

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

In re:

WASHINGTON MUTUAL, INC., et al.,¹

Debtors.

Chapter 11

Case No. 08-12229 (MFW)

Jointly Administered

Hearing Date: May 7, 2012 at 10:30 a.m.

Objection Deadline: April 30, 2012 at 4:00 p.m.

**MOTION OF EXAMINER FOR ENTRY OF ORDER
(1) DISCHARGING EXAMINER; (2) APPROVING DISPOSITION
OF DOCUMENTS; AND (3) GRANTING RELATED RELIEF**

Joshua R. Hochberg, the duly-appointed examiner (the “Examiner”) in the above-captioned cases of Washington Mutual, Inc. and WMI Investment Corp. (collectively, the “Debtors”), respectfully moves the Court for entry of an order: (1) discharging the Examiner; (2) authorizing the disposition of documents obtained by the Examiner in connection with the Investigation (as defined below); (3) granting the Examiner and his Professionals (as defined below) relief from third-party discovery; (4) exculpating the Examiner and his Professionals in connection with the Investigation; (5) approving a procedure for the filing and consideration of final fee applications for the Examiner and his Professionals; and (6) authorizing and directing the reimbursement of the reasonable future fees and expenses incurred by the Examiner and his Professionals in certain circumstances (the “Motion”). In support of the Motion the Examiner respectfully shows the Court as follows:

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.



JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). The statutory predicate for the relief sought herein is Sections 105 and 1106 of the Bankruptcy Code.

BACKGROUND

2. On September 26, 2008 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their affairs as debtors and debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

3. On October 15, 2008, the United States Trustee for Region 3 (the “U.S. Trustee”) appointed an Official Committee of Unsecured Creditors in these cases (the “Creditors Committee”).

4. On January 11, 2010, the U.S. Trustee appointed an Official Committee of Equity Security Holders (the “Equity Committee”).

5. 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, each of which has been subsequently amended. Embodied within the Plan is a proposed Global Settlement Agreement (the “Settlement”) that resolves certain disputes among the Debtors, JPMorgan Chase & Co. (“JPMC”), the Federal Deposit Insurance Corporation (“FDIC”), the FDIC as Receiver (“FDIC Receiver”) for Washington Mutual Bank (“WMB”), and certain other parties-in-interest.

6. On June 8, 2010, the Equity Committee filed its Motion in Support of Order Directing Appointment of an Examiner Under 11 U.S.C. § 1104(c) [Docket No. 4644].

7. On July 22, 2010, this Court entered its Agreed Order Directing the Appointment of an Examiner (the “Examiner Order”) [Docket No. 5120].

8. On July 26, 2010, the U.S. Trustee appointed Joshua R. Hochberg as Examiner in the Chapter 11 cases, and filed her Notice of Appointment of Examiner [Docket No. 5141]. Also on July 26, 2010, the U.S. Trustee filed her Application for Order Approving Appointment of Examiner [Docket No. 5142].

9. On July 28, 2010, this Court entered an order approving the appointment of Joshua R. Hochberg as Examiner in the Chapter 11 cases [Docket No. 5162].

10. On July 30, 2010, the Examiner filed his Application to Employ McKenna Long & Aldridge LLP (“MLA”) as Counsel *Nunc Pro Tunc* to July 26, 2010 [Docket No. 5183]. On August 10, 2010, this Court entered its Order Authorizing Retention of McKenna Long & Aldridge LLP as Counsel to the Examiner [Docket No. 5261]. On August 7, 2010, the Examiner filed his Application to Employ Cole, Schotz, Meisel, Forman & Leonard, P.A. (“Cole Schotz”) as Delaware Counsel [Docket No. 5241]. On August 24, 2010, this Court entered its Order Authorizing the Retention and Employment of Cole, Schotz, Meisel, Forman & Leonard, P.A. as Delaware Counsel [Docket No. 5340]. MLA and Cole Schotz (together, the “Examiner’s Professionals”) have been continuously representing the Examiner in these cases.

11. In the Examiner Order, the Court directed the Examiner to investigate “(a) the claims and assets that may be property of the Debtors’ estates that are proposed to be conveyed, released or otherwise compromised and settled under the Plan and Settlement Agreement, including all Released Claims, as defined in the Settlement Agreement, and the claims and defenses of third parties thereto (the ‘Settlement Component’) and (b) such other claims, assets and causes of actions which shall be retained by the Debtors and/or the proceeds thereof, if any,

distributed to creditors and/or equity interest holders pursuant to the Plan, and the claims and defenses of third parties thereto (the ‘Retained Asset Component’).” See Examiner Order at ¶ 2.

