IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re WASHINGTON MUTUAL, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 08-12229 (MFW) (Jointly Administered) **Re: Dkt. No. 6567** **Hearing Date: February 8, 2011 at 10:30 a.m.** **Objection Deadline: February 1, 2011 at 4:00 p.m.**

OBJECTION OF APPALOOSA MANAGEMENT L.P. TO THE MOTION OF THE EQUITY COMMITTEE FOR AN ORDER PURSUANT TO BANKRUPTCY RULE 2004 AND LOCAL BANKRUPTCY RULE 2004-1 DIRECTING THE EXAMINATION OF THE WASHINGTON MUTUAL, INC. SETTLEMENT NOTE HOLDERS GROUP

Appaloosa Management L.P. ("Appaloosa") submits the following objection to the Motion of the Official Committee of Equity Security Holders (the "Equity Committee") for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of the Washington Mutual, Inc. Settlement Note Holders Group (the "Equity Committee's Motion" or "Motion").

PRELIMINARY STATEMENT

The Equity Committee's Motion seeks discovery of Appaloosa and the other "Settlement Note Holders" based entirely on the months-old speculation of a disgruntled shareholder (Nate Thoma). Back in November, in the course of railing against the Debtors, JPMorgan, the FDIC and others, Thoma speculated that Settlement Note Holders may have

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

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traded in the Debtor's securities based on material non-public information because they made money on their purchases. These suspicions are demonstrably false and defamatory. And most importantly for this Motion, they are demonstrably false *based on the allegations themselves on the record as it now stands*. The Equity Committee's demand to nonetheless conduct an invasive and burdensome investigation of Appaloosa and others on these issues (let alone improperly reopening the entire case to broad discovery, which is what the Equity Committee obviously seeks to do) is entirely unnecessary and abusive.

Thoma speculates that because the market price of PIERS rose significantly during the period of October 2009 through March 2010, Settlement Note Holders who bought PIERS during this period must have known something the market did not. He says there was "no particularly positive public information that the price movement can be attributed to." (Thoma objection at ¶ 16). This is ill-informed and foolish, at best. The period between September 2009 and March 2010 was the period in the history of these cases where the *most* positive information was publicly announced to the market:

- On September 10, 2009, the Worker, Homeownership, and Business Assistance Act of 2009 (the "Business Assistance Act of 2009") was publicly introduced in Congress. This bill sought to increase the net operating loss ("NOL") carry back period to five years – something well known to be of particular significance to the Debtors' estates.
- On September 22, 2009, the bill passed in the House of Representatives by roll call vote. This usually occurs for non-controversial legislation.
- On November 4, 2009, the bill passed in the Senate with changes by roll call vote. These changes were approved by the House of Representatives on November 5, 2009.
- On November 6, 2009, the President signed the bill into law.

- On December 30, 2009, the Debtors' filed an Operating Report in which it estimated that the Business Assistance Act of 2009 could result in up to $2.6 billion in additional refunds to the Debtors' estates.

- On January 4, 2010, the media reported that the price of WMI securities had increased as a result of this $2.6 billion disclosure.

- On March 12, 2010, the Debtors announced in Court that they had reached a Global Settlement Agreement with the parties, and read the significant terms of that agreement into the record. That same day, the media reported that, under the terms of the Global Settlement Agreement, "JPMorgan will receive USD 1.82bn of USD 2.6bn in tax refunds that WMI has already received with the balance retained by WMI. The FDIC would receive roughly USD 1.6bn – USD 1.8 bn of a second expected tax refund estimated to be USD 2.6 bn – 3bn. . . . WMI would keep USD 1bn – USD 1.2 bn of the future installment."

- On March 26, 2010, the Debtors filed the Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, which incorporated the Global Settlement Agreement.

