Exhibit A hereto, including due diligence materials compiled prepetition in connection with pursuing strategic transactions, financial statements, business operations overview, asset analyses, claims analyses, prepetition transfer analyses, prepetition tax reports, anticipated tax refunds and tax payments, recovery scenario analyses, and valuation materials concerning the proposed reorganized Debtor

2. Documents To Be Produced

   2.1 Settlement Communications – non-privileged email correspondence between and among settling parties

      2.1.1 Using appropriate custodians to be searched applying substantive search terms (list of proposed custodians attached as Exhibit B hereto; search terms to be discussed with Objecting Parties)

   2.2 All correspondence with third parties in connection with the Debtors' Rule 2004 investigation

   2.3 Post-Petition WMI Documents

      2.3.1 Non-privileged, post-petition WMI documents that had been deemed responsive to JPMC's document requests in the Adversary Proceeding

      2.3.2 Solvency review – non-privileged version

      2.3.3 Blackstone Report (when complete)

2.3.4 Additional electronic search for non-privileged WMI documents using 25 proposed custodians to be searched applying substantive search terms (custodians and search terms to be discussed with Objecting Parties)

2.4 "Heritage" WMI Documents (Pre-receivership WMI documents in WMI's custody)

2.4.1 All non-privileged electronic documents in WMI's possession using 25 proposed custodians to be searched using substantive search terms (custodians and search terms to be discussed with Objecting Parties)

Washington Mutual

EXHIBIT A

Washington Mutual

EXHIBIT B

Washington Mutual

CUSTODIANS FOR SETTLEMENT COMMUNICATIONS

- Brian Rosen (WGM)
- Stuart Goldring (WGM)
- William Horton (WGM)
- Bill Kosturos (A&M)
- Jon Goulding (A&M)
- John Maciel (A&M)