

)	Chapter 11
In re:)	
)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., <u>et al.</u> , ¹)	
)	(Jointly Administered)
Debtors.)	
)	Requested Hearing Date: June 3, 2010 at 10:30 a.m. (ET)
)	Requested Obj. Deadline: June 2, 2010 at 12:00 p.m. (ET)
)	

The Official Committee of Equity Security Holders (the “Equity Committee”) of Washington Mutual, Inc. (“WMI” and, together with its chapter 11 debtor-affiliate, WMI Investment Corp., the “Debtors”) moves the Court pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 for an order authorizing the Equity Committee to conduct an examination of JPMorgan Chase Bank, N.A. (“JPMC Bank”), its parent company JPMorgan Chase & Co., and certain of their subsidiaries and affiliates as defined in **Exhibit A** hereto (collectively, “JPMC”), and represents as follows:

1. Following commencement of this Chapter 11 case, the Debtors identified potential legal claims against JPMC stemming from the events that led to the closure of Washington Mutual Bank (“WMB”) in September 2008 and the simultaneous sale of its assets to JPMC Bank by the Federal Deposit Insurance Corporation (“the FDIC”). By motion filed in May

{00409723;v1}

2009, the Debtors sought authority to conduct a Rule 2004 examination of JPMC, focusing on potential business tort claims that had been alleged in a Texas action filed by bondholders against JPMC.² The Court granted that motion on June 24, 2009 (Docket #1219).

2. Thereafter, the Debtors served document requests on JPMC. JPMC objected to all of those requests, and that led to a lengthy dialogue between the Debtors and JPMC ostensibly intended to resolve the objections. That dialogue stretched into 2010 and eventually came to a final halt when the Debtors and JPMC reached agreement on a so-called Global Settlement that would release (among other things) the potential business tort claims that the Debtors had been investigating. The Debtors disclosed the existence of the settlement to the Court on March 12, 2010.

3. Despite the blizzard of written objections that JPMC served in response to the Debtor's investigative requests, JPMC did produce approximately 40,000 pages of documents in August and September 2009.³ Although JPMC's production was materially restricted in its scope, given the substantial objections that remained outstanding at the time, the disclosures it did make were enough to sharpen the Debtors' interest in their potential business tort claims against JPMC, and the Debtors sought to expand their investigation through a second Rule 2004 motion filed in December 2009.⁴

4. That second motion sought authority to serve subpoenas on 20 third parties,

² See Motion for Rule 2004 Examination of JPMorgan Chase Bank, N.A. (Docket # 974) ("May Rule 2004 Motion").

³ See Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of Witnesses and Production of Documents from Knowledgeable Parties (Docket # 1997), filed on December 14, 2009 ("Dec. Rule 2004 Motion"), at ¶ 11; Debtors' Objection to Motion and Supporting Memorandum of the Official Committee of Equity Security Holders for the Appointment of An Examiner (Docket # 3626), filed May 4, 2010, at ¶ 22.

⁴ The Debtors represented in the motion that "[c]ertain of the documents in the JPMC productions highlight the need to expand to third parties the investigation this Court authorized concerning 'JPM[C]'s alleged malfeasance prior to the seizure and sale of WMB.'" Dec. Rule 2004 Motion at 2 (quoting Opinion of the Court dated June 24, 2009 (Docket #1219), at 17 & n.14).

including government agencies, potential suitors for an acquisition of WMB, and outside professionals retained by WMB to assist it in addressing its financial difficulties. In their briefing on the motion, the Debtors represented as follows:

As detailed in Debtors' Motion, the discovery sought through the Requested Examination concerns possible misconduct by JPMC preceding the seizure and sale of WMB, including gaining access to WMI's confidential information in connection with JPMC's supposed interest in bidding for the company, improperly disclosing such information to third parties to cause market panic and foment a government seizure of the bank, and destroying a 119-year old institution that once had more than \$50 billion in market capital.⁵

5. By order dated February 16, 2010, this Court denied the Debtors' motion. The Court did not express disagreement with the seriousness of the potential claims against JPMC or the probative nature of the supporting evidence the Debtors detailed in their motion. Instead, the Court concluded that the Debtors had failed to show that it was necessary to obtain additional information, particularly from third parties who were not themselves the subject of the claims Debtors were seeking to investigate, in order to determine whether they should assert those claims; and the Court further expressed concern that the Debtors' proposed subpoenas were not narrowly tailored to the potential tort claims against JPMC.⁶

6. Less than a month later, the Debtors announced the proposed Global Settlement that would release the potential business tort claims against JPMC, apparently without having conducted any further factual investigation of those claims. The proposed Global Settlement, as initially disclosed, also released significant claims against the FDIC, as well as potential claims against numerous unidentified third parties.

7. In light of the Debtors' dramatic change of course, the Equity Committee moved

⁵ Debtors' Reply to the Objections of the Knowledgeable Parties to Debtors' Motion for An Order Pursuant to Bankruptcy Rule 2005 and Local Bankruptcy Rule 2004-1 Directing the Examination of Witnesses and Production of Documents From Knowledgeable Parties (Docket #2212), filed Jan. 25, 2010, at 7.

