IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
	:	**Case No. 08-12229 (MFW)**
WASHINGTON MUTUAL, INC., et al.,	:	
	:	**Jointly Administered**
Debtors.	:	**Hearing Date: May 7, 2012, 10:30 a.m. (EST)**
	:	**Related Dkt. Nos. : 9923, 9949**

JAMES BERG'S LIMITED OBJECTION TO THE MOTION OF EXAMINER FOR AN ENTRY OF ORDER (1) DISCHARGING EXAMINER; (2) APPROVING DISPOSITION OF DOCUMENTS; AND (3) GRANTING RELATED RELIEF

TO: THE HONORABLE MARY F. WALRATH,
UNITED STATES BANKRUPTCY JUDGE

I am James Berg, a party in interest in the bankruptcy case of Washington Mutual Inc. ("**WMI**"), appearing *Pro Se*. Joshua R. Hochberg (the "**Examiner**") has filed a *Motion of Examiner for Entry of Order (1) Discharging Examiner; (2) Approving Disposition of Documents; and (3) Granting Related Relief* (the "**Motion**") [D.I. 9923]. I do not oppose the discharge of the Examiner as his continued retention since the November 1, 2010 filing of his final report has been a continuous drain on estate resources while providing no corresponding benefit to the estate. I do object to certain other elements of the relief requested. In support of my objection, I respectfully represent as follows:

1. WMI and WMI Investment Corp. were debtors and debtors in possession (the "**Debtors**")[1] in these cases. On December 12, 2011, the Debtors filed their *Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [D.I. 9178] (the "**Plan**"), and the *Disclosure Statement for the Seventh Amended Joint Plan of*

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 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.

Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, [Docket No. 9179], (as amended, the "**Disclosure Statement**")[2]. On January 11, 2012, the United States Bankruptcy Court for the District of Delaware (the "**Court**") held a hearing at which it approved the Disclosure Statement. Following the February 16-17, 2012 confirmation hearings, this Court commemorated approval of the Plan by issuing the *Findings of Fact, and Conclusions of Law, and Order Confirming the Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [D.I. 9759, filed February 24, 2012].

BACKGROUND

2. To avoid unnecessary duplication, I reiterate, reassert, and adopt the background information in paragraphs 2 to 14 of the Motion as my own. On July 26, 2010, the United States Trustee appointed Joshua R. Hochberg as Examiner, and filed her Notice of Appointment of Examiner [D.I. 5141]. By order, this Court approved that appointment on July 28, 2010 [D.I. 5162].

3. On August 6, 2010, the Examiner filed his *Examiner's Work and Expenses Plan/Report and Motion for Additional Relief* [D.I. 5234]. In paragraph 7 of *Id.*, the Examiner confirmed that he was directed by this Court 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[3], 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

2 Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion, or if not defined in the Motion, in the Disclosure Statement or, if not defined in the Disclosure Statement, in the Plan.

3 The Plan referenced here is the Fifth Amended Plan [D.I. 4850], with its related Disclosure Statement [D.I. 4851].

parties thereto (the '**Retained Asset Component**')" (collectively, the "**Investigation**").

4. Section 1.96 of the Fifth Amended Plan, entitled Global Settlement Agreement, describes certain causes of action to be settled as:

> That certain Settlement Agreement, executed by and among the Debtors, JPMC, the FDIC Receiver, FDIC Corporate, the Settlement Note Holders, and the Creditors' Committee, together with all exhibits annexed thereto, setting forth the compromise and settlement between the parties of, among other things, (i) the WMI Action, (ii) the JPMC Action, (iii) the Turnover Action, (iv) the Rule 2004 Inquiry, (v) the Debtors' Claims, (vi) the JPMC Claims, (vii) the Bankruptcy Stay Motions and the appeals therefrom, (viii) the FDIC Claim, and (ix) the asserted transfer of the Trust Preferred Securities and the consequent issuance of the REIT Series, and the sale, free and clear of all Liens, Claims and encumbrances, of the Plan Contribution Assets, a copy of which is annexed hereto as Exhibit "H".

