

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

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: Chapter 11
In re :
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: Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., *et al.*, :
:
: Jointly Administered
Debtors. :
: **Re: Docket No. 1997**
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**PROTECTIVE OBJECTION AND RESERVATION OF RIGHTS OF WELLS
FARGO, N.A. WITH RESPECT TO 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**

Wells Fargo, N.A. ("Wells Fargo"), as and for its Protective Objection and Reservation of Rights with respect to the 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 (the "Motion"), respectfully states as follows:

1. Wells Fargo does not object to the Motion insofar as the Debtors simply seek permission to issue a subpoena to Wells Fargo pursuant to Bankruptcy Rule 2004. Rather, Wells Fargo interposes this Protective Objection and Reservation of Rights solely to confirm that any order authorizing Rule 2004 discovery from Wells Fargo will not prematurely impair Wells Fargo's rights under Bankruptcy Rule 9016 and Federal Rule of Civil Procedure 45 incorporated therein, including the right to respond and object in due course to whatever subpoena may ultimately issue.



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2. Bankruptcy Rule 2004 contemplates a two-step process for obtaining discovery. Subsection (a) provides that a party first must make a motion requesting the Court to order an examination. *See* Fed. R. Bankr. P. 2004(a) (“On motion of any party in interest, the court may order the examination of any entity.”). Subsection (c) then provides that once an examination has been ordered, compelling attendance of a non-debtor entity for an examination or for the production of documents is to be accomplished by using the procedures in Bankruptcy Rule 9016. *See* Fed. R. Bankr. P. 2004(c) (“The attendance of an entity for examination and for the production of documents . . . may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial.”).

3. Bankruptcy Rule 9016, in turn, incorporates all of the substantive and procedural requirements and protections of entities subject to subpoena under Federal Rule of Civil Procedure 45. These requirements and protections are significant and must be respected. Rule 45 provides, for example, that an entity subject to a subpoena is entitled to object to it, and that no specific or general objections are required until after the subpoena has been authorized, issued, and served. *See* Fed. R. Civ. P. 45(c)(2)(B) (“A person commanded to produce documents or tangible things or to permit inspection may serve . . . a written objection The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served.”). As well, Rule 45 provides that a party “issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena,” and that the recipient of the subpoena may move to quash it on the ground, for example, that it fails to allow a reasonable time to comply, or requires disclosure of privileged information, trade secrets, or other protected or sensitive materials. *See* Fed. R. Civ. P. 45(c).

4. “Pursuant to these rules, when a party in interest obtains an order compelling an entity other than the debtor to be examined, the party should obtain a subpoena and serve it with the order.” 8 *Norton Bankruptcy Law and Practice* § 163:72 (3d ed. 2010); see also, e.g., *In re Aston-Nevada Ltd. P’ship*, 391 B.R. 84, 105 n.36 (Bankr. D. Nev. 2006) (“Rule 2004(c) . . . require[s] those who wish to compel the production of documents to issue or obtain a subpoena for such documents in accordance with Bankruptcy Rule 9016 (which incorporates Rule 45 of the Federal Rules of Civil Procedure).”), *aff’d*, No. 06 Civ. 00141 (D. Nev. Feb. 28, 2008); *Raynor v. Greenlight Capital Qualified, L.P.*, No. 08-00801-TJM, 2008 WL 2224897, at *4 (Bankr. D. Neb. May 23, 2008) (“[T]he law require[s] a subpoena to be served upon [the examinee] prior to his being required to take any action” pursuant to an order authorizing a Rule 2004 examination).

5. As drafted, the Motion and proposed order might be construed to deprive Wells Fargo in advance of the important procedural and substantive protections that Rule 45 affords to Wells Fargo under Bankruptcy Rule 2004(c). The Motion requests, for example, that the Court issue an order “requiring [Wells Fargo] to produce documents responsive to the requests” in a proposed subpoena (attached to the Motion as Exhibit A) (the “Proposed Subpoena”). Motion ¶ 33. Wells Fargo respectfully submits that the Court need not and should not enter an order at this time that passes upon the scope, timing, or other particulars concerning the Proposed Subpoena. All such matters can and must await judicial review, if necessary, through the mechanisms established by Rule 45. Of course, to the extent that the Debtors and Wells Fargo are able to agree upon the scope and terms of appropriate discovery, such judicial review may never become necessary.

6. The preservation and protection of Wells Fargo's rights under Rule 45 is particularly important here due to the blunderbuss nature of the Proposed Subpoena. The Proposed Subpoena attaches a laundry list of overly broad, overlapping document requests that encompass not only so-called "WaMu Suitors" (defined to include Wells Fargo and three other firms), but also other so-called "Knowledgeable Entities" that are subject to the Motion, such as government regulators, rating agencies, investment bankers, and outside advisors. The Proposed Subpoena thus inappropriately fails to tailor the request for documents sought from Wells Fargo to the minimal role Wells Fargo actually played in preliminarily exploring, for a very brief period, a possible transaction with the Debtors that never came to pass.

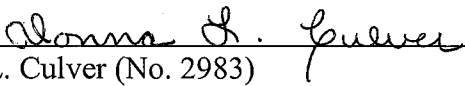
7. The Motion itself reveals that a much more limited set of document requests will fully satisfy the Debtors' stated need for information from Wells Fargo. The Motion states that the narrow purpose of obtaining discovery from Wells Fargo is to ascertain whether JPMorgan provided confidential information concerning Washington Mutual to Wells Fargo, the extent to which Wells Fargo was "engaged in talks to acquire or invest in WaMu," and any actions that JPMorgan may have taken to interfere with any potential transaction between Washington Mutual and Wells Fargo. Motion ¶ 22. All of that information can be sought through a very few narrowly tailored requests for communications between Wells Fargo on the one hand, and JPMorgan or the Debtors on the other hand, concerning these subjects. Wells Fargo stands ready to discuss such a reasonable resolution with the Debtors.

WHEREFORE, Wells Fargo respectfully requests that any order granting the Motion as to Wells Fargo confirm that (i) in accordance with Bankruptcy Rule 2004(c), any subpoena issued to Wells Fargo pursuant to Bankruptcy Rule 2004 is subject to the procedures and protections of Bankruptcy Rule 9016 and Federal Rule of Civil Procedure 45 incorporated

therein, and (ii) Wells Fargo's rights to respond and object on any and all grounds to any subpoena ultimately served on Wells Fargo are fully preserved.

Dated: January 15, 2010
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Donna L. Culver, Esquire, certify that I am not less than 18 years of age, and that service of the foregoing **Protective Objection And Reservation Of Rights Of Wells Fargo, N.A. With Respect To 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** was caused to be made on January 15, 2010, in the manner indicated upon the entities identified on the attached service list.

Date: January 15, 2010



Donna L. Culver (No. 2983)

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