UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

	:	**Chapter 11**
	:	
In re	:	**Case No. 08-12229 (MFW)**
	:	**(Jointly Administered)**
WASHINGTON MUTUAL, INC., et al.,[1]	:	
	:	**Re: Docket No.5549**
Debtors	:	
	:	**Objection Deadline: October 13, 2010 at 5:00 p.m**
	:	**Hearing Date: October 18, 2010 at 10:30 a.m.**
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OBJECTIONS OF THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL TO DEBTORS' DISCLOSURE STATEMENT FOR SIXTH AMENDED JOINT PLAN

The California Department of Toxic Substances Control ("DTSC"), submits the following objections to the Debtors' "Disclosure Statement for the Sixth Amended Joint Plan." First, DTSC respectfully suggests that the Court continue and reschedule its determination on the adequacy of the Disclosure Statement until after the Examiner has submitted his report and Debtors have then had the opportunity to amend the Joint Plan and Disclosure Statement as they deem necessary. Second, DTSC submits that the present version of the Disclosure Statement is not approvable in its current form because it does not comply with the adequate information standard of 11 U.S.C. § 1125 and that if the Court is inclined to rule at this time it must reject the Disclosure Statement as inadequate under law.

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98104.

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DTSC has submitted objections to previous versions of the Disclosure Statement. (Docket Numbers 4676 and 4242.) DTSC herein incorporates those previous objections, few of which have been resolved by the Sixth Amended Joint Plan or the accompanying Disclosure Statement.

I. THE COURT SHOULD DEFER ITS DETERMINATION ON THE ADEQUACY OF THE DISCLOSURE STATEMENT UNTIL THE EXAMINER HAS SUBMITTED HIS REPORT.

On November 1, less than two weeks after the scheduled hearing date for approval of the Disclosure Statement, the Court-appointed Examiner will deliver his final report. That Report may well indicate that Debtors' estimate of the value of the bankruptcy estate is substantially inaccurate, in which case, regardless of the Disclosure Statement's present merits and deficiencies, Debtors will need to revise the Joint Plan and the Disclosure Statement accordingly. A ruling now, in advance of the Examiner's Report, either accepting or rejecting the Disclosure Statement, would be subject to almost immediate reconsideration should the Examiner's determinations substantially differ from the conclusions relied on by Debtors.

To take just one example, the Liquidation Analysis, Exhibit C of the Disclosure Statement, will be subject to change until the Examiner's report is complete. First, implicit in the Liquidation Analysis is a valuation of causes of action that the Estate and/or Debtors possess against third parties. Yet in his interim report, Docket Number 5390, the Examiner indicated that that both the Settlement and Retained Asset Components of his examination would determine the value of various causes of action Debtors may have against third parties. See Docket Number 5390, paragraph 17 regarding, e.g., Business Tort Claims and Third Party Claims. Should the Examiner value those causes of action substantially differently than Debtors have the essential calculus of the Valuation and Liquidation Analyses will need to be redone. Second, the

Liquidation Analysis specifically "assumes" that any Chapter 7 Trustee would enter a Global Settlement Agreement "on the same terms and conditions as the Debtors propose in the Joint Plan." Liquidation Analysis, Disclosure Statement at C-2. But the Examiner's findings on the Settlement Component in particular could invalidate that assumption.

Thus, regardless of how the Court ruled, a ruling on the Disclosure Statement on October 18, on the eve of the Examiner's Final Report would likely be premature. DTSC believes, and argues herein, that the Disclosure Statement does not meet the standards of 11 U.S.C. § 1125 and must be rejected. Even a ruling to that effect, though it would be correct in DTSC's view, would be needlessly disruptive if the Examiner's Report, just two weeks later, independently forced a revision of the Joint Plan and Disclosure Statement. Conversely, it would be inefficient and disruptive for this Court to approve the Disclosure Statement on October 18, and two weeks later be called upon to reconsider and possibly reverse that decision based on the Examiner's Report. If the Examiner supports Debtors' views on the items under examination, the Court can rule on the Disclosure Statement immediately thereafter. If the Examiner reports otherwise, Debtors should be given the opportunity to modify their Joint Plan and Disclosure Statement.

