

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

	)	Chapter 11
In re:	)	
WASHINGTON MUTUAL, INC., <i>et al.</i> ,	)	Case No. 08-12229 (MFW)
	)	Jointly Administered
	)	
Debtors	)	<b>Hearing Date: July 8, 2010 at 10:00 am</b>
	)	<b>Related Docket No. 4739</b>

**OPPOSITION OF THE CONSORTIUM OF TRUST PREFERRED SECURITY  
HOLDERS TO MOTION OF JPMORGAN CHASE FOR PROTECTIVE ORDER**

The consortium of holders of interests subject to treatment under Class 19 of the Plan (the “TPS Consortium”<sup>1</sup>), by and through its undersigned counsel, hereby files this Opposition to the Motion of JPMorgan Chase (“JPMC”) for Protective Order [Docket No. 4739] (“JPMC Motion”). In support of this Opposition, the TPS Consortium respectfully represents as follows:

**PRELIMINARY STATEMENT**

1. In partial response to the TPS Consortium’s Motion to Compel JPMC to Produce Documents [Docket No. 4729], JPMC filed the JPMC Motion. JPMC seeks the Court’s imprimatur on a proposed document production that falls far short of fully responding to the TPS Consortium’s document requests (the “TPS Requests”). Rather than fulfilling its discovery obligations under the Federal Rules and Rules of Bankruptcy Procedure, JPMC proposes instead to place a large number of documents in the Debtors’ document depository (whether it will be

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<sup>1</sup> The TPS Consortium is made up of holders of interests (as set forth more fully in the group’s Amended Rule 2019 statement [Docket No. 3765], as such may be further amended) proposed to be treated under Class 19 of the Debtors’ Fourth Amended Plan (described in the Fourth Amended Plan and Fourth Amended Disclosure Statement as the “REIT Series”).



possible to efficiently search and/or access those documents has yet to be determined),<sup>2</sup> without regard for whether those documents are actually responsive to the TPS Request or whether JPMC has possession, custody or control of other documents responsive to the TPS Request. JPMC's proposal is, effectively, an indiscriminate mass document dump that is improper and should not be allowed.

2. For the reasons stated herein, and in the TPS Consortium's previously-filed Motion to Compel, the TPS Consortium requests that the Court: (a) deny JPMC's request for a protective order; and (b) require JPMC to produce documents responsive to the TPS Requests and in accordance with the requirements of the Federal Rules and the Rules of Bankruptcy Procedure.

### **ARGUMENT**

3. Despite being a party to these proceedings and a signatory to, and primary beneficiary of, the Global Settlement Agreement that underlies the Plan, JPMC seeks to avoid its obligations to respond to discovery.

4. Specifically, JPMC wrongly suggests that its discovery obligations would be satisfied by producing four categories of documents: (a) settlement communications; (b) documents that would have been responsive to the *Debtors'* 2004 Discovery (dating back to mid-

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<sup>2</sup> As of the time of this filing, the TPS Consortium still has not received access to the Debtors' document depository. Debtors have repeatedly represented to the parties and to this Court that access to the depository was to be granted by June 30. In fact, at the June 17, 2010 Omnibus Hearing, Debtors' Counsel Brian Rosen stated: "As I indicated before, Your Honor, Mr. Stoll's client [the TPS Consortium] has already signed a confidentiality agreement. They will get access as soon as that depository is open." June 17, 2010 Hearing Transcript, p. 27. Contrary to that representation to the Court, and after receiving assurances that the depository would be available by the close of business on June 30, after 11:30 p.m. Debtors' counsel stated that access would only be given subject to the signing of a new confidentiality agreement. See June 30, 2010 email attached as Exhibit A. The TPS Consortium still has not received access.

2009); (c) documents provided to the Senate Permanent Subcommittee on Investigations and the US Attorney's Office; and (d) documentation purportedly "sufficient to show" how JPMC recorded WMB's assets in its financial statements. *JPMC Motion*, p. 5-7.

5. With respect to the first category, JPMC, of course, is required to produce settlement discussions. Assuming that all settlement discussions that JPMC had with other parties are produced, there is no disagreement.<sup>3</sup>

6. As for the second category, JPMC's offer to produce documents produced in response to year-old requests by the Debtors is insufficient. First, the TPS Consortium and Equity Committee and even the Debtors have, on more than one occasion, identified how that production was deficient. Fundamentally, it does not appear that JPMC searched any source other than emails in connection with the Rule 2004 discovery, despite the fact that the obligation to respond to document requests encompasses all documents within the "possession, custody or control" of the responding party, not just email. Highlighting the fact that the production was deficient is the fact that JPMC identified a shared drive that contains responsive documents, yet inexplicably was not searched before. See *JPMC Motion* p. 6. JPMC has not indicated whether there are other sources of hard copy or electronic documents that contain responsive documents that were never searched.

7. Moreover, there are a number of individuals whose email accounts likely contain responsive documents, yet JPMC refused to include them in their list of custodians to search.

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<sup>3</sup> As a result of multiple conferences on discovery issues, the TPS Consortium and JPMC did reach agreement as to some of the TPS Requests. Specifically, JPMC has agreed to produce: (1) periodic reports/statements related to the value of the Trust Preferred Securities and underlying collateral pool, through the last quarterly reporting cycle; (2) the documents made available to JPMC by the FDIC in connection with the receivership of Washington Mutual Bank; and (3) documents evidencing the valuation of Washington Mutual Bank assets acquired by JPMC.

Despite the fact that it is the entity with knowledge of who was involved in relevant matters and how, JPMC continues to attempt to put the onus on requesting parties to identify the JPMC agents whose files and email accounts should be searched. JPMC has the obligation to identify the location of responsive documents within its possession, including the custodians, not the requesting party. See Graske v. Auto-Owners Ins. Co., 647 F. Supp. 2d 1105, 1109 (D. Neb. 2009) (production of 7,000 pages deficient without any indices or other tool to guide plaintiffs to the responsive documents because the responding party is familiar with business and records, and mere production without more, improperly shifts the burden to find responsive documents on the requesting party); Zurn Industries, Inc. v. J.A. Jones Constr. Co., 1992 U.S. Dist. LEXIS 12082, \*8 (E.D.N.Y. Aug. 3, 1992) (noting that in responding to document requests, defendant has to clearly identify location of responsive documents).

8. The third category of documents JPMC has stated it will produce consists of “millions of pages of documents” that were responsive “to requests from the U.S. Senate’s Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations (“PSI”).” *JPMC Motion*, p. 5. The rules of discovery require that when producing documents and/or electronically stored information:

A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request...

Fed. R. Civ. P. 34(b)(2)(E)(i). JPMC’s proposal to produce millions of pages of documents responsive to the PSI requests, does not satisfy its obligation to produce documents responsive to the TPS Requests, nor does it satisfy JPMC’s obligation to organize the production by category (or at least as kept in the ordinary course).

9. Furthermore, those millions of pages are not being produced to be responsive, they are being produced to be burdensome. A producing party is not allowed to dump a whole host of documents that may or may not be responsive, just for the sake of shifting the burden to the requesting party of determining what is responsive. Instead, the producing party has a burden to select and produce the items requested. 8 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2213 (4d ed. 2010). JPMC’s proposal to provide millions of pages of documents that were produced to the Senate, without regard to whether which (if any) of the documents are actually responsive to the TPS Request, is a combination of hide-and-seek and burying a needle in a haystack. Neither is appropriate, and both are egregious. See Rothman v. Emory University, 123 F 3d 446, 455 (7<sup>th</sup> Cir. 1997) (affirming sanctions imposed on plaintiff who produced three banker’s boxes and “blatantly (and repeatedly) rebuffed his obligation to sort through the documents and produce only those responsive to [defendant’s] request”).

10. With respect to the last category of documents, JPMC has stated that it will produce documents “sufficient to show” how it recorded the value of the acquired WMB assets in its financial statements. First, this category is insufficient to satisfy JPMC’s obligations because it is not responsive to several of the TPS Requests, including Request No. 19 and 20, which request information reflecting the calculation of the after-tax gain that JPMC recorded in its public filings.

11. Second, it is entirely unclear what JPMC means by “sufficient to show, and despite numerous meet and confer sessions, JPMC counsel has failed to provide any adequate explanation of what this term means. As set forth in the TPS Consortium’s Motion to Compel, this artificial limitation stems from JPMC’s general objection to requests seeking “any and all” documents related to particularized categories. *TPS Consortium Motion to Compel* [Docket No.

4729] at 7-8. Such artificial limitations are improper. The rules of discovery clearly require that the parties produce all responsive, non-privileged documents; producing parties are not allowed to pick and choose and hand over only those documents they want to produce. Instead, JPMC must produce all documents responsive to the TPS Requests. See General Electric Capital Corp. v. Flynn, 1993 U.S. Dist. LEXIS 8607, \*10 (E.D. Pa., June 24, 1993) (ordering production of documents responsive to request for “any and all documents relating or referring to, or evidencing or embodying any and all” accounts, loans, and various other categories of accounts and assets of the defendant); American Health Systems, Inc. v. Liberty Health System, 1991 WL 12153, \*2 (E.D. Pa. Feb. 1, 1991) (ordering production of “any and all documents” relating to accounts between two defendant hospitals that relate to or define membership and financial interest in health system just as plaintiff requested).

WHEREFORE, the TPS Consortium respectfully requests that the Court compel JPMC to produce immediately: (a) all non-privileged documents responsive to the TPS Requests; and (b) a full privilege log describing the recipients, subject matter and claimed privilege related to all documents contained therein.

Dated: Wilmington, Delaware  
July 1, 2010

Respectfully submitted,

**CAMPBELL & LEVINE LLC**

*/s/ Kathleen Campbell Davis*

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## EXHIBIT A

**Brown, Daniel J.**

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**From:** Coffey, Jeremy B.  
**Sent:** Wednesday, June 30, 2010 11:51 PM  
**To:** 'john.mastando@weil.com'  
**Cc:** 'brian.rosen@weil.com'; Stoll, James W.; Brown, Daniel J.; Wissner-Gross, Sigmund S.; Piron, Caleb B.; Weiss, Laura F.  
**Subject:** Re: WMI: Confidentiality Agreement

John,  
The TPS Consortium is already under a confidentiality agreement with the Debtors. As Brian Rosen represented to us and to the court at the last hearing, there is no need for another agreement. Your email on the cusp of midnight on June 30 hardly complies with the letter or the spirit of the representations made to the court by Brian Rosen and Peter Calamari at the last hearing. We will address with Judge Walrath on July 8 as necessary. Nonetheless, to begin with, please provide login credentials Dan Brown, Laura Weiss, Caleb Piron, James Stoll and me immediately. We will contact you with additional names in the morning.

Thank you,

Jeremy B. Coffey  
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**Sent:** Wed Jun 30 23:38:55 2010

**Subject:** WMI: Confidentiality Agreement

All:

Notwithstanding the fact that we have been unable to reach an agreement on general discovery procedures, we are prepared to provide access to the document depository as soon as possible, subject to a confidentiality agreement. Accordingly, please find attached a confidentiality agreement that governs the production, exchange, and use of discovery and information provided in the document depository or through any other means, along with a redline compared to the draft confidentiality provisions attached to Brian's discovery procedures order yesterday. In order to receive access to the depository, please execute the attached confidentiality agreement and return it to me. Also, please provide a list of names and email addresses of anyone who should receive access to the depository.

Thank you.

Regards, John

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7/1/2010

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

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

**ORDER APPROVING MOTION OF THE CONSORTIUM OF TRUST PREFERRED  
SECURITY HOLDERS TO COMPEL JPMC TO PRODUCE DOCUMENTS**

Upon consideration of the Motion of the Consortium of Trust Preferred Security Holders (the "TPS Consortium") to Compel JPMC to Produce Documents, as renewed (the "Motion to Compel"), the Opposition thereto and accompanying Motion of JPMorgan Chase for Entry of a Protective Order (the "Motion for Protective Order") and any objections thereto, it is HEREBY

ORDERED that the Motion to Compel is APPROVED and JPMC is required to produce immediately: (a) all documents responsive to the TPS Consortium's document requests; and (b) a full privilege log describing the recipients, subject matter and claimed privilege related to all documents contained therein; and further

ORDERED that the Motion for Protective Order is DENIED.

Dated: July \_\_\_, 2010  
Wilmington, Delaware

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The Honorable Mary F. Walrath  
UNITED STATES BANKRUPTCY JUDGE

**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**

I, Kathleen Campbell Davis, of Campbell & Levine, LLC, hereby certify that on July 1, 2010, I caused a copy of the foregoing *Opposition of the Consortium of Trust Preferred Security Holders to Motion of JPMorgan Chase for Protective Order* to be served upon the individuals listed below via First Class Mail.

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Dated: July 1, 2010

*/s/Kathleen Campbell Davis*

Kathleen Campbell Davis (No. 4229)