There is no way that Thoma – an individual who, according to him, had been "tracking the progress of this case since its inception" – failed to understand the significance of a multi-billion dollar tax refund to the Debtors' estates, or could assert in good faith that "there was no particularly positive public information." (Thoma objection at 1, ¶ 16). Thoma either did not do his homework or is deliberately misleading the Court. The same is true of Thoma's suggestion that the "heavy accumulation" of the Debtors' "PIERS" securities in March 2009 was the result of impropriety on the part of the Settlement Note Holders. (Thoma objection at ¶ 15). *Appaloosa did not buy a single share of PIERS securities during that time period*, and should not be subjected to the intrusive nature of a 2004 examination into its private business affairs based on yet another false and highly defamatory guess on the part of Thoma.

The reason for the Equity Committee's newfound interest in this issue is transparent. They seek to take advantage of this perceived "opportunity" to leverage a recovery where none exists, at no risk to its already out-of-the money constituency. Since the third party

releases of the Settlement Note Holders have been removed from the revised Plan, the only remaining issue even potentially affected by these issues is whether the agreed contract rate of interest is honored and paid to the Settlement Note Holders. The Equity Committee is unaffected by this, but the Settlement Note Holders stand to lose hundreds of millions of dollars. In the meantime, every month of delay caused by the Equity Committee costs the PIERS holders approximately $30 million in interest that must be paid over to senior and subordinated note holders pursuant to the purported subordination language in the PIERS documents. The result is a classic holdup – the Equity Committee is hoping that the Settlement Note Holders will offer them some money to drop the issue. That is not going to happen. This Motion should be seen for what it is and denied.

FACTUAL BACKGROUND

1. On October 6, 2010,[2] the Debtors filed a request for confirmation of their Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Plan") in conjunction with the Amended and Restated Global Settlement Agreement (the "Settlement Agreement").

2. On November 19, 2010, Mr. Thoma filed an objection to the Plan (the "Thoma objection"). The Thoma objection speculated that Owl Creek Asset Management, L.P. ("Owl Creek"), Centerbridge Partners L.P. ("Centerbridge"), Aurelius Capital Management L.P., Appaloosa, and several of their respective affiliates (collectively, the "Settlement Note Holders") might have traded on nonpublic and confidential information obtained during negotiations of the Plan.

[2] The Plan was modified on October 29 and November 24, 2010.

3. On November 19, 2010, and again on December 2, 2010, the Equity Committee filed its objections to the Plan. Neither of those objections raised any of the purported improprieties that Thoma had set forth in his objection.[3]

4. On December 2, 2010, the Court held a hearing with respect to approving the Settlement Agreement and confirmation of the Plan (the "Confirmation Hearing"). The hearing concluded on December 7, 2010.

5. On January 7, 2011, the Court issued an opinion denying confirmation of the Plan, although it noted that the Plan was "fair and reasonable" in most material respects (the "Opinion").

6. On January 18, 2011 – more than one month after the Confirmation Hearing and almost two weeks after the Court issued its Opinion – the Equity Committee filed the 2004 Motion. (Docket Index 6567).

ARGUMENT

I.
THE COURT SHOULD DENY THE EQUITY COMMITTEE'S 2004 MOTION

A. Applicable Law

7. The Equity Committee seeks to obtain broad-reaching and intrusive discovery on issues that are not relevant to plan confirmation through the use of Rule 2004. As discussed in greater detail below, *see* discussion at pp. 15-16 *infra*, it is well-recognized that once a contested matter has commenced, discovery must be made pursuant to Federal Rules of

[3] Indeed, the Equity Committee attempted to file a Second Supplemental Objection to Plan Confirmation on December 21, 2010. That objection – which the Court ultimately did not allow the Equity Committee to file – similarly did not raise any of Thoma's speculation as grounds for denying the Plan.

Bankruptcy Procedure 7026-7037. *See, e.g.*, *In re Washington Mutual*, 408 B.R. 45, 50 (Bankr. D. Del. 2009). The Equity Committee's Motion is, therefore, procedurally improper. In any event, whether the Motion is viewed through the lens of Rule 2004 or Rule 7026, the Motion must be denied as it is a transparent attempt to harass the Settlement Note Holders into a settlement.