5. On August 10, 2010, this Court filed an *Order Approving Examiner's Work Plan* [D.I. 5260], which directed the Examiner to investigate, *inter alia*, the Settlement Component and the Retained Asset Component. That same day, this Court also issued an *Order Authorizing the Examiner to Demand and Issue Subpoenas Compelling the Production of Documents and the Oral Examination of Persons and Entities* [D.I. 5259].

6. The *Examiner's Final Report* (the "**Examiner's Report**") [D.I. 5735] was filed on November 1, 2010. On November 22, 2010, the Examiner filed the *Notice of Availability of Documents Referenced in Examiner's Final Report* [D.I. 6049]. This electronic version of the Examiner's Report contained references to the documents cited by the Examiner and was made available at www.mckennalong.com/WaMuReport.zip. This archive is approximately 300 megabytes in size in compressed form, and contains certain of the underlying documents upon which the Examiner's Report was based. This archive containing voluminous records was filed just prior to the December 2010 confirmation hearing, so there was little time available to cross-check the Examiner's analysis versus the facts contained in the underlying documents.

7. Despite authorization by this Court for the Examiner to obtain admissible

information through subpoenas and sworn depositions, the Examiner elected not to do so, rendering his conclusions hearsay and therefore inadmissible. The TPS Consortium filed a *Motion in Limine to Preclude any use of or Reference to the Examiner's Report* [D.I. 6127]. The Equity Committee filed a *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* [D.I. 6148]. This Court granted the Equity Committee's motion to strike on December 10, 2010 [D.I. 6295], excluding all reference to the Examiner's Report from the December confirmation hearings.

PRELIMINARY STATEMENT

8. In the Motion, the Examiner requests entry of an order (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 certain circumstances. While I support the discharge of the Examiner in (1) above, I believe that cause exists to deny in whole or in part each of (2), (3), (4), (5), and (6).

9. Though the Examiner states in paragraph 16 of his motion that, "...the Examiner believes he has completed his duties in these cases", a simple comparison of the claims which have been released and the analysis provided in the Examiner's final report provide compelling evidence that this is not in fact the case. A full review of the underlying documents also brings into question many of the Examiner's conclusions as the facts appear in certain instances to

conflict with Mr. Hochberg's analysis. More troubling, many of the most significant litigation claims which should have provided a recovery for equity were never addressed in the Examiner's Report, despite the fact that they were clearly intended to be settled under the Global Settlement Agreement.

10. These include approximately $47 billion in avoidance or unjust enrichment claims against JP Morgan Chase ("**JPMC**"); and similarly valued claims against the Federal Deposit Insurance Corporation ("**FDIC**") in its Corporate capacity ("**FDIC-Corporate**"), certain of which could have been made against the United States Government under the Federal Tort Claims Act ("**FTCA**"). The facts used to obtain the $47 billion figure are not in dispute, as they come directly from JPMC's Securities and Exchange Commission ("SEC") filings, which are certified as factual by JPMC's CEO, Mr. Jamie Dimon. Some if not all of these claims (which could have been easily decided on summary judgment) have now been released due to Plan confirmation. The outcome of this case should have certainly been different had the Examiner properly investigated and reported the merits of these claims to this Court.

11. Through his Motion, the Examiner now requests the "related relief" of the ability to destroy documents potentially harmful to his own interests, while reserving the right to retain any which might help him. He requests that he be granted exculpations for his actions or inactions past, present, or future; to be immune from discovery; and that he be allowed to bill the estate to respond to any discovery requests that may be made upon his firm, without any consideration given to whether they might be based upon his own potential misconduct. While much of the relief requested is the same as contemplated at the Examiner's retention, that contemplated relief was predicated upon the assumption that the Examiner would perform his duties as this Court had directed. The facts show that this is clearly not the case.

12. As the Examiner observes in his Motion, his position as Examiner makes him a Court fiduciary, and that, "The Examiner performs his duties at the request of the court, for the benefit of the debtor, its creditors and shareholders..." Though the Examiner's report was excluded from the December 2010 confirmation hearings, this Court relied heavily upon the Examiner's analysis to form the conclusion that the Global Settlement Agreement was fair and reasonable.

