

Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code [Dkt. No. 6082]. Any references to the Examiner's Report in those other filings of the Settling Parties should also be stricken, and this Court should not consider those references when it decides whether to confirm the Plan and Global Settlement.

2. The Debtors have made a conscious decision not to rely on any advice of counsel or work product in trying to convince this Court that it has met its burden of proof and the Plan should be confirmed. The Equity Committee is skeptical of how the Debtors believe they can meet this burden given that the investigation and analysis of the claims at the heart of the Global Settlement and Plan all occurred through counsel for the Debtors. Nevertheless, the Debtors are convinced that they can do so.

3. Given the Debtors' decision not to rely on advice of counsel to approve the Global Settlement and Plan, it would be supremely inappropriate for this Court to allow the backdoor use of this material through the Examiner's Report. "The Debtors and the Creditors' Committee provided the Examiner with numerous attorney work-product documents outlining their analyses of potential claims, defenses, damages, and discovery materials relating to claims against JPMC, as well as other entities or individuals. The Examiner reviewed and utilized this work product in planning his Investigation." Examiner's Report at 13.

4. The Examiner's Report also repeatedly relies on inadmissible hearsay. Contrary to the representations made by the Examiner to members of the Equity Committee, the Examiner made a conscious decision not to take interviews under oath. In many instances, the Examiner relies solely on interviews, recollections, or representations as opposed to actually examining and investigating source documents or testing the assertions made by interested parties.

5. For example, the Examiner concludes that the BOLI/COLI policies – worth more than \$5 billion by themselves – belong to JPMC and not WMI, however, “the Examiner did not audit the analysis of the policies and plans conducted by the Debtors with respect to the Policies.” Examiner’s Report at 185. Instead, “[t]he Examiner was advised by the Debtors’ professionals, including A&M, that they had conducted such an audit.” Id. Apparently, the Examiner did not even have access to half of the relevant documents for this issue – nor do the Objectors. Id.

6. Likewise, on the vital question of whether WMI was solvent at the time of its seizure in September 2008, the Examiner decided not to look at the “loan-level data” and other information that “[v]irtually all who examined solvency commented . . . would be required to conduct a complete and accurate solvency analysis.” Examiner’s Report at 59. In fact, the Equity Committee specifically told the Examiner that the solvency analysis “would require a detailed review of WMB’s loan portfolio, which is not available to Equity and was also not reviewed by the Debtors.” Id. at 24 n.39. In other words, with respect to one of the threshold issues of the bankruptcy, no party has performed the analysis that everyone believes is required.

7. With respect to the Examiner’s “investigation” of JPMC, the Examiner appeared simply to accept JPMC’s assertion that it committed no tort despite evidence that the Examiner either overlooked or downplayed. For example, despite documents showing that JPMC intended to meet with ratings agencies in March and April 2008 to illegally discuss Washington Mutual, the Examiner accepted the fact that no meeting actually occurred based solely upon the representations of interested parties and no documentary evidence. Furthermore, it credited JPMC’s innocuous explanation for these meetings without citing a shred of documentary evidence. See Examiner’s Report at 215 & accompanying notes.

8. The Examiner also maintained that JPMC never spoke to the media despite

See Exh. A (JPM_EX00029497 at 29498) attached hereto.²

9. Perhaps most egregiously, the Examiner accepted JPMC's explanations for its interactions regarding a forced takeover of Washington Mutual with no testing of assertions and despite record evidence to the contrary for why it was discussing receivership in the summer of 2008 and fails to account at all for the fact that as early as March 2008, JPMC maintained that the Washington Mutual

See Exh. B (JPM_EX 00017493) attached

hereto. In fact, JPMC met with regulators without Washington Mutual's knowledge in late March 2008. Nevertheless, the Examiner states that "JPMC witnesses described contact with regulators in advance of a potential acquisition as routine." Examiner's Report at 212. In a footnote, however, the OTS regulator with whom JPMC spoke stated that such contact was "unusual." Id. at 213 n.753. Later in the Report, the Examiner concludes that this contact with OTS in the Spring of 2008 explicitly violated the parties' confidentiality agreement. Id. at 232.