12. As contemplated by the Examiner Order, the Examiner investigated the Settlement Component and the Retained Asset Component (the “Investigation”). During the course of the Investigation, the Examiner sought and obtained documents, in hard copy and electronic form, from numerous sources, including the Debtors, the FDIC, JPMC, the Equity Committee, the Creditors Committee, and others (the “Confidential Documents”). The Confidential Documents were provided to the Examiner pursuant to the Court’s Order Regarding the Voluntary Production of Documents to the Examiner [Docket No. 5258] (the “Confidentiality Order”), which Order provided, among other things, that the provision to the Examiner of the Confidential Documents would not operate as a waiver of attorney-client privilege, attorney work product protection, confidentiality, or any other applicable privilege, protection, immunity, or confidentiality. The Confidentiality Order further provided that the Examiner may use the Confidential Documents in his Report and would, at the conclusion of the Investigation, destroy the Confidential Documents or return the Confidential Documents to the parties that provided them.

13. On October 8, 2010, the Court entered its Order Authorizing Examiner to File Examiner’s Final Report Under Seal on a Temporary Basis and Establishing Procedures for Removing Seal (the “Sealing Order”). Pursuant to the Sealing Order, and after negotiating with the parties who supplied Confidential Documents, on November 1, 2010 the Examiner filed his Final Report with the Court as of public record (the “Report”). Since filing the Final Report, the Examiner has made a copy of the Final Report, together with the Exhibits thereto, available for public review and download on a web site maintained by the Examiner’s law firm.

14. Hearings on confirmation of the Sixth Amended Plan were held on December 1-3 and 6-7, 2010. The matter was taken under advisement. In an Opinion and Order dated January 7, 2011, the Court concluded that the Settlement was fair and reasonable, but declined to confirm the Debtors' Sixth Amended Plan on other grounds. In re Wash. Mut., Inc., 442 B.R. 314 (Bankr. D. Del. 2011).

15. On December 12, 2011, Debtors filed their Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (as modified, the "Seventh Amended Plan"). On February 24, 2012, the Court confirmed the Seventh Amended Plan.

16. There now appears to be no further issues which relate to the Examination and the Examiner believes he has completed his duties in these cases.

RELIEF REQUESTED

17. By this Motion, the Examiner seeks entry of an order discharging him from his duties under the Examiner Order, permitting him to destroy all Confidential Documents remaining in his possession, custody, or control, and granting him and his Professionals certain additional relief as is customary and appropriate in these circumstances. The specific relief sought by the Examiner is detailed below.

A. Discharge.

18. The Examiner seeks an order of the Court discharging him from any commitments or representations with respect to his duties as Examiner. As discussed above, the Examiner has completed the Investigation and filed his Report. The Examiner has completed the duties mandated by the Court's Examiner Order and requests that he be discharged as Examiner as of the date of the order granting this Motion.

B. Disposition of Documents.

19. During the course of the Examination, the Examiner either received or generated thousands of pages of documents (the “Documents”). The Documents include not only documents and materials delivered to the Examiner by the Debtors and other parties, but also include documents generated by the Examiner and the Examiner’s professionals. The Documents are both in paper and electronic form. By this Motion, the Examiner and the Examiner’s Professionals also request that the Court enter an order authorizing them to either destroy the Documents or return them to the producing party, through whatever process the Examiner determines and subject to the terms of the Confidentiality Order and any agreements the Examiner reached with any party, if applicable.

20. At the time the Examiner publicly filed his Report, he made a copy of the Report available on-line. Documents which were cited or referenced to in the Report were also made publicly available and have been continuously available to the public since the Report was filed. In addition to the Exhibits, however, the Examiner and the Examiner’s Professionals are in possession of voluminous other Documents. Many of these Documents were obtained from the Debtors and other parties pursuant to the terms of the Confidentiality Order and/or other agreements with the parties and are subject to the restrictions set forth therein. Accordingly, the Examiner requests that he and the Examiner’s Professionals be relieved of any obligation to maintain any non-public Documents they have obtained from third-parties in connection with the Examination. Where required pursuant to the terms of the Confidentiality Order, the Examiner and the Examiner’s Professionals will return or destroy Documents in accordance with such agreements.