13. This is evident because all of the major structural problems evident in the Examiner's Report are also present in the January 7, 2011 opinion denying confirmation (the "**January Opinion**"). Namely, the FDIC-Corporate release issues I raised at the February 2012 confirmation hearings, and WMI's litigation claims such as avoidance actions and unjust enrichment which could impinge upon WMI's Title 12 claims in the WMI Action. These structural weaknesses appear first in the Examiner's Report and have carried through to this Court's January Opinion, necessitating my active involvement in this case.

ARGUMENT

I. Areas the Examiner Ignored or Missed Entirely

A. FDIC-Corporate's Lack of Consideration for a Release

14. FDIC-Corporate has no claim against the estate, and is not even a party to the bankruptcy action, having been dismissed early in the process. WMI had significant claims filed against FDIC-Corporate in the WMI Action, yet FDIC-Corporate had no claim whatsoever against the bankruptcy estate, either in this Court or in any other court. This legal separation should have come to no surprise to the Examiner, since both FDIC-Receiver and FDIC-Corporate had argued this point in multiple briefs, and at oral argument before Judge Collyer. As a professional, there can be no excuse for the Examiner ignoring the fact that FDIC-

Corporate was to receive valuable releases from WMI under the GSA for no consideration.

15. When I later argued at the February 2012 confirmation hearing that FDIC-Corporate's legal separation from FDIC-Receiver caused FDIC-Corporate to have no consideration to offer to obtain a release of WMI's claims, Mr. Califano rose and addressed the Court as representative for both FDIC-Corporate and FDIC-Receiver. He confirmed my argument, stating that,

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20 "Your Honor, I'll be very brief. I'm surprised that at
21 this point we still have to argue issues related to the global
22 settlement agreement which is soon to be over two years old.
23 Simply put, Your Honor, the FDIC-Corporate did not file claims
24 but the FDIC-Corporate was a defendant in the DC action that
25 the debtors brought to prosecute their receivership proof of

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1 claim.
2 The releases granted to the FDIC-Corporate as part of
3 the global settlement agreement were a core consideration for
4 the FDIC in accepting the settlement agreement. They're an
5 integral part of the settlement agreement. We've had testimony
6 here several times. It's a unitary agreement and is a core
7 part of the consideration for the FDIC to consent to the global
8 settlement agreement."

16. Mr. Califano's statement provides conclusive proof that FDIC-Corporate was dominating and controlling FDIC-Receiver, which would have allowed WMI to pierce the FDIC's Corporate veil, potentially providing billions in additional recovery to WMI. FDIC-Receiver had limited funds ($1.888 billion) to draw against, while FDIC-Corporate has a $100 billion line of credit they are able to draw against. When piercing the corporate veil, any claim which could have been made solely against FDIC-Receiver could now be made against FDIC-Corporate as well. While the Examiner could not have known that FDIC-Corporate would foolishly admit to such an action, he should have at least considered the possibility that FDIC-

Corporate's veil could be pierced at some point in the future.

B. Examiner's Failure to Address Certain of WMI's Counterclaims Against JPMC

17. Despite a mandate to investigate "...**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**...", certain claims against JPMC to be released were ignored in their entirety by the Examiner for reasons as yet unknown. These include WMI's Fourteenth Counterclaim against JPMC for unjust enrichment and WMI's Tenth Counterclaim against JPMC for the avoidance of the P&A Agreement as a fraudulent transfer. Once the unjust enrichment has been calculated, those same numbers can be used for the P&A avoidance action or any of the other legal theories seeking a recovery for the seized assets.

18. Thanks to JPMC's SEC filings, the amount for JPMC's unjust enrichment is easily calculated via numbers which have been certified as accurate by JPMC's CEO, Mr. Jamie Dimon. Using JPMC's SEC filing numbers, this unjust enrichment was $46.22 billion as of February 6, 2012 filing of the Objection to the Seventh Amended Joint Plan of Affiliated Debtors by James Berg, (the "**POR7 Objection**") [D.I. 9569]. *See POR7 Objection, ¶¶ 19-26.* Due to changes in JPMC's model due to the interest rate and other variables, this amount has now increased to $47.5 billion. However, for the purposes of the Examiner, a shift in the overall amount by a few percentage points is not relevant; only the knowledge that such an amount would have put all WMI equity in the money, not only preferred stock, but also the common equity which he concluded could have no possibility of a recovery. JPMC's unjust enrichment provides the perfect example of just how wrong the Examiner's analysis was.