8. Rule 2004 allows for broad discovery, but there are limits to what is allowed under the rule. The examination must be relevant to the administration of the estate, and it may not be used as a tool for the purposes of abuse or harassment – which is what the Equity Committee is trying to do here. *See In re Symington*, 209 B.R. 678, 684-85 (Bankr. D. Md. 1997); *In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984). The Equity Committee had a full and fair opportunity to investigate the issues raised in the Thoma objection in November and December 2010. It chose not to do so, presumably because it saw the Thoma allegations for what they were – pure speculation based on incomplete and wrong facts and faulty logic. Now that the Court has denied all of the Equity Committee's objections to the Plan in a lengthy and well-reasoned opinion, the Equity Committee seeks to relitigate every issue in the administration of the estate using the pretext of the Thoma objection. This is clearly nothing more than a transparent attempt to harass the parties and extort a settlement.

9. Rule 2004(a) of the Federal Rules of Bankruptcy Procedure states that "[o]n motion of any party in interest, the court may order the examination of any entity." The primary purpose of the examination is "to show the condition of the estate [and] to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of the creditor may be preserved." *Cameron v. United States*, 231 U.S. 710, 717 (1914) (discussing former section 21(a) of the Bankruptcy Act from which Rule 2004 and former Rule 205

derived); *see In re Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 708 (Bankr. S.D.N.Y. 1991) (finding that the purpose of the examination is to enable the trustee to discover the nature and extent of the bankruptcy estate).

10. While the scope of the examination is broad and can be in the nature of a "fishing expedition," *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996), such examinations are *not* allowed to be tools for abuse or attempts to create negotiating leverage. *See In re Coffee Cupboard, Inc.*, 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991). As the Court stated in *In re Drexel Burnham Lambert Group*:

> Rule 2004 requires that we balance the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination. That documents meet the requirement of relevance does not alone demonstrate that there is good cause for requiring their production.

In re Drexel Burnham Lambert Group., 123 B.R. at 712 (citations omitted); *see In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 393 (Bankr. W.D. Pa. 2008). Instead, "a totality of circumstances approach is required, taking into account all relevant factors." *In re Countrywide Home Loans,* 384 B.R. at 393.

11. To determine whether good cause to examine a third party exists, a balancing test is used which weighs the examiner's interests in obtaining access to the information versus the examinee's interests in avoiding the cost and burden of disclosure. *Id.* The level of good cause required to be established varies like a sliding scale:

> Inquiries that are tightly-focused on the creditor's relationship with a particular debtor will require a relatively low level of good cause because they represent a low level of intrusion into the creditor's business affairs and a low risk of abuse. Inquiries that seek far-reaching information on policies and procedures of general application in the creditor's operation will require a correspondingly higher showing of good cause.

Id.

12. The burden of establishing "good cause" rests upon the Equity Committee. *In re Metiom, Inc.,* 318 B.R. 263, 268 (Bankr. S.D.N.Y. 2004) ("the examiner bears the burden of proving that good cause exists for taking the requested discovery"); *In re Buick,* 174 B.R. 299, 204 (Bankr. D. Colo. 1994) (same). This burden cannot be met merely by "showing that justice would not be impeded by production of the requested documents[,]" *In re Drexel Burnham Lambert Group,* 123 B.R. at 712, or on the basis of unsubstantiated allegations, *see generally In re Wilcher,* 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985).

13. Where the allegations prompting the Rule 2004 request are entirely unsubstantiated, as they are here, the motion should be denied. *See, e.g. In re Strecker,* 251 B.R. 878 (Bankr. D. Colo. 2000) (denying a Rule 2004 motion by the assignee of "bad checks" written by the debtor for examination of the debtor's bank and financial records because the movant could not show, directly or by inference, that the debtor committed fraud in connection with the "bad checks"); *In re Wilcher,* 56 B.R. at 433 (denying a Rule 2004 motion which sought discovery from the purchaser of an apartment complex for information relating to alleged irregularities surrounding the sale of the complex because the allegations against the purchaser had not been substantiated).