⁶ Transcript of Hearing, Jan. 28, 2010 (Docket # 2312), at 88-90 (excerpts attached as Exhibit D).

on April 26, 2010, for appointment of an examiner pursuant to Section 1104(c) of the Bankruptcy Code with authority to investigate, among other things, the broad range of claims that the Debtors proposed to release. (Docket #3579) At a hearing on May 5, 2010, the Court denied appointment of an examiner. One significant ground for the Court's decision was that the Equity Committee had the ability itself to conduct the investigation that it sought to have an examiner conduct, and the Court made explicit reference to Rule 2004 as an appropriate vehicle for that effort.⁷

8. Since the Court's ruling on the examiner motion, the Equity Committee has attempted to finish collecting and more carefully analyze the information that the Debtors had assembled before deciding to abandon their potential claims against JPMC, and to obtain a more detailed understanding of what the Debtors did and did not do in the course of their own investigation. What the Equity Committee has learned only further convinces it that the investigation was indeed dramatically incomplete and was terminated prematurely.

9. The Equity Committee has also attempted to avoid reinventing the wheel and to save precious time by asking the Debtors to share the fruits of their own analysis, including any collections of key documents sifted from the admittedly incomplete universe of documents that the Debtors had collected from JPMC and others. Invoking the work-product privilege, the Debtors have refused to provide any written analysis (legal or factual) of the claims against JPMC they propose to release, or any selection of key documents. Instead, their message to the Equity Committee, in a nutshell, has been: "Do the work yourselves."

10. The Equity Committee made similar requests to the Creditors Committee for their analysis and selections of key documents, but nothing has been forthcoming.

⁷ Transcript of Hearing, May 5, 2010, at (Docket #3699) at 100 (excerpts attached as Exhibit E).

11. The Equity Committee does not believe that disclosure of the Debtors' analysis to it would result in waiver of any applicable privileges and will be bringing that dispute to the Court's attention shortly. The purpose of this motion is to enable the Equity Committee (and other interested parties) to pursue further the investigation that the Debtors abruptly terminated, by completing discovery of documents within JPMC's control – including pre-seizure business records of WMB that are now within JPMC's exclusive possession – and by taking depositions of JPMC personnel with the most knowledge of subjects relevant to the claims that the Debtors propose to abandon.

12. The Equity Committee also seeks authority to conduct document and deposition discovery of JPMC directed to the negotiation and meaning of the proposed Global Settlement, and the circumstances that led to its adoption.

II. JURISDICTION AND VENUE

13. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core bankruptcy proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

III. BACKGROUND

14. Prior to commencing this Chapter 11 case, WMI was a savings and loan holding company that owned Washington Mutual Bank ("WMB") and indirectly WMB's subsidiaries, including Washington Mutual Bank fsb ("FSB"). (DS 1)⁸ It was the largest savings and loan holding company in the country, and WMB and its subsidiaries collectively constituted the

⁸ Except as otherwise noted, parenthetical citations in this motion with the "DS" prefix refer to the Debtor's proposed Disclosure Statement for the Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (Docket #2623), filed in this case on March 26, 2010. That Disclosure Statement has since been twice superseded.

seventh largest U.S.-based bank. (DS 22)

15. On September 25, 2008, the Office of Thrift Supervision (the “OTS”) ordered the closure of WMB and appointed the FDIC as receiver for WMB. (DS 2) Immediately after its appointment as receiver, the FDIC took possession of WMB’s assets and sold substantially all of them to JPMC Bank for \$1.88 billion and the assumption of WMB’s deposit liabilities. (DS 2) That precipitated this bankruptcy. (DS 29)

16. Before those dramatic actions by the OTS and FDIC, WMI’s financial condition had been adversely affected by significant disruptions during 2007 and 2008 in the U.S. residential mortgage market. (DS 28) And yet, WMI had weathered the storm, due in part to completion in April 2008 of a significant recapitalization that resulted in a \$7.2 billion capital infusion by institutional investors. (DS 28) Moreover, although the OTS lowered WMB’s supervisory rating in a way that made it ineligible to receive primary credit from the Federal Reserve Board’s Discount Window, WMB was able to receive secondary credit from the Discount Window of the Federal Reserve Bank of San Francisco, and was able to maintain borrowings up to the time of its seizure. (DS 29) Nevertheless, speculation began to circulate in the market that WMI’s and WMB’s operations and capital positions were unstable, and in the ten days prior to the FDIC receivership, WMB experienced significant deposit withdrawals of more than \$16.7 billion. (DS 29)

17. During this ongoing process, WMI pursued a merger or sale transaction with another financial institution and investigated other strategic alternatives intended to increase WMI’s capital and liquidity levels. (DS 29) WMI was continuing to pursue those alternatives when the OTS stepped in and appointed the FDIC as receiver for WMB.

18. In a nutshell, those are the events, as described by the Debtor in the most recent

version of its proposed Disclosure Statement, that led to this bankruptcy. But a multitude of serious questions existed at the commencement date about how and why WMI failed, about the events that led to intervention by the OTS and the FDIC, about the events and communications that led to the sale of WMB's assets to JPMC, and in particular about the role of JPMC in events such as the "run on the bank," the seizure of WMB, and the immediate sale of its assets.

A. American National Action

19. In February 2009, various insurance companies that hold bonds issued by WMB and WMI filed suit against JPMC in state district court in Galveston County, Texas. "Specifically, the plaintiffs asserted that there was a premeditated plan by JPMC designed to damage WMB and FSB, and thereby enable JPMC to acquire WMI's banking operations at a 'fire sale' price." (DS 34) Among other things, the allegations in the complaint raised disturbing questions about the extent to which JPMC had been working with the FDIC behind the scenes for weeks before the seizure of WMB, and had withdrawn from negotiations for the purchase of WMB after concluding that government seizure of WMB would happen and that it could then acquire the assets more cheaply.

20. The FDIC intervened in the suit as a defendant and removed it to the U.S. District Court for the Southern District of Texas, which then transferred it to the District Court for the District of Columbia. (DS 34) On April 13, 2010, that court granted motions by JPMC and the FDIC to dismiss the suit for lack of subject matter jurisdiction and entered a final order dismissing the suit and closing the case. The court did not reach the merits of the allegations against JPMC, but rather held that the FDIC was a necessary party to the plaintiffs' claims and that plaintiffs were required to pursue their claims against the FDIC exclusively through an administrative claims process established by Congress in the Financial Institutions Reform,

Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 83 (1989).⁹

B. The Debtors' Rule 2004 Examination Requests

21. As a result of the American National Action, the Debtors filed a motion for Rule 2004 examination on May 1, 2009, seeking an order directing the examination of JPMC.¹⁰ In that motion, the Debtors summarized the allegations in the American National Action and sought the authority to investigate the underlying merit of those claims, as well as other potential estate claims suggested by the American National allegations.

22. The Creditors Committee in this case has represented that it also carefully examined the American National allegations and consulted in advance with the Debtors about a potential Rule 2004 examination of JPMC.¹¹

23. This Court granted the Debtors' motion on June 24, 2009, over JPMC's opposition. (Docket #1220) Pursuant to the Court's order, the Debtors served JPMC with a subpoena requesting production of documents.¹² On July 20, 2010, JPMC served objections to all of the requests.¹³ The Debtors and JPMC began holding a series of meet-and-confer sessions, but JPMC agreed to begin producing certain documents in August and September 2009 as those discussions continued.¹⁴

⁹ See *Am. Nat'l Ins. Co. v. JPMorgan Chase & Co.*, 2010 U.S. Dist. LEXIS 36487, *10-12 (D.D.C. April 13, 2010).

¹⁰ See Motion for 2004 Examination of JPMorgan Chase Bank, N.A. (Docket # 974) ("May Rule 2004 Motion").

¹¹ Objection of the Official Committee of Unsecured Creditors of Washington Mutual Inc., et al., to the Official Committee of Equity Security Holders' Motion for the Appointment of An Examiner (Docket # 3629), filed on May 4, 2010 ("Creditors Committee Objection to Examiner"), at ¶ 27.

¹² Dec. Rule 2004 Motion, at ¶ 9 and Exhibit 4 thereto.

¹³ *Id.*; see Exhibit C hereto (JPMC objections).

¹⁴ See Dec. Rule 2004 Motion, at ¶¶ 10-11.

24. JPMC's production totaled approximately 40,000 pages.¹⁵ The Debtors reviewed those documents, as did the Creditors Committee, and they concluded that further investigation was warranted.¹⁶

25. Accordingly, on December 14, 2009, the Debtors moved for authority to conduct a further Rule 2004 examination of witnesses and to request production of documents from various third parties – including the FDIC, the OTS, the U.S. Department of the Treasury, and former U.S. Treasury Secretary Henry M. Paulson, Jr.¹⁷ The Debtors also sought to obtain testimony and documents from rating agencies, banks (including Goldman Sachs, the investment bank that WMI retained in September 2007 to assist it in finding a suitor), and third-party professionals that WMI had at one time used.¹⁸

26. In that motion, the Debtors described the contents of certain documents they had obtained pursuant to the first Rule 2004 examination – documents that the Debtors themselves fairly characterized as warranting the need for further investigation from third parties who “are likely to have information currently unobtainable by Debtors relevant to potential estate claims sounding in business tort and tortious interference against JPMC, including information relevant to allegations made in [the American National Case].”¹⁹ The Debtors explained in their reply brief:

As detailed in Debtors' Motion, the discovery sought through the Requested Examination concerns possible misconduct by JPMC preceding the seizure and sale of WMB, including gaining access to WMI's confidential information in

¹⁵ Dec. Rule 2004 Motion, at 5; Debtors' Objection to Motion and Supporting Memorandum of the Official Committee of Equity Security Holders for the Appointment of An Examiner (Docket # 3626), filed May 4, 2010, at ¶ 22.

¹⁶ Creditors Committee Objection to Examiner, at ¶¶ 27-28.

¹⁷ Dec. Rule 2004 Motion at 1, n. 2.

¹⁸ Dec. Rule 2004 Motion at 1, n. 2.

¹⁹ *Id.* at 3.

connection with JPMC's supposed interest in bidding for the company, improperly disclosing such information to third parties to cause market panic and foment a government seizure of the bank, destroying a 119-year-old institution that once had more than \$50 billion in market capital.²⁰

27. It was apparent from the December Rule 2004 motion that the Debtors had not obtained the requested information through discovery in any of the lawsuits to which it was then a party.

28. This Court denied the Debtors' motion from the bench at a hearing on January 28, 2010. As noted earlier, the Court did not express disagreement with the seriousness of the potential claims against JPMC or the probative nature of the supporting evidence the Debtors detailed in their motion. Instead, the Court concluded that the Debtors had failed to show that it was necessary to obtain additional information, particularly from third parties who were not themselves the subject of the claims Debtors were seeking to investigate, in order to determine whether they should assert those claims; and the Court further expressed concern that the Debtors' proposed subpoenas were not narrowly tailored to the potential tort claims against JPMC.²¹

29. Less than one month later, on March 12, 2010, the Debtors publicly announced the settlement and proposed release of the substantial claims they had told the Court as late as the January 28 hearing on their motion that they vitally needed to investigate further through Rule 2004.

C. The Equity Committee's Motion for Appointment of An Examiner

30. In light of the Debtors' dramatic change of course, the Equity Committee moved on April 26, 2010, for appointment of an examiner pursuant to Section 1104(c) of the

²⁰ See Reply of the Debtors to the Objections to Dec. 2004 Motion (Docket # 2212), filed on January 25, 2010 ("Reply Br. Dec. Rule 2004 Motion").

²¹ Transcript of Hearing, Jan. 28, 2010 (Docket # 2312), at 88-90 (excerpts attached as Exhibit D).

Bankruptcy Code. (Docket #3579.) The Equity Committee proposed that the examiner be empowered and directed to investigate the following matters, among others:

- The extent to which there are potential claims and causes of action held by the Debtors' estates against any person or entity, and the merit and value of those claims, arising from circumstances leading to the OTS's closure of WMB and appointment of FDIC as receiver and the FDIC's sale of WMB assets to JPMC;
- The extent to which there are potential claims and causes of action held by the Debtors' estates arising from breach of fiduciary duty or other legal duties by WMI officers, directors, and employees in their supervision or direction of WMB investment in subprime residential mortgages during 2007 and 2008, or in other actions and events that led to WMB's seizure and sale in September 2008;
- The disputes at issue between the Debtors and JPMC concerning the existence and valuation of WMI tax attributes (principally its NOLs) and the meaning and impact of a tax sharing agreement between WMI and WMB on those disputes;
- The proper ownership, valuation, and asset affiliation of the trust preferred securities at issue in the adversary litigation between JPMC and the Debtors, and the proper ownership of all other assets that are the subject of claims and counterclaims in that adversary proceeding;
- Potential claims belonging to the Debtors for fraudulent conveyance or for the recovery of preferential transfers, including but not limited to any such claims that arise from WMI's capital contributions to WMB;
- The identification, nature, and valuation of assets held by the Debtors post-bankruptcy, including assets that would be conveyed to JPMC and the FDIC under the proposed Global Settlement Agreement.

31. At a hearing on May 5, 2010, the Court denied appointment of an examiner. The Court articulated two reasons for that decision.

32. First, the Court observed that the debtor had already been the subject of numerous investigations and expressed doubt that an examiner would "find any stone unturned."²² The Court made those observations in the context of the broad scope of the examination that the

²² Transcript of Hearing, May 5, 2010, at (Docket #3699) at 98 (emphasis added) (excerpts attached as Exhibit E).

Equity Committee proposed. The Court made reference to numerous investigations by governmental agencies and legislative bodies²³ and stated as follows:

It is true that their investigations exceeded the scope of what the Court need concern itself with. They have talked about systemic problems. They have investigated possible criminal actions by the parties. . . . I don't think it is fair to the creditors in this case to be saddled with the cost of an investigation into systemic problems, that would only benefit future parties but not benefit the parties in this case.²⁴

33. As we will explain below, while it is correct that many public agencies and private parties have conducted factual investigations that concerned WMB's massive investment in subprime residential mortgages and certain aspects of the OTS/FDIC decisions to seize and then sell the assets of WMB, JPMC's role in the failure and forced sale of WMB has not been thoroughly investigated to death, either in this case or in any other forum.

34. Second, leaving aside the investigation of "systemic problems" that may have contributed to WMB's closure, the Court turned to narrower issues such as "what assets the debtor owns, what the value of those assets is, whether a settlement is reasonable,"²⁵ and in that context the Court concluded that appointment of an examiner was unnecessary because the Equity Committee itself has the ability to conduct the investigation that it sought to have an examiner conduct:

. . . I think the equity committee is fully able to conduct the investigation that it seeks to have the examiner conduct. It has the benefit of Rule 2004, it has the benefit of the discovery rules, because there are contested matters presently and anticipated in which the equity committee could fully avail itself of that discovery.²⁶

35. With respect to an investigation that the Equity Committee might conduct itself,

²³ *Id.* at 98-99.

²⁴ *Id.* at 99.

²⁵ *Id.* at 100.

²⁶ *Id.*

the Court made clear that the Debtors and the Creditors Committee should cooperate in making information available on a voluntary basis:

In this case specifically, the debtor and the creditors' committee have investigated the specific assets owned by the debtor, or that the debtor claims it owns. The debtor has vigorously appeared in and prosecuted its position in several adversaries in this case, in addition to filing a claim in the FDIC receivership and prosecuting claims it has in that forum. All of that information should be available to the equity committee. And I don't want to hear about obstacles being placed in their path to getting full and open access to that information, whether its documentary or interviews with the debtors' management or others who have conducted these investigations; and the same goes with the creditors' committee, who's been actively involved in all of this.

. . . .

[A]gain, I'm strongly urging the committee and the debtor to provide all the information to the equity committee without testing the Court's patience with discovery motions.²⁷

D. Events Following the Court's Denial of the Equity Committee's Motion for Appointment of An Examiner

36. Since the Court's ruling on the examiner motion, the Equity Committee has attempted to finish collecting and more carefully analyze the information that the Debtors had assembled before deciding to abandon their potential claims against JPMC, and to obtain a more detailed understanding of what the Debtors did and did not do in the course of their own investigation. What the Equity Committee has learned only further convinces it that the investigation was indeed dramatically incomplete and was terminated prematurely.

37. In particular, the Equity Committee's litigation counsel has begun more closely reviewing the documents that the Debtors obtained through their Rule 2004 requests to JPMC and the documents the Debtors obtained through voluntary productions by a handful of third parties that were among those identified in the Debtors' unsuccessful Rule 2004 motion filed in December of last year.

²⁷ *Id.* at 99, 100.

38. With respect to JPMC, it is clear that the production was woefully incomplete. In a November 2, 2009 letter to JPMC, the Debtors identified four major deficiencies in JPMC's production, none of which was cured during the ensuing eight additional weeks of negotiation.²⁸

(1) The Debtors identified 37 JPMC employees who had a significant involvement in JPMC's purchase of WMB's assets according to JPMC's internal documents,²⁹ but JPMC only searched the records of 13 of these custodians; JPMC later admitted that eight whose documents were not searched had more than limited involvement, but it refused to conduct that search unless the Debtors waived their right to have the files of any other custodians searched, including 16 others the Debtors had already identified and any others they might identify in the future³⁰; (2) the production from the 12 custodians whose files were searched appeared to be woefully inadequate—for example, only 9 documents were produced from the C.E.O. of JPMC, who drafted one of the main agreements and corresponded directly with the FDIC about the purchase—and JPMC refused to reveal the search terms it used to conduct the searches of those 9 custodians; (3) JPMC admitted that it was withholding a number of documents on the ground of third-party confidentiality, notwithstanding a confidentiality agreement between JPMC and WMI that would protect that confidentiality; and (4) the overall production was remarkably sparse—for example, JPMC produced very few responsive documents in connection with document requests 7, 8, 12, and 13, which sought documents concerning JPMC's communications with WMI, governmental entities, the media, and third parties relating to JPMC's interest in acquiring WMB assets and the seizure, sale and financial condition of

²⁸ See 11/2/09 Letter from WMI to JPMC (describing deficiencies), attached hereto as Exhibit F; *see also* 12/28/09 Letter from WMI to JPMC (describing impasse in negotiations on these deficiencies), attached hereto as Exhibit G.

²⁹ See Exhibit H attached hereto (list of knowledgeable JPMC employees, sent by WMI to JPMC on 11/25/09).

³⁰ See 12/21/09 Letter from WMI to JPMC, attached hereto as Exhibit I.

WMB.³¹

39. In addition, it appears that one especially significant source of information relevant to JPMC's conduct remains almost entirely untapped: The pre-seizure business records of both WMI and WMB. Among other things, those records would contain information about the nature of confidential information that WMI and WMB disclosed to JPMC during discussions over JPMC's supposed interest in making an offer for WMB; the details of those discussions themselves; the communications between WMI and other potential suitors; intelligence about market rumors concerning WMI's financial condition that JPMC may have had a hand in generating; and a wide range of other subjects directly germane to the Debtors' potential business tort claims against JPMC. The problem (as explained to us by Debtors' counsel) is that after the FDIC's sale of WMB assets to JPMC in September 2008, JPMC took control of all WMB documents and information systems. JPMC also took control of the former corporate offices of WMI in Seattle, including the WMI documents and information systems located in those offices. While JPMC agreed to provide the Debtors, at the Debtors' request, with access to certain documents necessary for the administration of the bankruptcy estates (such as information relevant to the preparation of tax returns), the Debtors have either not had – or not availed themselves of -- general access to the pre-seizure universe of WMI/WMB business records for the purpose of searching those records for information relevant to the potential business tort claims against JPMC.³²

40. In any event, whatever documents the Debtors may have retrieved (if any) from the pre-seizure information now in JPMC's control for purposes relevant to the JPMC business

³¹ See 11/2/09 Letter from WMI to JPMC, attached hereto as Exhibit F.

