

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:

WASHINGTON MUTUAL, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 08-12229 (MFW)

(Jointly Administered)

Related Docket No. 4739

Hearing Date: July 8, 2010 at 10:00 a.m.

Objection Deadline: July 1, 2010

**OMNIBUS REPLY OF JPMORGAN CHASE BANK, N.A. IN FURTHER SUPPORT OF
ITS MOTION FOR ENTRY OF A PROTECTIVE ORDER WITH RESPECT
TO PLAN OBJECTORS' REQUESTS FOR DISCOVERY**

JPMorgan Chase Bank, N.A. ("JPMC"), by and through its undersigned counsel, hereby submits this Reply in Further Support of its Motion For Entry of a Protective Order With Respect to Plan Objectors' Requests for Discovery (the "Motion").

1. In the time since the June 3, 2010 hearing, JPMC has separately conferred numerous times in good faith with the Official Committee of Equity Security Holders (the "Equity Committee") and the Consortium of Trust Preferred Security Holders (the "TPS Consortium") in an effort to reach agreement on the reasonable scope of settlement and plan confirmation discovery. Those efforts have resulted in agreement on a number of topics and narrowing of disputes, as acknowledged in the Equity Committee's filing earlier today. As detailed in the Motion, after careful consideration of the requests propounded by the Equity Committee, the TPS Consortium and others, JPMC agreed to produce a significant amount of additional discovery to aid the parties' evaluation of the plan and global settlement agreement

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). The Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.



(the “JPMC Proposed Discovery”). The JPMC Proposed Discovery includes (1) settlement communications and non-privileged communications about them from the files of both JPMC and Sullivan & Cromwell LLP, (2) millions of pages of documents that were produced in response to government investigations into the failure of Washington Mutual, in which the Equity Committee expressed specific interest, (3) even though JPMC believes that no additional search is necessary or required, further documents responsive to Debtors’ broad and sweeping Rule 2004 requests from two additional custodians and one informal shared drive, and (4) accounting information and documents to show how Washington Mutual Bank’s (“WMB”) assets were recorded on JPMC’s financial statements. JPMC agreed to make these documents available before the Omnibus Hearing on June 17, 2010. And, as of June 30, 2010, substantially all of the JPMC Proposed Discovery has been loaded into the data room being maintained by the Debtors, and JPMC is diligently working to provide the remaining documents.

2. Despite the scope of the JPMC Proposed Discovery—which expands confirmation discovery beyond settlement communications to include information identified during litigation as likely to be produce had these matters been tried to verdict—the Equity Committee and the TPS Consortium continue to seek much more. Accordingly, since the last Omnibus Hearing, JPMC conferred in good faith with these parties about what “more” could reasonably be provided. And, further agreements on productions have been reached. For example, as the TPS Consortium acknowledges, in an effort to resolve the dispute, JPMC has further agreed to provide certain available information related to the value of the trust preferred securities and other information. And, proposals for further JPMC productions have been made. On June 28, JPMC wrote to the Equity Committee with an expanded offer if the Equity Committee would agree to resolve the dispute: JPMC would agree to search the eight additional

custodians JPMC was discussing with the Debtors during litigation and had been identified by JPMC as representing the next tier of custodians that might possess some responsive documents. This revised proposal would increase the number of additional JPMC custodians searched and produced to ten, comprising the complete set of additional custodians whose documents were previously collected and considered for production in the litigation phase of these proceedings. (See Ex. A to Supplemental Declaration of Brian D. Glueckstein (“Glueckstein Supp. Decl.”).) This additional discovery from JPMC, along with the documents previously produced during the contested litigation, provides any party in interest with more than necessary to evaluate the reasonableness of the Debtors’ plan and the global settlement agreement.

3. Notwithstanding the JPMC Proposed Discovery, the Equity Committee, the TPS Consortium and the ANICO Plaintiffs² are still seeking far more, attempting to turn this confirmation process into a full trial on the merits and beyond. The Equity Committee continues to seek a search of eight different custodians, none of whom was in good faith identified by JPMC to the Debtors during contested litigation as potential targets for additional searches. (See Ex. B to Glueckstein Decl.) JPMC has sought to understand the Equity Committee’s interest in those particular custodians, none of whom was involved in settlement or was a principal actor in the underlying purchase of WMB’s assets from the FDIC, but the Equity Committee has provided no substantive answer. Lacking any basis for choosing their list of eight custodians ahead of the eight JPMC identified (as the Equity Committee and the TPS Consortium argue is JPMC’s burden) and agreed to produce, the Equity Committee misstates the discovery record

² The ANICO Plaintiffs now assert that they do “not seek to open a new Rule 2004 investigation, nor has it ever stated that it intended to open a Rule 2004 investigation” of JPMC or of JPMC’s parent company, JPMorgan Chase & Co. (ANICO Opp. at 1.) To the extent the ANICO Plaintiffs are withdrawing their discovery requests that have appeared in emails and letters, that is fine. Otherwise, the ANICO Plaintiffs discovery requests of any JPMorgan Chase entity should be subject to the protective order and extinguished.

between JPMC and the Debtors. In its further response filed on July 6, 2010, the Equity Committee claims that “JPMC has agreed to search . . . an additional eight employees who were *not* among those requested by either the Equity Committee or the Debtors.” (Equity Committee Further Response (D.I. 4872) at 9.) This is false. A review of the correspondence between JPMC and the Debtors shows that, in order to resolve the dispute, JPMC proposed on December 21, 2009, to search the eight custodians on the Debtors’ list that JPMC identified as the additional custodians “who are most likely to have documents responsive to Debtors’ Rule 2004 Requests”—the same eight JPMC has offered to provide now. (Ex. B to Glueckstein Supp. Decl.)³ On December 28, 2009, the Debtors acknowledged and accepted that JPMC would search the “additional eight” custodians and did not dispute that those custodians were the next most likely to have documents responsive to the Rule 2004 requests, but nonetheless left open that they would also seek documents from others. (Ex. C to Glueckstein Supp. Decl.) Said differently, the custodial searches JPMC has offered to undertake are precisely the searches that would have been undertaken in continued litigation. The custodians on which the Equity Committee are focused are further removed from the relevant events, were not identified by JPMC during litigation as custodians who would be sensible to search (even to resolve a discovery dispute) and should not be within the bounds of confirmation discovery that is fundamentally about the reasonableness of the Debtors’ plan and settlement decisions.

4. Along the same lines, the argument that it was JPMC’s alleged failure to disclose information during litigation that justifies this new investigation is without merit. Once

³ On December 21, 2009, JPMC wrote to the Debtors’ counsel explaining that certain custodians, including the eight now sought by the Equity Committee, “had limited or no substantive, decision-making involvement in [the Washington Mutual transaction], and therefore are not among the primary custodians who are most likely to have documents responsive to Debtors’ Rule 2004 Requests.” (See Ex. B to Glueckstein Supp. Decl.)

again the Equity Committee asserts that JPMC did not disclose to the Debtors the database of documents provided to the U.S. Senate Permanent Subcommittee on Investigations. JPMC corrected the prior misstatement on several occasions, including in its opening brief. (*See Mot.* at 5-6, n.4.) All of the heritage Washington Mutual documents produced to the U.S. Senate Permanent Subcommittee on Investigations were available to the Debtors for review.

5. Moreover, the Equity Committee has provided no indication that even a search of those custodians would resolve the dispute. The Equity Committee has not narrowed its requests that JPMC undertake a firm-wide search in response to five subject-matters about Washington Mutual's value, ratings, purchase price capitalization, as well as any communications with the FDIC about Washington Mutual. In addition, the Equity Committee also seeks an ad hoc Rule 30(b)(6) deposition of JPMC in advance of all other confirmation depositions.

6. The TPS Consortium continues to ask for full litigation discovery in response to all its requests that overlap with the Debtors' Rule 2004 requests.

7. In essence, the oppositions to JPMC's motion for a protective order that were filed are simply requests for "more." Setting aside the lack of any concrete objection why the proposed discovery is not sufficient for the confirmation process, JPMC has again tried to resolve all discovery disputes with the following supplemental offer: JPMC is searching and will produce responsive documents from the eight additional custodians previously identified by JPMC as the next tier of custodians even though, to date, the Equity Committee has not responded to JPMC's revised proposal.⁴ In addition, in response to arguments by the Equity

⁴ On June 16, 2010, counsel for the Equity Committee informed JPMC that it would no longer engage in substantive negotiations by teleconference, but would require all negotiating be done in writing. JPMC believes this position has created inefficiency and delay, and has hindered progress towards resolving, or at least a further narrowing of, the dispute. JPMC has

Committee and the TPS Consortium that JPMC should be required to produce additional hard copy documents as part of confirmation discovery, JPMC is searching and will produce any non-privileged responsive hard copy documents from the seventeen relevant custodians previously searched, that were also identified for production should the litigation have continued.

8. JPMC is providing more than sufficient discovery for the upcoming confirmation hearing. JPMC's production clearly exceeds what is required for the Equity Committee, the TPS Consortium and other parties to evaluate the reasonableness of the Debtors' plan and the global settlement agreement. The only response contained in the objections to JPMC's Motion filed by the Equity Committee and the TPS Consortium is that they want "more," as if these matters were still in litigation. The time is now to stop the document discovery requests so the confirmation process may proceed. Good cause exists to grant JPMC's motion and relieve JPMC of any present obligation to respond to confirmation discovery, beyond the JPMC Proposed Discovery, as supplemented herein. *In re Am. Business Financial Servs., Inc.*, No. 05-10203, 2008 WL 3906894, at *3-4 (Bankr. D. Del. 2008) (Walrath, J.) (finding "good cause" for protective order in the discovery context).

9. Once the objecting parties have reviewed the JPMC Proposed Discovery, as well a confirmation discovery from other parties, the Equity Committee, TPS Consortium or any other party would be free to seek any further appropriate discovery at that time. Likewise, as part of the confirmation depositions, JPMC will consider the Equity Committee's request for a Rule 30(b)(6) deposition along with other deposition requests that are sure to follow, but JPMC

repeatedly asked counsel for the Equity Committee to reconsider its position, which it has refused to do. Accordingly, JPMC has received no oral response to its proposal of June 28, 2010. The only written response to JPMC was filed by the Equity Committee with the Court on July 2, 2010, rejecting JPMC's attempt to resolve any open discovery issues through this production.

should not be required to respond to the Equity Committee's current, ad hoc deposition request (or other ad hoc requests) before the available confirmation discovery is even reviewed. After all the parties have reviewed the documents that have been made available, depositions can proceed to the extent appropriate in an efficient and non-duplicative manner.

Dated: July 6, 2010
Wilmington, Delaware

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