II. TO BE APPROVABLE, THE DISCLOSURE STATEMENT MUST PROVIDE "ADEQUATE INFORMATION" TO CREDITORS SUCH AS DTSC.

Under 11 U.S.C. § 1125(b), a party seeking chapter 11 bankruptcy protection has an affirmative duty to provide creditors with a disclosure statement containing "adequate information" to "enable a creditor to make 'an informed judgment' about the Joint Plan." 11 U.S.C. § 1125(a)(1); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. GMC*, 337 F.3d 314, 321-323 (3d. Cir. 2003) ("[C]reditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed reorganization Joint Plan, [therefore]

the importance of full and honest disclosure cannot be overstated.") Adequate information is defined as information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the Joint Plan.

III. FOR THE FOLLOWING REASONS, THE CURRENT VERSION OF THE DISCLOSURE STATEMENT DOES NOT PROVIDE DTSC ADEQUATE INFORMATION.

A. The Joint Plan Purports to Make Unprovable an Indeterminate Portion of DTSC's Claim; The Disclosure Statement Fails to Provide DTSC Sufficient Information for DTSC to determine What Amount or Percentage of its Claim would be Unprovable.

As discussed in its objections to the first Disclosure Statement, Docket Number 3722, DTSC's Proof of Claim is grounded primarily in the Comprehensive **Environmental** Response, Compensation and Liability Act ("CERCLA") 42 U.S.C. § 9601 et seq.[2] Specifically, DTSC's claim seeks past and future "response costs," a term of art under CERCLA, for the closed BKK hazardous waste landfill in West Covina California. Debtors are liable for past and future response costs because a predecessor of Debtor WMI, through various subsidiaries, created and owned and operated the BKK Landfill.[3] Confusingly, however, the Joint Plan, without reference to CERCLA or any other legal basis, purports to bifurcate that claim into two distinct parts – an *assumed portion*, for which JP Morgan affirmatively assumes the liability and agrees to pay DTSC outside this bankruptcy and an *unassumed portion* for which JP Morgan does not assume

[2] DTSC's Proof of Claim also asserts analogous rights under the federal Resource Recovery and Conservation Act, 42 U.S.C. § 6901 and parallel state laws. For the purposes of this memo only, DTSC encompasses those analogous liabilities as response costs also.

[3] Documents supporting the facts presented in this discussion are attached to the Supplemental Statement DTSC submitted with its Proof of Claim, Number 2213.

the liability and to which Debtors' would object.[4] Section 2.21(a)(a) of the Restated Global Settlement Agreement defines the "BKK Liabilities," what we are here calling the *assumed portion*, as "remediation or clean-up costs and expenses (and excluding tort and tort related liabilities, if any,) in excess of applicable and available insurances, arising from or relating to [a lawsuit filed in 2006 and Consent Decree filed therein and a joint defense agreement WMB signed]." In Section 2.21(a)(a), JP Morgan assumes the BKK Liabilities and in Section 2.21(a)(b), JP Morgan agrees to pay the BKK Liabilities. As explained below, the Joint Plan's so-called "BKK Liabilities," do not include all of the liability in DTSC's Proof of Claim and the balance is what we refer to here as the *unassumed portion*.

With respect to the unassumed portion, Section 2.21(b) both obliges Debtor to object to the BKK-related proofs of claim, including DTSC's and invites DTSC to withdraw its proof of claim. "To the extent the BKK Proofs of Claim are not withdrawn, with prejudice, JP Morgan shall defend the Debtors" against those claims.[5] *Ibid.* The intent of Section 2.21 and by extension the Joint Plan is clear, to wipe out the unassumed portion of DTSC's claim. That DTSC would contest any such objections does not change Debtors' intent.

The difficulty, and why this is a Disclosure Statement issue, is that the lack of any legal basis for partitioning of DTSC's claim into the assumed and unassumed portions means that DTSC has no way of knowing what amount – as a percentage or dollar amount– of DTSC's claim is assumed and what amount is not. Without that knowledge, which the Disclosure

[4] Several other claimants submitted claims relative to the BKK Landfill. The proofs of claim numbered 2138, 2213, 2233, 2405, 2467, 2693, and 3148 all relate to the BKK Landfill.

[5] Nothing in the Joint Plan or the Disclosure Statement suggests any particular theory or legal merit for the objection and DTSC believes there is no such merit. JP Morgan will apparently prosecute those objections nonetheless.

Statement fails to provide, DTSC cannot make an informed decision on whether to vote for or against the Joint Plan.

Two distinct dividing lines define the assumed portion. First, whereas DTSC's proof of claim pertains to all past and future response costs at the BKK Landfill, JP Morgan is assuming only those costs it deems to be "arising from or relating to" the 2006 litigation and WMB's joint defense agreement. This restriction has no basis under CERCLA and given the fluidity of the term "related" it is impossible to say what future costs are and are not related to that litigation. Second, the assumed portion includes only "remediation and clean-up expenses." This category of costs, although typically ill-defined, seems to exclude a substantial range of well-recognized CERCLA response costs, which are included in DTSC's proof of claim.[6] In sum, the inclusion in the unassumed portion all response costs *not* "arising from or relating to" the 2006 litigation and all response costs that are *not* "remediation or clean-up expenses" effectively prevents DTSC from knowing what portion of its proof of claim would be allowed or otherwise paid.

Thus, the Joint Plan seeks to render some ill-stated portion of DTSC's claim, the unassumed portion, unprovable, But neither the Joint Plan nor the Disclosure Statement quantifies the unrecoverable portion, therefore the Disclosure Statement does not fulfill its role of providing adequate information enabling DTSC to make an informed decision about the Plan.

B. The Disclosure Statement Also Fails to Clarify the Impact of Insurance Recovery on DTSC's Ability to Have its Proof of Claim Paid.

Another ambiguity in the Joint Plan's construction of the "assumed portion" (see section III.A, immediately above) concerns the insurance provisions. JP Morgan's assumed portion

[6] Response costs that would most likely not be considered "remediation or cleanup costs" include the costs of providing security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing and permanent relocation of residents and businesses. 42 U.S.C. § 9601

includes only liability "in excess of applicable and available insurance." Unfortunately insurance being "applicable and available," is no guarantee that the insurers will actually pay or that the funds will go to the BKK Landfill. To serve its function of providing adequate information, the Disclosure Statement should either 1) clarify that for the purposes of the Joint Plan, "applicable and available insurance" means recoveries that the insurers actually pay or 2) estimate the possible gap between the actual insurance recovery and "applicable and available insurance." Lacking as it does either of these representations, the Disclosure Statement does not provide adequate information for DTSC to vote on the Plan.

Further, at a minimum, the Disclosure Statement should indicate the amount of insurance coverage available.

C. While the Joint Plan 1) Directs DTSC to Seek Recovery from WMI's Non-Debtor Subsidiary WMI Rainier and 2) Appropriates Assets from WMI Rainier, the Disclosure Statement Fails to Specify what Assets, if any. WMI Rainier Would Retain.

WMI Rainier is a non-debtor subsidiary of WMI and is the successor to a company that held title to the BKK Landfill during its operation. The Joint Plan attempts to isolate liability for the BKK Landfill in WMI Rainier. First, Section 2.21 of the Restated Global Settlement Agreement states multiple times that JP Morgan is not assuming any liability of WMI Rainier. Second, the Disclosure Statement, Section V.P.b. at page 135, states that "nothing in the [Joint Plan] is intended to release WMI Rainier from claims asserted against WMI Rainier and its assets relating to the BKK Litigation."[7] Debtors and JP Morgan seem to be suggesting to that DTSC should pursue WMI Rainier outside the bankruptcy.

[7] However, as discussed in DTSC objections to previous versions of the Disclosure Statemen, it is highly ambiguous whether the text of the Joint Plan as drafted otherwise would release WMI Rainier from any of its BKK liability. See Docket Number 4424 at page 10.

At the same time, numerous provisions in the Joint Plan take from WMI Rainier the very resources that it might use to pay any share of liability for the BKK Landfill. First, under the Joint Plan, Debtors appear to be taking possession of approximately $1.6 million in funds associated with Ahmanson Developments Inc., the predecessor of WMI Rainier. Appendix E of the Restated Global Settlement Agreement indicates that ADI had approximately $1.6 million in accounts with WMB, accounts that are referred to therein as the "WMI Accounts." Under the Global Settlement Agreement and Joint Plan, the money in the WMI Accounts will be given to Debtors. Disclosure Statement at 10. This appears to be an uncompensated appropriation of WMI Rainier's assets. Second, WMI Rainier appears to be part of the Tax Group, which the Disclosure Statement predicts will receive tax refunds in the approximate amount of $5.5 billion to $5.8 billion. Disclosure Statement at 11. WMI Rainier may have paid some of the taxes being refunded and therefore should be entitled to that portion of the tax refund.[8] Nothing in the Disclosure Statement, however, indicates that any of the tax refunds will flow to WMI Rainier. Third, as previously discussed, Section 2.21(a)(c) of the Global Settlement Agreement assigns to JP Morgan all of WMI Rainier's interest in various insurance policies which may provide coverage for the BKK response costs. There is no indication that either Debtors or JP Morgan will reimburse WMI Rainier for that insurance. Finally, we note that the Joint Plan appears to release all claims between the WMI Entities, so called intercompany claims.

In response to previous objections filed by DTSC, Debtors have argued that because WMI Rainier is a non-debtor subsidiary rather than a debtor itself, the actual Debtors have no obligation to provide information on WMI Rainier's assets and liabilities. This misses the point.

[8] Notably, the settlement with the Internal Revenue Service, Docket Number 5376, indicates that part of the refund derives from the handling of the sale of Ahmanson Ranch. DTSC is investigating whether WMI Rainier or its predecessor had any interest in Ahmanson Ranch.

Because of Debtors' and JP Morgan's actions in constructing the Joint Plan – wherein they seem to attempt to isolate liability for the BKK Landfill in WMI Rainier while taking WMI Rainier's assets, including insurance – DTSC needs to review WMI Rainier's financial documents to determine the Joint Plan's impact on DTSC's proof of claim. For that reason, without WMI Rainier's balance sheet and associated documents the Disclosure Statement will not provide Adequate Information to DTSC.

IV. THE RELEASE PROVISIONS REMAIN IMPROPERLY AMBIGUOUS.

In its previous objections, see Docket Number 4424, DTSC has discussed at great length the ambiguities in the Joint Plan's release provisions. Subsequent versions of the Joint Plan have not remedied this deficiency. For the reasons previously stated, the Court should not approve the Disclosure Statement unless and until the broad, ambiguous release provisions currently included in the Disclosure Statement are revised

V. THE JPMC ALLOWED UNSECURED CLAIMS UNREASONABLY DISTORT ALL OF THE CLASS 12 GENERAL UNSECURED CLAIMS.

According to the Joint Plan JP Morgan has over 40 proofs of claim, denominated the JPMC Allowed Unsecured Claims, which are to be "allowed" and will allegedly receive the same treatment as other allowed general unsecured claims under the Joint Plan. Disclosure Statement, page 14. In fact, however, the JPMC allowed claims will do nothing but dilute the voting rights of other Class 12, General Unsecured Claims. JP Morgan will, apparently "waive any distribution JPMC otherwise would be entitled to receive on account" of its claims. The Disclosure Statement must explain, therefore, how the JPMC Allowed Unsecured Claims will affect the calculation of the pro rata share of other Class 12 claimants. Neither the Joint Plan nor the Disclosure Statement is clear, but the most likely interpretation seems to be that the JPMC

Allowed Unsecured Claims will not affect the pro rata share of other Class 12 claimants. In other words, the other pro rata shares will be calculated as if the JPMC allowed claims did not exist. If this is correct, the JPMC Allowed Unsecured Claims seem to serve no purpose except to create voting rights. They would not, in that case, represent an actual claim or interest by JP Morgan, rather a device whereby JP Morgan can support the Joint Plan, over the interests, possibly, of actual general unsecured creditors.

At a minimum, the Disclosure Statement must specify the amount of the JPMC allowed claims.

VI. INCORPORATION OF OTHER PREVIOUS OBJECTIONS.

DTSC hereby incorporates and reiterates the objections it has previously filed. See Docket Number 4676.

VII. CONCLUSION

DTSC therefore respectfully submits that the Court should defer ruling on the Disclosure Statement until the Examiner has submitted his final report. In the alternative, DTSC respectfully suggests, the Court should reject the Disclosure Statement and instruct the Debtor ordered to cure the deficiencies identified herein and in DTSC's previous submittals. DTSC

reserves the right to join in objections filed by other creditors or parties in interest and to supplement this objection.

Dated: October 13, 2010

Respectfully Submitted,

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EDMUND G. BROWN JR.
Attorney General of California
DON ROBINSON
MARGARITA PADILLA
Supervising Deputy Attorneys General
JAMES R. POTTER
OLIVIA W. KARLIN
Deputy Attorneys General
State Bar No. 166992
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2637
Fax: (213) 897-2802
E-mail: James.Potter@doj.ca.gov
Attorneys for Claimant Department of Toxics Substance Control

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