³² Declaration of Edgar Sargent in Support of the Motion of the Official Committee of Equity Security Holders for An order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of JPMorgan Chase, filed herewith ("Sargent Decl.") (attached hereto as Exhibit B) at ¶¶ 12-14.

tort claims has not been produced to the Equity Committee.³³ Nor have the Debtors produced to the Equity Committee any WMI/WMB documents they have identified as relevant to the business tort claims against JPMC from among pre-seizure WMI/WMB documents obtained for other purposes. The Debtors' position is that any such documents constitute privileged work product, and that if the Equity Committee wants to obtain access to relevant documents within that universe of material, it must do so by serving discovery requests on the Debtors.³⁴

41. While the Debtors' Rule 2004 subpoena to JPMC, on its face, was broad enough to call for relevant information from the pre-seizure WMI/WMB business records now under JPMC control, JPMC itself never agreed to conduct a search for relevant information from those sources.

42. Moreover, apart from the significant gaps in JPMC's document production, the Debtors have taken no depositions of JPMC personnel or former WMB personnel who now work for JPMC.

43. With respect to the numerous third parties that were the subject of the Debtors' December 2009 motion for examination pursuant to Rule 2004, the Debtors obtained only limited production of documents on a voluntary basis from some of those third parties.³⁵

44. Approximately 650 pages of documents from the Office of Thrift Supervision.

45. Approximately 240 pages of heavily redacted documents produced by the FDIC

³³ In opposing the Equity Committee's motion for appointment of an examiner, the Debtors vaguely represented that: "[I]n connection with discovery and data presentation efforts, the Debtors and their advisors have undertaken a collection and review of the documents in their possession (or provided to the Debtors under information access arrangements with JPMC). In this regard, the Debtors and their advisors have collected approximately 7.6 million pages of documents." Debtors' Objection to Motion and Supporting Memorandum of the Official Committee of Equity Security Holders for the Appointment of An Examiner (Docket #3629), filed May 4, 2010, at ¶ 22. These documents apparently have not been thoroughly reviewed by the Debtors for the purpose of identifying information relevant to the business tort claims against JPMC; they were not obtained from JPMC for that purpose in any event; and anything the Debtors found has not been provided to the Equity Committee. See Sargent Decl. ¶ 14.

³⁴ See Sargent Decl. ¶ 14.

³⁵ The following description of third-party documents is supported by the Sargent Decl., ¶¶ 8-11.

pursuant to FOIA requests. This appears to be the sum total of information that the Debtors obtained through all of the various discovery efforts they have directed to the FDIC to date, whether in court cases or pursuant to FOIA.³⁶ At this writing, the Equity Committee has not yet received this FDIC production, though we expect to receive a copy shortly.

46. Less than 20 documents produced by Moody's and a lobbying firm called the OB-C Group. Those documents have not been provided to the Equity Committee because Moody's and the OB-C have refused to consent to such disclosure.

47. Approximately 900 documents produced by Citigroup and approximately 500 documents produced by Blackstone. The Debtors provided those documents to the Equity Committee for the first time on May 24, 2010.

48. Approximately 27,500 pages of documents from TPG Capital, the company that made a significant equity investment in WMI in the summer of 2008. This production constitutes the vast majority of documents obtained by the Debtors from third parties – yet it would appear to have only a limited (if any) relationship to the potential business tort claims against JPMC.³⁷

49. In opposing the Equity Committee's motion for appointment of an examiner, the Debtors represented to the Court as follows:

³⁶ In opposing the Debtors' December 2009 motion for a Rule 2004 examination, the FDIC in its corporate capacity described to the Court three different sets of discovery requests it had received from the Debtors – the Rule 2004 subpoena, a set of FOIA requests, and a request for FDIC Exempt Records and Information. Objection of FDIC-Corporate to the Debtors' Motion For An Order Pursuant to Bankruptcy Rule 2004 (Docket #2170), filed Jan. 15, 2010, at 3. The FDIC further stated that it was "processing" the Debtors' FOIA requests. *Id.* at 2. The FDIC also explained that it was then engaged in responding to "a massive document request from Congress regarding the resolution of Washington Mutual Bank (WMB)," and that once that production was complete, the FDIC expected to begin "an appropriate production of documents to the Debtors pursuant to its administrative processes." *Id.* at 2. The net result of the FDIC's production to the Debtors, after all that, appears to be the roughly 240 pages referred to in the text.

³⁷ Of that mass of TPG Capital documents, the Equity Committee is unable to access more than 22,000 pages of the production because the disk provided by the Debtors which contains them is password-protected and the Debtors have not provided the password.

The Debtors have also engaged in extensive negotiations with Sullivan & Cromwell, LLP. The Office of the Comptroller of the Currency (the “OCC”), the Board of Governors of the Federal Reserve System (the “Federal Reserve”), the U.S. Department of the Treasury (the “DOT”), Cerberus Capital Management, L.P., Lehman Brothers, and Morgan Stanley for further documents related to the Business Tort Investigation. Supplementing the Business Tort Investigation, the Debtors also issued information requests pursuant to the Freedom of Information Act to the FDIC, OTS, the Securities Exchange Commission, the DOT, the Federal Reserve and the OCC.

50. However much negotiating, discussing, and supplemental requesting the Debtors have done, the actual result in terms of obtaining actual documentary evidence consists of what the Equity Committee has described above – unless the Debtors are holding back information from the Equity Committee without saying so.

51. In sum, although many aspects of WMI and WMB’s pre-seizure affairs may have been extensively investigated, the Debtors and the Creditors Committee have certainly not conducted a complete or thorough investigation of JPMC’s role in the loss of WMB and the precipitation of this bankruptcy – and JPMC has succeeded in significantly confining its own production of information while at the same time participating in the negotiation of a Global Settlement that would release all the potential business tort claims against it -- so that the investigation never will be completed.

52. Even with respect to analyzing the modest amount of information assembled by the Debtors before pulling the plug on their own investigation, the Equity Committee has attempted to avoid reinventing the wheel and to save precious time by asking the Debtors to share the fruits of their own analysis, including any collections of key documents sifted from the admittedly incomplete universe of documents that the Debtors collected from JPMC and others. Invoking the work-product privilege, the Debtors have refused to provide any written analysis (legal or factual) of the claims against JPMC they propose to release or any selection of key documents. Instead, their message to the Equity Committee, in a nutshell, has been: “Do the

work yourselves.”³⁸

III. RELIEF REQUESTED

53. Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1, the Equity Committee requests authorization to conduct an examination of JPMC, including production of documents responsive to the document requests attached hereto as **Exhibit A** and oral examination of JPMC witnesses most knowledgeable about the subjects described in those requests. The Equity Committee seeks entry of an order substantially in the form of the Proposed Order filed with this motion as **Exhibit J**.

54. The document requests fall into four categories. First, the majority of them are substantially similar (and in most cases identical) to requests that the Court permitted the Debtors to serve when it granted their first Rule 2004 request in June 2009. With respect to those requests, of course, JPMC need not re-produce the documents it previously produced to the Debtors, as long as it will verify that the Equity Committee’s copy of those documents is complete and may be used as if produced in response to the Equity Committee’s own Rule 2004 requests. However, as explained earlier, JPMC’s production of documents in response to those requests was materially incomplete. Serving essentially the same requests propounded by the Debtors will permit the Equity Committee to take steps intended to obtain a complete production – including responsive, pre-seizure WMI/WMB documents and JPMC’s pre-seizure communications with government agencies and other third parties.

55. Second, additional requests have been added that are designed to explore other pre-seizure JPMC activities that may have been part of a scheme to impair WMI’s ability to raise

³⁸ See Sargent Decl., ¶¶ 3-7. The Equity Committee also requested that the Creditors Committee share any selection of key documents that the Creditors Committee had culled from its own review of documents supplied by the Debtors or from other sources, as well as any factual or legal analysis of the potential claims. The Creditors Committee refused. *See id.*

capital and avoid a government takeover.

56. Third, an additional series of requests specifically targets certain categories of pre-seizure WMB/WMI documents, including financial data, information that WMB/WMI provided JPMC under confidentiality agreements, and documents concerning WMB/WMI's efforts to address its financial difficulties, including WMI's search for a potential acquiror.

57. Fourth, the requests seek information concerning the negotiation and impact of the proposed Global Settlement. This information is highly relevant in the broad context of this bankruptcy case because the proposed settlement is the cornerstone of the Debtors' proposed plan of reorganization.

IV. **BASIS FOR RELIEF**

58. Bankruptcy Rule 2004(a) provides that “[o]n motion of any party in interest, the court may order the examination of any entity.” The purpose of a Rule 2004 examination “is to enable the trustee to discover the nature and extent of the bankruptcy estate.” Opinion of the Court (Docket #1219) dated June 24, 2009 (“June 24 Opinion”) at 8 (citing *In re Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 708 (Bankr. S.D.N.Y. 1991); see also *In re Symington*, 209 B.R. 678, 684 (Bankr. D. Md. 1997). Among the “[l]egitimate goals of Rule 2004 examinations” are “determining whether wrongdoing has occurred,” June 24 Opinion, at 8 (quoting *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002), and exposing any fraudulent conduct. *Symington*, 209 B.R. at 683-84.

59. Rule 2004 grants parties in interest “broad rights of examination of a third-party’s records.” *Snyder v. Society Bank*, 181 B.R. 40, 41 (S.D. Tex. 1994); see also *In re Cousins Barricades & Metal Prods. Inc.*, No. Civ. A. 99-2035, 200 WL 245860, *3 (E.D. La. Mar. 2, 2000). Emphasizing the broad purpose of Rule 2004, courts permit examination of any third

party that has “knowledge of the debtor’s affairs,” *In re Ecam Publ’ns*, 131 B.R. 556, 559 (Bankr. S.D.N.Y. 1991), or who can be shown to have had dealings with the debtor, *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 432 (S.D.N.Y. 1993), *aff’d*, 17 F.3d 600 (2d Cir. 1994). See Bankruptcy Rule 2004(b) (noting that Rule 2004 examination may concern “any matter which may affect the administration of the debtor’s estate”).

60. The Court has already once determined that examination of JPMC under Rule 2004 was appropriate and warranted, both factually and legally. Unfortunately, the examination was never completed – though in light of the proposed Global Settlement, its importance has grown in significance. Indeed, the reasonableness of the bargain reflected in that proposed settlement turns in large measure on an assessment of the claims against JPMC that the Debtors propose to give up, including the potential business tort claims that are the primary subject of the examination requested by this motion.

61. The Rule 2004 discovery sought by this motion is particularly appropriate because the requested examination to continue investigation of the potential business tort claims against JPMC is unrelated to any pending adversary proceeding in which the Equity Committee is or could become a party. It is even unrelated to any adversary proceeding or other litigation against JPMC in which the Debtors are parties, because the Debtors have never asserted the potential business tort claims against JPMC.

62. Moreover, even if the pending adversary proceeding and other litigation involving the Debtors and JPMC actually included allegations against JPMC of the kind that are the subject of the requested Rule 2004 examination, all such matters have been stayed, as the Court is aware. Thus, discovery is unavailable in those actions; no pending proceeding provides an alternate vehicle through which the requested discovery could be expeditiously obtained. See *In re Int’l*

Fibercom, Inc., 283 B.R. 290, 292 (Bankr. D. Ariz. 2002) (holding that pending proceeding rule was inapplicable when discovery was unavailable in other litigation due to a stay).

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 2004-1

63. By e-mail on May 21, 2001, counsel for the Equity Committee provided all counsel of record for JPMC with a copy of Exhibit A hereto, described the substance of the relief requested by this motion, and asked whether JPMC would agree to the requested examination and to respond to the document requests without a court order. Counsel requested that JPMC respond by close of business on May 24 and also asked that JPMC identify a time when JPMC counsel would be available to discuss the requests. As of the time of the filing of this motion, JPMC has not responded. However, JPMC opposed the examination sought by the Debtors in May 2009, and it is likely JPMC will oppose the relief requested here. To prevent unnecessary delay arising from disputes concerning, among other things, the Equity Committee's entitlement to the information requested and claims of confidentiality, the Equity Committee requests that this motion be set for hearing and thereby ensure an expeditious resolution of any such disputes. Prior to the hearing, the Equity Committee will continue attempting to discuss the relief requested and attempt to resolve any legitimate objections raised by JPMC.

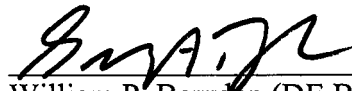
64. Accordingly, the Equity Committee seeks the Court's authority to conduct an examination under Bankruptcy Rule 2004 and Local Rule 2004-1 that includes JPMC's production of all documents responsive to the requests attached as Exhibit A, as well as related oral examination of witnesses most knowledgeable about the subjects described in the document requests.

65. The Equity Committee has made no previous request for the relief sought herein to this Court or any other court.

WHEREFORE, the Equity Committee respectfully requests that the Court grant the relief requested by this motion, and for such other and further relief as it deems just and proper.

Dated: May 25, 2010

ASHBY & GEDDES, P.A.



William P. Bowden (DE Bar No. 2553)
Gregory A. Taylor (DE Bar No. 4008)
Stacy L. Newman (DE Bar No. 5044)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899
Telephone: (302) 654-1888
Facsimile : (302) 654-2067
E-mail: wbowden@ashby-geddes.com
gtaylor@ashby-geddes.com
snewman@ashby-geddes.com

*Co-Counsel to the Official Committee of Equity
Security Holders of Washington Mutual, Inc., et al.*

SUSMAN GODFREY, L.L.P.

Stephen D. Susman (NY Bar No. 3041712)
Seth D. Ard (NY Bar No. 4773982)
654 Madison Avenue, 5th Floor
New York, NY 10065
E-mail:
ssusman@susmangodfrey.com
sard@susmangodfrey.com

Parker C. Folse, III (WA Bar No. 24895)
Edgar Sargent (WA Bar No. 28283)
Justin A. Nelson (WA Bar No. 31864)
1201 Third Ave., Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Facsimile: (206) 516-3883
E-mail:
pfolse@susmangodfrey.com
esargent@susmangodfrey.com
jnelson@susmangodfrey.com

*Co-Counsel for the Official Committee of Equity
Security Holders of Washington Mutual, Inc., et al.*