C. Examiner's Failure to Address Certain of WMI's Counterclaims Against the FDIC

19. Similarly, the Examiner failed to discuss in his final report the avoidance of the P&A Agreement as a fraudulent transfer to either or both of FDIC-Receiver and FDIC-Corporate, and the constructive release of the United States Government through the dismissal of the WMI Action before Judge Collyer in the Circuit Court for the District of Columbia. Again, JPMC's unjust enrichment can be used to value either of these claims.

20. Following confirmation of the Plan, I attempted to intervene in the WMI Action in the District Court for the District of Columbia. The plaintiffs in the WMI Action (the Debtors) instead delayed responding to my emergency motion until such time as they were prepared to file a stipulation of dismissal, then seriously mis-characterized my intent to Judge Collyer. Unfortunately she dismissed the action before I the deadline to respond to the Debtor's statements, apparently having been convinced that it was my intention to re-argue the GSA before her court. Had that truly been my intent, I would have appealed instead to the District Court for the District of Delaware and entertained myself for the next ten years by appealing all the way to the Supreme Court. My goals were simple: to raise the issues of misconduct regarding Project Fillmore before the DC court, and to request that the claims subject to the Federal Tort Claims Act be transferred to the Court of Federal Claims prior to the WMI Action being dismissed as provided for in the Plan. This course of action would have preserved a recovery path for Equity, allowing WMI to fulfill its fiduciary duty to equity, and minimized the impact of the Examiner's ill-fated actions which appear intended to convince equity to give up and move on.

21. Most importantly, all of the parties to the GSA would have gotten what they wanted, while the U.S. Government would have been potentially on the hook for what is

undoubtedly the largest government 5th amendment taking in United States history. There is no reason why the WMI Equity holders and the WMB bondholders should be required to bear the burden for the FDIC's action. This precipitous, preemptive seizure has benefited both JPMC and the FDIC greatly, but more importantly, it has benefited the entire banking system as a whole. It was my goal to ensure that the burden was shared by all, just like the benefit.

II. Examiner's Illogical or Poorly Supported Arguments

22. In my Post-Confirmation Written Argument following the July 2011 confirmation hearings, [D.I. 8407], I poked holes in many of the Examiner's arguments. Though this Court was unwilling to change its decision regarding the reasonableness of the GSA (fearing a "litigation morass"), that alone does not bolster the Examiner's weak arguments. Rather than repeat my earlier arguments here, I will include the following sections by reference:

(1)	JPMC's Receipt of WMB Tax Refunds Violates Congressional Intent	*Id.*, ¶ 27
(2)	P&A Agreement Excludes the Sale of Any Claims Against WMI	*Id.*, ¶¶ 28-31
(3)	Business Tort Claim Against JPMC: The "Constructive Leak"	*Id.*, ¶¶ 32-35
(4)	Value of Certain Disputed Assets to be Transferred to JPMC	*Id.*, ¶¶ 44-51
(5)	Examiner's Misunderstanding of Project Fillmore	*Id.*, ¶¶ 57-59
(6)	Examiner's Misunderstanding of the ANICO Dismissal	*Id.*, ¶ 60
(7)	Examiner's Misapplication of Emergency Economic Stabilization Act	*Id.*, ¶¶ 61-64
(8)	Other Serious Examiner Errors and Invalid Assumptions	*Id.*, ¶¶ 65-67

23. Similarly, in the *Objection to the Seventh Amended Joint Plan of Affiliated Debtors by James Berg* [D.I. 9569], I raise additional areas where the Examiner's arguments were poorly supported by the facts. Again, I include the following sections by reference:

(9)	Viability of Claims Against FDIC-Receiver	*Id.*, ¶¶ 27-31

(10)	Viability of Claims Against FDIC-Corporate	*Id.*, ¶¶ 32-34
(11)	Updated Project Fillmore Materials	*Id.*, ¶¶ 41-57
(12)	Potential Actual Fraud: FDIC-Corporate and the Standstill Agreement	*Id.*, ¶¶ 58-60
(13)	Potential Breach of Contract by FHLB San Francisco	*Id.*, ¶ 60

III. Relief Requested in the Examiner's Motion

A. Discharge

24. I do not oppose the discharge requested by the Examiner, but as I've stated, I do not agree with his assertion that he has completed his duties, as significant duties were never completed in the first place, and are now moot due to Plan confirmation.