10. The Examiner's pattern of accepting the veracity of statements while overlooking documentary evidence continued through his description of the events in the summer of 2008 when JPMC was analyzing scenarios under which WMB was placed in receivership. For example, the Examiner accepted at face value the statements from JPMC witnesses that it had no inside information from regulators regarding a contemplated seizure of the bank. He stated that he "found no contrary evidence on this point" to contradict these self-serving statements. Examiner's

² Pursuant to the Court's Order Governing the Production and Use of Discovery Materials in Connection with Plan Confirmation entered on July 2, 2010 [Dkt. No. 4863] authorizing Parties to file confidential materials under seal without filing a separate motion to that effect, the Equity Committee is filing certain of the exhibits hereto under seal and redacting references to those sealed exhibits.

Report at 218 & n.787; id. at 279 n.1102 (“No JPMC witness recalled WMB being discussed at that meeting or another meeting between JPMC and the FDIC in July.”). Documents from JPMC, however,

See Exh. C (JPM_EX00028481 at 28481, 28492-28532) attached hereto.

11. And on July 17, 2008, an email among senior JPMC executives who were interviewed by the Examiner stated,

See Exh. D (JPM_EX00000322-00000339) attached hereto (emphasis added). Attached to the email is a 15-page presentation entitled “Despite this email, the Examiner accepts JPMC’s explanation that they “could not recall the July 18, 2008 meeting” and that “deals or clients typically were not discussed at these types of meetings.” Examiner’s Report at 220. In a footnote, the Examiner dismisses the July 17 email because, based on his interviews, “it is not clear whether the investment bank spoke with regulators about WMI in particular.” Id. at 220 n.803. The Examiner, of course, had no documents from the FDIC on this point.

12. In fact, the Examiner chose not to aggressively pursue discovery regarding the FDIC’s interactions with JPMC in the summer of 2008. The Examiner justified his decision on the ground that the claims against the FDIC suffer legal impediments. But even assuming *arguendo* that the claims against the FDIC are barred, such discovery would have shed significant light on JPMC’s conduct during this critical period. Indeed, the Examiner did not gain access to a yet-to-be-released report by the Offices of Inspector General for Treasury and the FDIC regarding

“the FDIC’s resolution process for WMB” – one of the reports that the Debtors cited in prior briefing about why an Examiner was unnecessary. Examiner’s Report at 268 n.1047.

13. The Debtors may raise in response, and this Court may wonder, whether the Equity Committee is in any position to move to strike reliance on the Examiner’s Report given that it pushed so hard for one to be appointed in the first instance. The answer, however, is that the Examiner’s Report was never intended to replace a full and fair opportunity to contest the Plan and Global Settlement. Indeed, the Examiner decided not to use the full scope of his authority, but rather examine only whether the settlement was fair and reasonable. As this Court is aware, the Equity Committee in fact objected to that limitation on the Examiner’s investigatory scope. See, e.g., Supplemental Statement In Support of Motion for Examiner and on Timing for Resolution of Shareholder Meeting at ¶ 4 (filed under seal). And the agreed Order directing the appointment of an examiner was not so limited [Dkt No. 5120].

14. Moreover, the Examiner was able to access some documents and facts that the Equity Committee could not have accessed. And those facts, indeed, lead the Examiner to conclude in at least two instances that JPMC had breached its confidentiality agreement with Washington Mutual. In other instances, as described above, the Examiner relied on unsworn statements that are hearsay in any court proceeding as opposed to discussing the documentary record itself.³ Indeed, for one of the Examiner’s primary conclusions – that a liquidity crisis caused OTS to seize WMB and such seizure was therefore justified – the Examiner relied primarily on Peter Freiling, the only Washington Mutual witness to agree with the OTS’s decision to close the bank. Examiner’s Report at 74. Apparently unbeknownst to the Examiner,

³ The Equity Committee agrees with and incorporates by reference the arguments and authorities cited in the TPS Consortium’s Motion in Limine to Preclude Any Use of or Reference to the Examiner’s Report, Dkt No. 6127.

however, Mr. Freilinger is a paid consultant to the Debtors and their professionals. See Exh. E (Freilinger Depo. 190:17-191:25) attached hereto.

15. More fundamentally, however, the Debtors and other Settling Parties have refused to allow the Equity Committee to test the veracity of the statements and material they presented to the Examiner. They have claimed that any such material is privileged. See Official Committee of Equity Securities Holders Objection to Plan Confirmation [Dkt. No. 6012] at 28; Exh. F (Kostoros Depo. 109:15-111:12 (rough draft)) attached hereto; Exh. G (Goulding Depo. 43:25-45:25 (rough draft)) attached hereto. This has substantially prejudiced the Equity Committee and other objectors because it stymies the ability to determine whether in fact the statements made to the Examiner were accurate.

16. For these reasons, the Equity Committee does not believe it is appropriate to rely on the Examiner's Report as a basis to confirm the plan and settlement. In the alternative, however, and in order for the Objectors to properly assess the merits of what was revealed to the Examiner, the Equity Committee respectfully suggests that the Settling Parties reveal all communications and discussions with the Examiner. Reliance on the Examiner's Report opens the door to being able to test the substance of the communications between each of the Settling Parties and the Examiner.

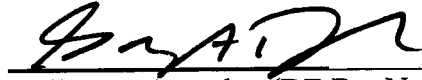
17. With respect to the Debtors' communications, any privilege belongs to the Estate, and therefore at a minimum and regardless of whether the Examiner's Report is introduced, the Equity Committee should have access to this material pursuant to the Rule 502(d) order between the Debtors and the Equity Committee entered on July 2, 2010 [Dkt No. 4863].

WHEREFORE, the Equity Committee respectfully requests entry of an Order substantially in the form attached hereto striking each of the Declarations submitted by the Debtors in support of confirmation of the Plan that in any way rely upon the Examiner's Report and precluding the

Debtors from relying upon the Examiner's Report in any way in support of confirmation of the Plan or, in the alternative, compelling the Debtors to produce all work product and communications related to the Examiner's Report.

Dated: November 30, 2010
Wilmington, Delaware

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EXHIBIT A

FILED UNDER SEAL

EXHIBIT B

FILED UNDER SEAL

EXHIBIT C

FILED UNDER SEAL

EXHIBIT D

FILED UNDER SEAL

EXHIBIT E

FILED UNDER SEAL

EXHIBIT F

FILED UNDER SEAL

EXHIBIT G

FILED UNDER SEAL

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

In re:)	Chapter 11
WASHINGTON MUTUAL, INC., <u>et al.</u> , ¹)	Case No. 08-12229 (MFW)
Debtors.)	(Jointly Administered)
)	Related Docket No. _____

**ORDER GRANTING THE MOTION TO STRIKE DECLARATIONS AND ARGUMENTS
RELYING ON EXAMINER'S REPORT OR, IN THE ALTERNATIVE, TO COMPEL
PRODUCTION OF ALL DEBTORS' WORK PRODUCT AND COMMUNICATIONS
RELATED TO THE EXAMINER'S REPORT**

Upon consideration of the *Motion to Strike Declarations and Arguments Relying on Examiner's Report, or in the Alternative, to Compel Production of all Debtors' Work Product and Communications Related to the Examiner's Report* (the "Motion")² filed by the Official Committee of Equity Security Holders (the "Equity Committee"), the Court finds that it has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334; this is a core proceeding pursuant to 28 U.S.C. § 157(b); venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; the relief requested in the Motion is in the best interests of the Debtors, their estates and creditors; proper and adequate notice has been given and no other or further notice is necessary; after due deliberation and sufficient cause appearing thereof, it is hereby:

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is **GRANTED**.
2. Any and all references to the Examiner's Report in support of confirmation are

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

² All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

hereby stricken.

3. This Court will not rely on the Examiner's Report in determining whether to confirm or deny the Plan.

4. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: Wilmington, Delaware
_____, 2010

THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT