

only with metadata, which fails to provide sufficient information to allow the TPS Consortium to determine which documents are responsive to particular requests, or even whether responsive documents have been produced at all. In other words, despite the Court's instructions, the TPS Consortium is no closer to having a truly responsive production than it was months ago.

2. Because of the short timeframe before trial on the TPS Consortium's adversary proceeding and/or a hearing on confirmation of the Debtors' proposed plan of reorganization and the continuing delays manufactured by Debtors and JPMC, it is critical for the TPS Consortium to be able to receive an immediate and appropriate response to its document requests. As such, the TPS Consortium requests that this Court order the Debtors and JPMC to comply with their obligations under the Federal Rules and comply with this Court's August 10 ruling by producing and organizing all responsive documents corresponding to the TPS Consortium's requests, and that they be required to do so by September 1, 2010.

ARGUMENT

3. At the August 10 hearing, the Court entered a ruling that, with respect to the TPS Consortium's document requests, the producing parties:

[S]hould be able to organize the documents that are responsive to the discovery requests or [they] should provide metadata for all **those** documents so that the plaintiffs can do it without making the plaintiffs pay for it.

August 10, 2010 Hearing Transcript, p. 89 (emphasis added).

4. Despite the Court's ruling, there remain significant disputes, such that the Debtors and JPMC still have not complied with their discovery obligations. Specifically, during a teleconference on August 16, Debtors stated that in addition to providing certain metadata, they will provide some form of guidance to search for documents. However, the form of that guidance remains undisclosed, as is the timing for the provision of this mysterious guidance.

5. More than two weeks have passed since the Court ordered the Debtors and JPMC to rectify their prior failures to comply with their discovery obligations. Debtors' counsel has stated that it will be at least another week before any progress will be made, and maybe several weeks beyond that for a substantive response. In other words, more delay in responding to requests that are already more than two months old.

6. JPMC has stated that it will provide only metadata (consisting primarily of information related to date, author, recipient, etc.), which, as discussed below, is insufficient to satisfy JPMC's discovery obligations and will not be a useful tool in determining what, or even whether, responsive documents have been produced. Additionally, the TPS Consortium's counsel confirmed, during a conference call on August 20, that JPMC does not intend to provide any other information. In other words, JPMC will continue to hide the ball with respect to its responses, or rather, the lack thereof.

7. In responding to document requests, the Federal Rules impose two separate and distinct obligations:

- (i) 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;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms...

Fed. R. Civ. P. 34(b)(2)(E). Unfortunately, by raising the issue of metadata with the Court at the August 10 hearing, Debtors blended and confused the separate issues of (1) organization and (2) format. The production of metadata has no bearing on the first obligation (dealing with organization of documents produced), metadata relates only to the second obligation regarding format of the electronically stored information that is produced. As such, merely producing

metadata does not satisfy the obligation under the Rules to produce documents and electronically stored information in an organized fashion corresponding to the applicable requests.¹

8. Additionally, producing metadata will not satisfy what the TPS Consortium believes to have been the spirit of the Court's August 10 ruling – that, if the producing parties were not going to organize the documents themselves by request, the Consortium be given all of the information necessary to be able to organize the responsive documents by category of request and to be able to determine whether responsive documents have even been produced at all. Essentially, metadata will provide only the authors, recipients, dates and Bates ranges of documents. That information will not allow the TPS Consortium to conduct any meaningful analysis of the production, nor will it allow the TPS Consortium determine whether certain document requests simply have been ignored.

¹ JPMC, in an attempt to avoid its obligation to produce and organize responsive documents, has claimed that its documents were and/or will be produced as they are “kept in the usual course of business.” First, the Court already stated that the documents have not been produced as kept in the ordinary course of business. August 10, 2010 Hearing Transcript, pp. 88-89, 90. Second, if JPMC were to produce documents in that fashion, then it bears the burden of proving that it has done or will in fact do so. Pass & Seymour, Inc. v. Hubbell, Inc., 255 F.R.D. 331, 334 (N.D.N.Y. 2008) (“A party selecting the alternative method of production bears the burden of demonstrating that the documents made available were in fact produced consistent with that mandate.... To carry this burden, a party must do more than merely represent to the court and the requesting party that the documents have been produced as they are maintained.”).

JPMC has not even come close to meeting that burden. Indeed, JPMC's claim has no merit because it compiled documents and emails from a number of separate sources, and proposes to produce them altogether in one group. On its face, that does not constitute production of documents as they are kept in the usual course of business. Scripps Clinic & Research Found. v. Baxter Travenol Laboratories, Inc., 1988 U.S. Dist. LEXIS 7495, * (D. Del. June 21, 1988) (documents gathered from multiple sources and transferred in an unintelligible manner is not producing documents as they are kept in the ordinary course of business); see SEC v. Collins & Aikman Group, 256 F.R.D. 403, 413 (S.D.N.Y. 2009) (SEC documents collected and gathered in connection with investigation, which is not by its nature routine or repetitive, are not kept in the ordinary course of business, and therefore, must be categorized); United States v. O'Keefe, 537 F. Supp. 2d 14, 19 (D.D.C. 2008) (applying Rule 34(b) by analogy in criminal setting and holding that documents removed from original files and copies were not produced in manner in which the originals were ordinarily kept).

9. The obligation to organize documents is placed on the producing party because they are familiar with the documents that exist, with the documents that have been produced, and with the documents that have been withheld. Providing a search function, or metadata, cannot help the recipient determine those facts. For that reason, numerous courts have made clear that “the fact that the documents can be electronically searched by key term is not sufficient to discharge defendant's duty to sufficiently identify the location of the relevant documents.” Graske v. Auto-Owners Ins. Co., 647 F. Supp. 2d 1105, 1109 (D. Neb. 2009); Pass & Seymour, Inc. v. Hubbell, Inc., 255 F.R.D. 331, 337 (N.D.N.Y. 2008) (“Plaintiff's initial production, while capable of being converted into text searchable format, contained no organizational information regarding the documents produced. Admirably, since this dispute came to a head P&S has made strides to provide some information regarding the documents produced, identifying the sources of the documents produced by Bates number ranges. While this represents a step toward compliance with Rule 34(b)(2), it does not fully satisfy the rule”); Residential Constructors, LLC v. ACE Prop. and Cas. Ins. Co., 2006 U.S. Dist. LEXIS 36943, * 3-8 (D. Nev. June 5, 2006) (finding that imaged documents in continuous order with no index or table of contents, although text searchable, did not comply with producing party's obligations under Rule 34); see also Alford v. Aaron Rents, Inc., 2010 U.S. Dist. LEXIS 67790, * 65 (S.D. Ill. May 17, 2010) (“A blanket dump of documents is deficient...Absent sufficient guidance in locating documents, the burden to find the responsive documents is not substantially the same on both parties”); Stiller v. Arnold, 167 F.R.D. 68, 71 (N.D. Ind. 1996) (“Producing 7,000 pages of documents in no apparent order does not comply with a party's obligation under Rule 34(b)”); SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 407, 413 (S.D.N.Y. 2009) (finding a searchable document dump of 1.7 million documents to be insufficient under Rule 34(b) and requiring the SEC to amend its responses by providing the other side with documents that respond to the requests); Koninklijke

Philips Electronics N.V. v. KXD Technology, Inc., 2007 U.S. Dist. LEXIS 20205, * 10 (D. Nev. Mar. 20, 2007) ("A party who fails to maintain its business records in an organized state, cannot rely on its own lack of organization to dump records on the discovering party and simply advise it to go search for what it is seeking...This applies to documents that are produced electronically or in paper format").

10. This point is illustrated by one example of JPMC's failure to produce responsive documents, despite the fact that they agreed to do so two months ago. As a result of several "meet and confer" conferences, JPMC agreed to produce, among other things, all periodic reports and/or statements related to the value of the Trust Preferred Securities and the underlying collateral pool. See June 25, 2010 email from Daniel J. Brown, and response of Brian Glueckstein, attached as Exhibit A. That very small set of documents, likely consisting of only quarterly statements for a period of only a few years, is important to determine the value of the securities.

11. When the TPS Consortium finally received access to the document depository, counsel attempted to locate those statements, but was unable to do so. Because JPMC's documents are not organized by category, it was not clear where the documents could be found. Having the metadata for those documents would not have been helpful because without knowing the author, the name of such documents, the Bates ranges, the date ranges, or any other identifying information, the TPS Consortium could not use the metadata to locate the promised documents. Additionally, simply having metadata would not help prove a negative, i.e. that the documents had not been produced. As the TPS Consortium learned after having to contact JPMC's counsel, even after several weeks, the documents had not been produced. See August 9-10, 2010 email exchange attached as Exhibit B. On August 20, for the first time and despite prior representations, JPMC's counsel stated that no such documents reflecting the value of the

Trust Preferred Securities and the underlying collateral pool exist. This is but one example of JPMC's failure to comply with its discovery obligations, but one that demonstrates the further deficiency of JPMC's proposal to supplement its document production only with metadata.

12. Lastly, the Debtors and JPMC should not be allowed to engage in a document dump, even if non-responsive documents purport to be organized in some fashion. Producing thousands of documents, without regard to which (if any) of the documents are actually responsive to particular requests, defeats the Federal Rules' requirement that documents be organized by response and masks the fact that numerous relevant documents likely have not been produced, while a mass of irrelevant documents buries the relevant documents.² Such practices are prohibited under the Rules. See Rothman v. Emory University, 123 F.3d 446, 455 (7th 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"); Graske, 647 F. Supp. 2d at 1109 (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

² As was mentioned at the August 10 hearing, multiple folders in the document depository, representing multiple topical categories, are populated with irrelevant documents such as WebMD articles related to salmonella poisoning, emails regarding fantasy football, golf reservations and articles regarding the migratory patterns of whales, (examples of which are attached as Exhibit C). Making the matter worse, the documents were gathered, identified as purportedly "Confidential" or "Highly Confidential" and then sorted into various categories and placed into multiple folders. Thus, these documents were reviewed numerous times, and rather than remove them from the production, these documents were placed intentionally into various folders, sometimes multiple times, to force the reviewers to go through them.

clearly identify location of responsive documents). Thus, in addition to organizing responsive documents, Debtors and JPMC are required to remove non-responsive documents.

RELIEF REQUESTED

13. For the foregoing reasons, the TPS Consortium requests that this Court Order the Debtors and JPMC to comply with their obligations under the Rules and by September 1, 2010, produce and organize all responsive, and only responsive, documents corresponding to the TPS Consortium's requests.

Dated: Wilmington, Delaware
August __, 2010

Respectfully submitted,

CAMPBELL & LEVINE LLC

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Counsel for the TPS Consortium

EXHIBIT A

Brown, Daniel J.

From: Glueckstein, Brian D. [gluecksb@sullcrom.com]
Sent: Friday, June 25, 2010 6:48 PM
To: Brown, Daniel J.; Friedman, Stacey
Cc: Stoll, James W.; Coffey, Jeremy B.
Subject: RE: Meet and Confer

Dan,

A couple of clarifying points:

3. We are not saying that we believe the answer is that no such documents exist, but rather that until we finish our inquiries, we simply do not know. We are looking at the documents already produced, among others in order to be able to answer your question.

5. Our proposal regarding the scope of the privilege log is in the spirit of an overall compromise. We are hoping to reach agreement on the outstanding issues, but if we cannot, JPMC reserves the right to revisit the privilege log issue.

Have a nice weekend.

Brian

From: Brown, Daniel J. [mailto:DBrown@brownrudnick.com]
Sent: Friday, June 25, 2010 3:58 PM
To: Friedman, Stacey; Glueckstein, Brian D.
Cc: Stoll, James W.; Coffey, Jeremy B.
Subject: Meet and Confer

Stacey and Brian,

To confirm our conversation this afternoon:

1. Periodic Reports--JPMC has agreed to produce periodic reports/statements related to the Trust Preferred Securities and the underlying collateral pool up to and including the last quarterly reporting cycle. As I understand the explanation, JPMC has not prepared the same type of reports that were sent out prior to the receivership, but does prepare quarterly reporting documents that will be produced.

2. Bid Package--Thank you for providing reference to certain of the bid related documents already produced in the 2004 documents. Thank you for also agreeing to produce S&C's collection of the documents from the data room set up by the FDIC in connection with the receivership.

3. P&A sec. 3.2(b)(ii) (Request No. 18)--It is my understanding that you are double-checking whether any bids were submitted by JPMC pursuant to sec. 3.2, but as of now, you believe the answer is that no such documents exist.

4. Pro Forma Statement--This will be produced, along with other documents related to the valuation of acquired assets.

5. Privilege log--We have agreed that: (a) solely internal S&C communications do not need to be logged; and (b) documents, including communications between JPMC and S&C that are withheld on privilege grounds that are also sent to (including cc or bcc) any other party, will be logged. We have not yet agreed, but will both consider whether we can agree on any further narrowing of documents to be logged. As we discussed, please let me know if you have comments to the way I phrased the potential limitation in my June 22 email, and we will consider it.

6. Scope of Search--We continue to disagree on the scope of any search and the list of custodians. It is our position that: (a) hard copy files, hard drives (such as that identified and described in communication to Susman Godfrey), and any electronic databases are required to be searched; and (b) custodians identified by JPMC as having responsive documents must be searched, including

8/20/2010

those I identified as being included on the email related to value of REIT assets (JPM EX 41). I understand that you will get back to us as to other custodians that JPMC will agree to search, but we still likely have a disagreement as to the scope of the required search.

As you stated, we should speak again early next week. Please let me know when you are available.

Have a nice weekend,
Dan



Daniel J. Brown

Counselor at Law

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EXHIBIT B

Brown, Daniel J.

From: Glueckstein, Brian D. [gluecksb@sullcrom.com]
Sent: Tuesday, August 10, 2010 9:58 AM
To: Brown, Daniel J.; Friedman, Stacey
Cc: Stoll, James W.; Coffey, Jeremy B.
Subject: RE: WaMu--Document Depository

As agreed, JPMC will produce available post-petition accounting information or reports relating to the Trust Preferred Securities. This information is not yet in the document depository but will be added promptly.

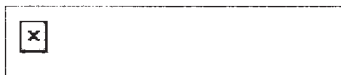
Thanks,
Brian

From: Brown, Daniel J. [mailto:DBrown@brownrudnick.com]
Sent: Monday, August 09, 2010 2:22 PM
To: Friedman, Stacey; Glueckstein, Brian D.
Cc: Stoll, James W.; Coffey, Jeremy B.
Subject: WaMu--Document Depository

Stacey and Brian,

Because of the cumbersome and difficult way in which documents were produced in the depository, we have been unable to locate the quarterly distribution reports that JPMC was going to produce for the Trust Preferred Securities. Would you please confirm that they have been produced and where, specifically, they are located?

Thanks,
Dan



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8/20/2010

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EXHIBIT C

*****CONFIDENTIAL – FILED UNDER SEAL *****

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

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

ORDER REGARDING PRODUCTION OF DOCUMENTS

Upon consideration of the Statement Regarding the Document Depository and Request for Further Relief (the "Motion") filed by the Consortium of Trust Preferred Security Holders (the "TPS Consortium") and any objections thereto, it is HEREBY

ORDERED that the Motion is approved and Debtors and JPMorgan Chase shall:

1. Produce by September 1, 2010, all documents responsive to the TPS Consortium's request related to the Trust Preferred Securities;
2. Organize by September 1, 2010, all responsive documents in a manner corresponding with the TPS Consortium's document requests; and
3. Remove from their respective document productions, those documents that are not responsive to the TPS Consortium's requests.

Dated: August __, 2010
Wilmington, Delaware

The Honorable Mary F. Walrath
UNITED STATES BANKRUPTCY JUDGE

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

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

**LOCAL RULE 7026-1 CERTIFICATION OF COUNSEL
IN SUPPORT OF THE STATEMENT OF THE TPS CONSORTIUM REGARDING THE
DOCUMENT DEPOSITORY AND REQUEST FOR FURTHER RELIEF**

I, Daniel J. Brown, counsel for the Consortium of Trust Preferred Holders (“TPS Consortium”) hereby certify that during the morning of August 16, 2010 and the afternoon of August 20, 2010, I, as counsel for the TPS Consortium conducted teleconferences with counsel for the Debtors, to meet and confer with respect to potential discovery disputes. The parties were unable to resolve their differences with respect to the issues arising after the Court’s August 10, 2010 order regarding the production of documents.

Furthermore, the afternoon of August 20, 2010, I conducted a teleconference with counsel for JPMorgan Chase, to meet and confer with respect to potential discovery disputes. The parties were unable to resolve their differences with respect to the issues arising after the Court’s August 10, 2010 order regarding the production of documents.

/s/ Daniel J. Brown _____
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(617) 856-8201 (fax)

**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, hereby certify that on August 23, 2010, I caused a copy of the foregoing *Statement of the TPS Consortium Regarding the Document Depository and Request for Further Relief* to be served on the individuals listed below in the manner indicated.

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Dated: August 23, 2010

/s/ Kathleen Campbell Davis
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