B. Disposition of Documents

25. Given certain of the Examiner's analysis and conclusions appear not entirely consistent with the facts found in the underlying documents, I would like a truly neutral party (if such a person could be found) to review the documents prior to their destruction. Alternately, perhaps some means of conversion to electronic format could be arranged, which should not represent the storage problem the Examiner wishes to avoid.

C. Relief from Third Party Discovery

26. While it may be customary for an examiner to be provided relief from third party discovery, I believe that the lapses I have shown today demonstrate the "extraordinary circumstances" that warrant discovery from class action counsel, should one be appointed to pursue the Examiner. Perhaps other third-party discovery should be limited for a period during which class action counsel would have exclusive access, then a determination could be made to allow or restrict additional discovery based upon the outcome.

D. Exculpation of the Examiner and His Professionals

27. The Examiner "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."

28. While certain of the Examiner's actions may constitute gross negligence or willful misconduct which would not be subject to this restriction, I am concerned that granting the relief the Examiner asks may allow him to stymie any attempts to determine the true nature of his actions. Given the magnitude of the potential claims which were not addressed, I believe it would be prudent to ascertain the facts before granting the Examiner and his Professionals blanket immunity.

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

29. I have no objection to the Examiner being reimbursed for reasonable costs in conjunction with necessary work which provides a benefit to the estate. My concern, however, given the nature of the claims which were neglected or not disclosed, I believe it would be reasonable to restrict those costs to those which are truly necessary, and not based upon an attempt or potential attempt to obtain immunity for potential misconduct. Obtaining Court approval for future charges over a certain limit would likely address those concerns.

IV. Conclusions

30. While it might be possible to excuse certain of the areas where the Examiner's judgment appeared incorrect, the nature of his errors are on a scale so large as to be unbelievable. It is inexcusable for the Examiner to simply overlook WMI's most significant claims for unjust enrichment. The methodology I used is not new or novel; the Debtors themselves first cited it in their own brief in the WMI Action. They were the first to quote the article I later quoted which showed an accretable yield balance of $29.1 billion yet to be accreted to JPMC. Had the Examiner simply read through all of the WMI Action filings in the DC court, they would likely have come to the same conclusion I had, provided, of course, that there was no ulterior motive and that the Examiner was acting as a truly independent, unbiased, neutral fiduciary intended to benefit creditors and shareholders alike.

31. This Court should be outraged as it should have been able to rely without question upon the Examiner's work product since he is a court fiduciary. Whether through error, omission, negligence, or willful misconduct, the Examiner and his Professionals have failed in their duty both to this Court and to those shareholders who were the intended beneficiaries of his work. Mr. Hochberg's actions have undermined the integrity of this Court, and his actions are a proximate cause of very significant harm to myself and all other shareholders who owned WMI equity at the November 1, 2010 release date of the Examiner's Report. I believe that a class action suit against the Examiner and his Professionals is warranted, and that this Court should take no action which could impede reasonable, appropriate discovery by class action counsel into the Examiner's conduct and analysis. Further, if that conduct is in any way implicated, I believe the Examiner alone should bear the costs, not the estate.

D. Reservation of Rights

32. I expressly reserve the right to supplement this objection for any reason, including by joining in the objections of other parties, regardless of whether those grounds are addressed herein.

WHEREFORE, I request that the Court consider my objection along with the Examiner's Motion, and make her own reasoned conclusion as to the merits based upon the facts presented.

Dated: April 28, 2012

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

CERTIFICATE OF SERVICE

On this 28th day of April 2012, I, James A. Berg, served a true and correct copy of the *James Berg's Limited Objection to the Motion of Examiner for Entry of Order (1) Discharging Examiner; (2) Approving Disposition of Documents; and (3) Granting Related Relief* upon the parties and in the manner listed below:

Via Express Mail:

Cole, Schotz, Meisel,
Forman & Leonard, P.A.
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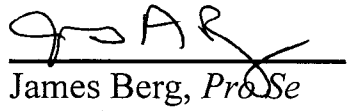

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