B. Discussion

14. The Equity Committee seeks to conduct broad discovery into the affairs of a non-debtor based on highly speculative and false allegations made by Thoma. It claims that such an examination would be "relevant to Plan confirmation." (Equity Committee's Motion at 2). The Equity Committee is wrong.

15. As the Equity Committee is well aware, the allegations contained in Mr. Thoma's objection are nothing more than demonstrably false conjectures by an individual shareholder who, at best, was not keeping abreast of developments in the case and, at worst, sought to defame Appaloosa and others in an attempt to secure a settlement. The Motion is both untimely and has no factual basis.

(i) Mr. Thoma's Allegations Are Demonstrably False

16. In support of its Motion for a 2004 Examination, the Equity Committee claims that the Court "noted the[] relevance [of the Thoma objection] to at least two unresolved issues concerning the Plan." (Equity Committee's Motion at 2). This statement clearly overstates the Court's findings, and bears correcting.

17. The allegations made by Thoma in his objection are not evidence. (Opinion at 69, 106). They are not even hearsay. They are nothing more than the musings of a creditor and equity holder who, having no regard for the truth or the reputations of the entities which he defames, was content to make whatever claims he deemed necessary in order to secure a better position under the Plan. Allowing an examination on the basis of such conjecture would create a dangerous precedent and would cause innocent creditors to endure the cost, annoyance and harassment that necessarily stem from this type of inquiry.

18. Mr. Thoma purports to be a "concerned citizen" who has "been tracking the progress of this case since its inception." (Thoma objection at 1). Thoma's own statements belie his claim.

19. Thoma focuses on two time periods in his Objection – (a) March 2009 and (b) October 2009 through March 2010. He observes that there was heavy trading in PIERS securities during those time periods, and that the price of the PIERS securities increased. He

then speculates, based on no facts, that each of the Settlement Note Holders had been engaged in a high volume of trading during those time periods and that such trading was the result of nonpublic, material information.[4]

20. As an initial matter, Thoma does not appear to have a handle on the public record or the state of negotiations during the time periods he discusses. This is either by design or gross negligence.

21. For example, Thoma spends three paragraphs on the period between October 2009 and March 2010. He notes that "WMI Notes . . . seem to have traded at or above par since February 2010," that there was an "uncanny" "accumulation of the PIERS claims . . . surrounding the timeframe of October 2009 to March 2010," and that there was a "near-exponential run up in the price of the [PIERS] security ca. January, 2010, on volume of nearly 1 million shares." (Thoma objection at ¶¶ 14-16). Thoma then expresses feigned confusion regarding the reasons behind these spikes in trading since, according to Thoma, "there was no

[4] Thoma does not make any specific allegations against Appaloosa, although he does single out Owl Creek and Centerbridge. While Appaloosa does not have any specific knowledge about these allegations, it notes that they are incredible on their face. As a preliminary matter, it is unclear why Thoma is "frighten[ed]" by Owl Creek's "ability to time the market" on October 26, 2009. While it is certainly true that the Business Assistance Act of 2009 was not signed until November 6, 2009, it was first introduced to Congress on September 10, 2009, and had passed in the House of Representatives by roll call vote on September 22, 2009. Thus, by October 26, 2009, there was ample information in the public to support a trade.

More perplexing is Thoma's complaint that Centerbridge acquired shares of PIERS "off the backs of frenzied retail investors" on March 12, 2010. As the Court recalls, the terms of the Settlement Agreement were announced on the record that day, and the media reported the event. It is, therefore, not clear what material, *nonpublic* information Thoma believes Centerbridge had in its possession at the time of the trade. In any event, Centerbridge does not appear to have been advantaged in these purchases given that its Bankruptcy Rule 2019 Statement indicates that it acquired the shares at $26.94, and the price of PIERS declined thereafter.

particularly positive public information that the price movement can be attributed to." (Thoma objection at ¶ 16).

22. Apparently, during the time that Thoma was diligently "tracking the progress of this case," he missed some of the most material facts relative to the value of the estates. For example,

- On November 6, 2009, the President signed the 2009 Business Assistance Act. The 2009 Business Assistance Act had overwhelming support in the Congress since its introduction in September 2010. Significantly, the 2009 Business Assistance Act allowed businesses to carry back net operating losses ("NOLs") up to five years with a 50-percent income limit on NOL offsets in the fifth year – a provision that most, if not all, sophisticated investors understood to have the potential of materially impacting the Debtors' estates.

- On December 30, 2009, the Debtors filed their November Operating Report. In that Report, the Debtors quantified the impact of the 2009 Business Assistance Act on the Debtors' estates. Specifically, the Debtors estimated that "[p]ursuant to the Worker, Homeownership, and Business Assistance Act of 2009, WMI estimates that electing to extend the Net Operating Loss carry back period could result in additional refund of up to *$2.6 billion*." (*See* Debtor-In-Possession Monthly Operating Report for Filing Period 11/1/09 - 11/30/09 (Docket Index 2077) (emphasis added)).

- On January 4, 2010, Debtwire reported that "WMI's preferred stock rose to eight cents from six cents" after a "monthly operating report disclosed that Washington Mutual can expect an extra USD 2.6bn of tax refunds in the future due to a recent change in tax law. . . ."

- On March 12, 2010, the Debtors announced in Court that they had reached a settlement with the FDIC and JPMorgan on all issues regarding ownership of the $4 billion of disputed deposits, and read the significant terms of that global settlement into the record. That same day, the media reported that, under the terms of the settlement, "JPMorgan will receive USD 1.82bn of USD 2.6bn in tax refunds that WMI has already received with the balance retained by WMI. The FDIC would receive roughly USD 1.6bn – USD 1.8 bn of a second expected tax refund estimated to be USD 2.6 bn – 3bn. . . . WMI would keep USD 1bn – USD 1.2 bn of the future installment."

- On March 26, 2010, the Debtors filed the Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, which incorporated the Global Settlement Agreement.

23. It is hard to believe that someone in Thoma's position – who, given all of the legalese and financial charts contained in his submission, seems to have had the assistance of attorneys and financial advisors – missed all of these events and their significance to the estates. It is harder yet to understand how the Equity Committee can ignore them, and argue that a further examination into these claims is warranted – especially given the fact that Appaloosa did not purchase any PIERS in January, February or March 2010. (*See* First Supplemental Verified Statement of Fried, Frank, Harris, Shriver & Jacobson LLP Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure at Ex. A (Docket Index 3761)).

24. Similarly, Thoma complains that there was "heavy accumulation" of PIERS securities in March 2009. While seemingly true, none of that "heavy accumulation" was done by Appaloosa. Indeed, Appaloosa did not buy a single share of PIERS securities in March 2009. Thus, Thoma's assertion is entirely irrelevant with respect to Appaloosa.

25. Finally, Thoma posits that a holder of a credit default swap may "have problems with voting and confirmation" because that holder's "sole motivation [would] not [be] based on its interests as a creditor in the bankruptcy case, but [would] instead rest[] with the possible financial gains under the credit default swap agreement." (Thoma objection ¶¶ 37-39). Thoma points to no evidence of any such transactions, and the record is wholly devoid of any such evidence. In particular, Thoma's theoretical musings on the "pitfalls associated with confirming plans in the face of credit default swaps" (Thoma objection ¶ 37), are wholly irrelevant as to Appaloosa. Appaloosa did not hold credit default swaps, or any other form of derivative, on WMI securities. Once again, Thoma's speculations are demonstrably unsupported by the facts.

26. Accordingly, there is simply no "good cause" to pursue these claims, and the Court should reject the Equity Committee's Motion.

(ii) The Motion for 2004 Discovery Is Untimely

27. Despite the broad reach of 2004 examinations, courts should be wary of allowing discovery of third parties – especially by a non-debtor – on such tenuous grounds as those advanced by Thoma in his objection. This is especially true where, as here, the timing of the requests clearly demonstrates that the party seeking the examination has no reason to credit the far-fetched claims.

28. The Thoma objection has been known to all parties, including the Equity Committee, since at least November 19, 2010. The objection, while baseless, was neither lengthy nor complex. Thus, the Equity Committee had more than enough time to seek discovery from the Settlement Note Holders (either formally or informally) but chose not to do so. It presumably made this tactical decision because the facts on which Thoma relies are false and incomplete, and the conclusions which he draws are bizarre and illogical.

29. No new information has come to light that would warrant further examination now. Indeed, in the more than two months after Thoma's speculations were made, not a single person with knowledge of the negotiations and the trades – including the Debtors and JPMorgan – has come forward to support these baseless claims. Thus, the time for the Equity Committee to pursue examination into this matter has come and passed. Having failed to seek discovery at the appropriate time, the estate and its creditors should not be burdened with the costs of yet another investigation that is based solely on misguided and false speculation. At this late stage of the proceeding, more than mere conjuncture is required. *See generally In re*

Coffee Cupboard, 128 B.R. at 514 (noting that examinations under Rule 2004 should not be used to annoy, embarrass or oppress).

30. Now that the Court has denied all of the Equity Committee's objections to the Plan, the Equity Committee seeks to relitigate every issue in the administration of the estate on the pretext of Thoma's objection. This is clearly nothing more than a transparent attempt to annoy the parties and extort a settlement.

(iii) The Motion Is a Pretext to Conduct a Wholesale Investigation into a Non-Debtor

31. Rule 2004 "may not be used as a device to launch into a wholesale investigation of a non-debtor's private business affairs." *In re Countrywide Home Loans*, 384 B.R. at 393-94 (quoting *In re Wilcher*, 56 B.R. at 433-34). The scope of a Rule 2004 inquiry should not be so broad as to be more disruptive and costly to the party to be examined than beneficial to the party seeking discovery. *In re Countrywide Home Loans*, 384 B.R. at 393; *see also In re Continental Forge Co., Inc.*, 73 B.R. 1005 (Bankr. W.D. Pa. 1987) (denying a Rule 2004 motion where the examiner failed to show reasonable need for the requested material and the examinee's right to privacy in its business affairs far exceeded the examiner's interest in the requested material).

32. In its Motion, the Equity Committee purports to seek discovery "in order to obtain evidence concerning [] allegations of insider trading." (Equity Committee's Motion at 2). However, its proposed discovery requests seek a laundry list of information that is unrelated to the allegations in the Thoma objection. Specifically, the Equity Committee's proposed requests include:

- Information and documents regarding all communications, regardless of their nature, between Appaloosa and any third parties regarding WMI, WMB, or their

debt or equity since April 30, 2001 – seven years prior to the instant bankruptcy. (*See* Docket Index 6567 at Ex. B, Request 2).

- Information regarding Appaloosa's role in the settlement negotiations. (*See* Docket Index 6567 at Ex. B, Request 3).

- Information regarding profits that Appaloosa has made in WMI or WMB since April 30, 2001 – seven years prior to the instant bankruptcy. (*See* Docket Index 6567 at Ex. B, Request 4).

- All documents concerning trade confirmations for Appaloosa's buy and sale orders (for any financial products) from September 25, 2008. (*See* Docket Index 6567 at Ex. C, Request 2).

- All minutes regarding meetings of the Settlement Note Holders' group from September 25, 2008 (without respect to the subject matter of the meeting). (*See* Docket Index 6567 at Ex. C, Request 6).

- All documents and communications regarding Appaloosa's document retention policy. (*See* Docket Index 6567 at Ex. C, Request 10).

- All documents and communications regarding Appaloosa's organizational structure. (*See* Docket Index 6567 at Ex. C, Request 11).

- All documents and communications related to the Worker, Homeownership, and Business Assistance Act of 2009. (*See* Docket Index 6567 at Ex. C, Request 16).

33. Such requests are clearly designed to intrude upon the private business affairs of Appaloosa, are improper and wholly irrelevant to the plan of reorganization, and should be rejected. *In re Countrywide Home Loans*, 384 B.R. at 393-94.

34. Accordingly, the Equity Committee's Motion for discovery into those areas must be denied.

(iv) The Motion Fails to Meet the Requirements of Rule 7026

35. Finally, the Equity Committee is procedurally barred from proceeding under Bankruptcy Rule 2004.

36. As the Equity Committee is well-aware, an objection to confirmation is governed by Bankruptcy Rule 9014 as a contested matter. *See* Fed. R. Bankr. P. 3015(f). "'[O]nce a[] . . . contested matter has been commenced, discovery is made pursuant to Federal Rules of Bankruptcy Procedure 7026 et seq., rather than by a [Rule] 2004 examination.'" *In re Washington Mutual*, 408 B.R. 45, 50 (Bankr. D. Del. 2009) (quoting *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996)); *see* Fed. R. Bankr. P. 9014(c).

37. Discovery under Bankruptcy Rule 7026 is more restrictive than Rule 2004. *See In re Washington Mutual*, 408 B.R. at 51; *In re 2435 Plainfield Ave., Inc.*, 223 B.R. 440, 455-56 (Bankr. D.N.J. 1998). For example, Bankruptcy Rule 7026 does not permit parties to engage in fishing expeditions. *See In re 2435 Plainfield Ave.*, 223 B.R. at 456. Courts are, thus, wary to "allow a 2004 exam where an adversary proceeding is pending, because the party requesting the exam is likely seeking to avoid the procedural safeguards of Bankruptcy Rules 7026-7037," as the Equity Committee is doing here. *Id.* (quoting WILLIAM L NORTON, JR., 2 NORTON BANKRUPTCY LAW AND PRACTICE § 141:35 (2d ed. 1998)).

38. The Equity Committee's attempt to proceed under Bankruptcy Rule 2004 is, therefore, procedurally improper, and the Court should analyze the Motion under the discovery rules applicable to adversary proceedings and contested matters. Since the Equity Committee's Motion does not meet the standard of good cause under the more lenient standards of Rule 2004, it necessarily does not meet the exacting standards of Bankruptcy Rule 7026.

39. Indeed, as discussed in greater detail above, the Equity Committee's Motion seeks to obtain overly broad and harassing discovery into matters wholly unrelated to confirmation of the plan with the purpose of coercing a settlement out of the Settlement Note

Holders. This is plainly not allowed under the rules of discovery. Accordingly, the Equity Committee's Motion must be denied.

II.
RECIPROCAL DISCOVERY

40. As discussed above, the Equity Committee has made no showing of good cause to pursue inquiry into the Thoma objection. Accordingly, this Court should deny the Equity Committee's Motion in its entirety. Should the Court determine, however, to allow examination into this area, Appaloosa would be entitled to conduct reciprocal discovery of Thoma, the Equity Committee, and any other party or attorney who is revealed to have had any involvement in the Thoma objection or the Motion.

41. As can be expected, Appaloosa takes seriously any allegations of wrongdoing, and is strongly committed to defending itself against such scurrilous accusations. Given the number of factual inaccuracies and glaring omissions contained in the Thoma objection, Appaloosa believes that the statements were made maliciously and with reckless disregard for the truth, and presented to harass and cause unnecessary delay. Appaloosa is, therefore, entitled to explore (a) whether the allegations were knowingly false when made, and (b) who played a part in proffering them, in order to properly defend itself against any allegation of wrongdoing.

42. With respect to the latter point, as noted above, the objection is full of legalese, and Thoma is not a lawyer. Appaloosa reserves all of its rights with respect to the involvement of anyone connected to these cases or anyone who played a role in the Thoma objection.

CONCLUSION

For the reasons stated above, Appaloosa respectfully requests that this Court deny the Equity Committee's Motion.

Dated: January 31, 2011

BLANK ROME LLP

/s/ Victoria Guilfoyle

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CERTIFICATE OF SERVICE

I, Victoria A. Guilfoyle, hereby certify that on January 31, 2011, I caused a copy of the following document to be served upon the parties listed on the attached service list in the manner indicated.

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Dated: January 31, 2011

/s/ Victoria Guilfoyle
Victoria A. Guilfoyle (DE No. 5183)

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