21. The Examiner also requests that the order granting this relief provide that the Examiner and the Examiner’s Professionals be authorized to retain, at their discretion and subject

to the provisions of the Confidentiality Agreements, all of the Documents which were created or compiled by the Examiner and/or the Examiner's Professionals, including, without limitation, those Documents that are protected from discovery by the attorney-client privilege or the work product doctrine.

22. The Examiner respectfully submits that the proposed procedures are in accordance with the terms of the Confidentiality Order and that relieving the Examiner of maintaining the Documents supplied by others is in accordance with the purpose of the Examination is in the best interests of Debtors' estates and is consistent with the immunity from discovery that is also requested by the Examiner.

C. Relief from Third Party Discovery.

23. It is possible that the Examiner or his Professionals will receive requests from third parties for certain of the Documents. It is also possible that third parties will seek testimony from the Examiner or his Professionals relating to the Investigation. As set forth below, the Examiner respectfully requests that the Court issue an order prohibiting and enjoining such discovery.

24. "The Examiner performs his duties at the request of the court, for the benefit of the debtor, its creditors and shareholders, and not to 'fuel the litigation fires of third party litigants.'" In re New Century TRS Holdings, Inc., 407 B.R. 558, 566 (Bankr. D. Del. 2009) (quoting In re Baldwin United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985)). Courts have prohibited third-party discovery of examiners' records. See Air Line Pilots Ass'n, Int'l v. Am. Nat'l Bank & Trust Co. of Chicago (In re Ionosphere Clubs), 156 B.R. 414, 435 (S.D.N.Y. 1993) (upholding denial of request by union for access to documents supporting examiner's report and stating that the "public interest is in the Report and the Examiner's conclusions, not in the record upon [sic] the conclusions are based"); In re Baldwin United Corp., 46 B.R. at 317. This Court,

among others, has entered orders precluding third parties from pursuing discovery from examiners and their professionals absent extraordinary circumstances. See Order Approving Motion of Court-Appointed Examiner, Kenneth N. Klee, Esq., for Order (I) Discharging Examiner, (II) Granting Relief from Third Party Discovery, (III) Approving the Disposition of Certain Documents and Information, and (IV) Granting Certain Ancillary Relief, In re Tribune Co., et al., Case No. 08-13141 (Bankr. D. Del. Aug. 26, 2010); Order Discharging Michael J. Missal as Examiner and Granting Related Relief, In re New Century TRS Holdings, Inc., Case No. 07-10416 (Bankr D. Del. May 1, 2009); Order Granting in Part the Examiner's Motion for Entry of an Order Regarding Certain Procedural Issues in Connection with the Termination of the Examination of SemCrude, LP, et al., In re SemCrude, L.P., et al., Case No. 08-11525 (Bankr. D. Del. July 27, 2009); Order Granting Examiner's Motion to Approve Procedures Related to Third Party Discovery and Public Disclosures, In Re DBSI, Inc., et.al., Case No. 08-12687 (Bankr. D. Del. November 24, 2009).

25. Consistent with the holdings in the cases above, the Examiner respectfully requests that the Court issue an order precluding any third party from issuing or serving on the Examiner or his Professionals any formal or informal discovery of any nature relating to the Report, the Investigation, the Debtors, and these Bankruptcy Cases, including, without limitation, any request for production of documents, requests for admission, interrogatories, subpoenas *duces tecum*, trial subpoenas, requests for testimony, or any other discovery of any nature. This prohibition shall not apply to requests for documents that the third party demonstrates it cannot obtain from any other source as long as such production does not violate any protective or other order of this Court or seek the production of privileged materials.

D. Exculpation of the Examiner and His Professionals.

26. The Examiner further requests the entry of an order exculpating the Examiner and his Professionals in connection with the Investigation and the Report.

27. An examiner “constitutes a Court fiduciary and is amenable to no other purpose or interested party.” In re Hamiel & Sons, Inc., 20 B.R. 830, 832 (Bankr. S.D. Ohio 1982). As a quasi-judicial officer, an examiner is entitled to immunity from claims. Kovalesky v. Carpenter, No. 95 CIV. 3700(SAS), 1997 WL 630144, at *4-*5 (S.D.N.Y. Oct. 9, 1997); see also In re Baldwin United Corp., 46 B.R. at 317 (bankruptcy examiner “is entitled to some immunity from the whirlwind of litigation commonly attendant to large Chapter 11 cases”). This Court, among others, has granted exculpation to examiners and their professionals in similar circumstances. See Order Approving Motion of Court-Appointed Examiner, Kenneth N. Klee, Esq., for Order (I) Discharging Examiner, (II) Granting Relief from Third Party Discovery, (III) Approving the Disposition of Certain Documents and Information, and (IV) Granting Certain Ancillary Relief, In re Tribune Co., et al., Case No. 08-13141 (Bankr. D. Del. Aug. 26, 2010); Order Discharging Michael J. Missal as Examiner and Granting Related Relief, In re New Century TRS Holdings, Inc., Case No. 07-10416 (Bankr D. Del. May 1, 2009); Order Granting in Part the Examiner’s Motion for Entry of an Order Regarding Certain Procedural Issues in Connection with the Termination of the Examination of SemCrude, LP, et al., In re SemCrude, L.P., et al., Case No. 08-11525 (Bankr. D. Del. July 27, 2009).

28. Exculpation of the Examiner and his Professionals in these cases is necessary to avoid wasteful and collateral litigation regarding the Report and Investigation. Accordingly, the Examiner respectfully requests that any order granting this Motion provide that neither the Examiner nor his Professionals shall have any liability with respect to any act, omission, statement, or representation arising out of, relating to, or involving in any way, the Investigation,

the Report, or any pleading or other writing filed by the Examiner or his Professionals in connection with the Debtors' Chapter 11 cases. To be clear, the exculpation and immunity for the Examiner and his Professionals should extend to all acts of the Examiner and his Professionals in connection with the Debtors' Chapter 11 cases, even after the Report was filed. Any exculpation for the Examiner and his Professionals, however, should not limit the liability of the Examiner and his Professionals for any violations of any applicable disciplinary rule or rule of professional conduct or for any acts of willful misconduct or gross negligence.

E. Approval of Final Fee Applications of Examiner and His Professionals.

29. The Examiner also respectfully requests that the Court consider and approve the final fee applications filed by the Examiner and his Professionals contemporaneously herewith.

30. Finally, the Examiner seeks approval for the reimbursement of the reasonable fees and actual expenses incurred by the Examiner and his Professionals in connection with: (1) disposing of Records pursuant to the procedures contemplated herein; (2) responding to any formal or informal discovery requests to the extent that such requests are served upon the Examiner or his Professionals notwithstanding the prohibitions established by the Court regarding such discovery; (3) the preparation and prosecution of final fee applications; and (4) such other actions undertaken by the Examiner and his Professionals at the request or direction of the Court. To the extent that the Examiner and his Professionals incur reasonable fees or costs in connection with these matters subsequent to the time period covered by their final fee applications, the Examiner would request that the Debtors be authorized and directed to pay or reimburse the Examiner and his Professionals for such fees and costs without the need for Court approval.

NOTICE

31. This Motion is being served on the Debtors, JPMC, the FDIC, the Official Committee of Unsecured Creditors, the Equity Committee, all parties interviewed by the Examiner during the course of the Investigation and their counsel, all parties that provided Confidential Documents to the Examiner, and all parties who have filed a notice of appearance in the Chapter 11 cases.

NO PRIOR REQUESTS

32. The Examiner has not previously sought the relief that is requested in this Motion.

CONCLUSION


For the reasons stated above, the Examiner respectfully requests that the Court enter an order, in substantially the form attached hereto as “Exhibit 1”, (1) discharging the Examiner; (2) authorizing the disposition of documents obtained by the Examiner in connection with the Investigation; (3) granting the Examiner and his Professionals relief from third-party discovery; (4) exculpating the Examiner and his Professionals in connection with the Investigation; (5) approving a procedure for the filing and consideration of final fee applications for the Examiner and his Professionals; and (6) authorizing and directing the reimbursement of the reasonable future fees and expenses incurred by the Examiner and his Professionals in the circumstances described herein.

[Signatures on the following page]

Dated: March 16, 2012

Respectfully submitted,

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.



J. Kate Stickles (No. 2917)
Patrick J. Reilley (No. 4451)
500 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 652-3131
Facsimile: (302) 574-2101

Counsel to the Examiner

- and -

Henry F. Sewell, Jr.
David E. Gordon
MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, Suite 5300
Atlanta, GA 30308
Telephone: (404) 527-4000
Facsimile: (404) 527-4198

Counsel to the Examiner

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

In re:

WASHINGTON MUTUAL, INC., et al.,¹

Debtors.

Chapter 11

Case No. 08-12229 (MFW)

Jointly Administered

Hearing Date: May 7, 2012 at 10:30 a.m.

Objection Deadline: April 30, 2012 at 4:00 p.m.

**NOTICE OF MOTION OF EXAMINER FOR ENTRY OF ORDER
(1) DISCHARGING EXAMINER; (2) APPROVING DISPOSITION
OF DOCUMENTS; AND (3) GRANTING RELATED RELIEF**

PLEASE TAKE NOTICE that, on March 16, 2012, Joshua R. Hochberg, the Court-appointed Examiner, filed the **Motion of Examiner for Entry of Order (1) Discharging Examiner; (2) Approving Disposition of Documents; and (3) Granting Related Relief** (the "Motion"), which seeks entry of an order: (i) discharging the Examiner; (ii) authorizing the disposition of documents obtained by the Examiner in connection with the Investigation (as defined in the Motion); (iii) granting the Examiner and his Professionals (as defined in the Motion) relief from third-party discovery; (iv) exculpating the Examiner and his Professionals in connection with the Investigation; (v) approving a procedure for the filing and consideration of final fee applications for the Examiner and his Professionals; and (vi) authorizing and directing the reimbursement of the reasonable future fees and expenses incurred by the Examiner and his Professionals in certain circumstances

PLEASE TAKE FURTHER NOTICE that, any responses or objections to the Motion must be in writing, filed with the Clerk of the Bankruptcy Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon and received by the undersigned counsel for the Examiner on or before **April 30, 2012 at 4:00 p.m. (Eastern Time)**.

A HEARING ON THE MOTION WILL BE HELD ON **MAY 7, 2012 AT 10:30 A.M. (EASTERN TIME)** BEFORE THE HONORABLE MARY F. WALRATH, UNITED STATES BANKRUPTCY JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 5TH FLOOR, COURTROOM NO. 4, WILMINGTON, DE 19801.

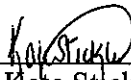
¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: March 16, 2012

Respectfully submitted,

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.



J. Kate Stickles (No. 2917)
Patrick J. Reilley (No. 4451)
500 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 652-3131
Facsimile: (302) 574-2101

Counsel to the Examiner

- and -

Henry F. Sewell, Jr.
David E. Gordon
MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, Suite 5300
Atlanta, GA 30308
Telephone: (404) 527-4000
Facsimile: (404) 527-4198

Counsel to the Examiner

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

In re:

WASHINGTON MUTUAL, INC., et al.,¹

Debtors.

Chapter 11

Case No. 08-12229 (MFW)

Jointly Administered

Related to Docket No. _____

**ORDER GRANTING SIXTH INTERIM AND FINAL APPLICATION OF JOSHUA R.
HOCHBERG, THE EXAMINER, AND MCKENNA LONG & ALDRIDGE LLP,
COUNSEL TO THE EXAMINER, FOR ALLOWANCE OF COMPENSATION FOR
SERVICES RENDERED AND FOR REIMBURSEMENT OF EXPENSES INCURRED
FOR THE PERIOD FROM JULY 26, 2010 THROUGH MARCH 16, 2012**

Upon the *Application of Joshua R. Hochberg, the Examiner, and McKenna Long & Aldridge LLP, Counsel to the Examiner, for Allowance of Compensation for Services Rendered and for Reimbursement of Expenses Incurred for the Period from July 26, 2010 Through March 16, 2012* (the "Application")² filed by Joshua R. Hochberg as examiner in these cases (the "Examiner"); and notice thereof having been served upon the Debtors, counsel to the Debtors, the Office of the U.S. Trustee, and the Official Committee of Unsecured Creditors; the Court finding that such notice is appropriate and sufficient under the circumstances; the Court having reviewed the Application and other papers filed in respect thereof; and finding good cause to grant the Application, it is

ORDERED, ADJUDGED, and DECREED:

1. The Application is granted.

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 Capitalized terms used but not defined herein shall have the meaning set forth in the Application.

2. The Examiner and MLA are hereby allowed and awarded fees in the amount of \$23,140.00 and reimbursement of expenses in the amount of \$767.87 for the Interim Period.

3. Debtors are hereby authorized and directed to pay to MLA the sum of \$23,907.87 on account of MLA and the Examiner's fees and expenses for the Interim Period.

4. The Court hereby grants final approval and allowance of all fees and expenses previously awarded and paid to the Examiner and MLA during the course of the Chapter 11 Cases.

5. This Court shall retain jurisdiction to resolve any disputes arising or related to this Order and to interpret, implement, and enforce the provisions of this Order.

SO ORDERED THIS ____ DAY of May, 2012

MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE