IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re	Chapter 11
WASHINGTON MUTUAL, INC., et al.[1]	Case No. 08-12229 (MFW)
Debtors	Jointly Administered Re: Dkt.No. 6141

THE DEBTORS' RESPONSE TO THE MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR ENTRY OF AN ORDER GRANTING RELIEF FROM THE CONFIDENTIALITY AGREEMENT GOVERNING CONFIRMATION DISCOVERY TO PERMIT REFERENCE TO DEBTORS' WORK PRODUCT UPON CLOSING OF THE COURTROOM

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., debtors and debtors in possession in these jointly administered chapter 11 cases (collectively the "Debtors"), hereby file this response to the Motion of the Official Committee of Equity Security Holders ("Equity Committee") for Entry of an Order Granting Relief from the Confidentiality Agreement Governing Confirmation Discovery to Permit Reference to Debtors' Work Product Upon Closing of the Courtroom (the "Motion").

1. Without prior notice, the Equity Committee filed the Motion less than two days before the commencement of the Confirmation Hearing, asking to close the Courtroom so that it may "introduce portions of the Debtors' [attorney work] product to rebut declarants," work product that was voluntarily made available to the Committee under an unusual Confidentiality Agreement and Order.[2] Motion at f 3. Making matters

[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 925 Fourth Avenue, Seattle, Washington 98104.
[2] Order Governing the Production and Use of Discovery Materials in Connection with Plan Confirmation (collectively with exhibits the "Confidentiality Agreement and Order"), July 2, 2010 [Docket No. 4863],

worse, the Committee has refused to identify for Debtors which of these documents it intends to use as exhibits. Moreover, the Committee has asked the Court to close the courtroom so it may introduce these documents without explaining what process it seeks to utilize to do so, when it seeks to do so, or how many times the courtroom will need to be closed and for how long each time. Finally, the Committee makes no attempt to explain why it cannot use a less disruptive means to introduce the documents, such as presenting them to the Court for *in camera* review or consideration.

2. The Committee has had access to these materials for over four months, but has only made limited use of that access, and has not even participated in most of the depositions. The Committee now seeks to raise the potential use of such attorney work product to create havoc on the eve of trial.

3. Given the lack of information provided by the Equity Committee about which documents it intends to use and when, along with how many times it will ask the Court to clear the courtroom, Debtors are unable to agree to the relief sought by the Equity Committee under the Motion.

4. Pursuant to paragraph 1(f) of the Confidentiality Agreement and Order and the previously entered 502(d) Order,[3] the Debtors agreed to provide to the Equity Committee attorney work product of its counsel concerning the claims and causes of action covered by the Global Settlement Agreement. Also, pursuant to paragraph 2(b) of the Confidentiality Agreement and Order, the Equity Committee may use these documents in connection with the prosecution of its objection to the plan. However, the Confidentiality Agreement and Order did not give the Committee free license to use the

[3] Interim Order Pursuant to Federal Rule of Evidence 502(d) ("502(d) Order"), June 16, 2010 [Docket No. 4740]. Pursuant to paragraph 6 of the 502(d) Order, such production of attorney work product does not constitute a waiver of any applicable privilege.

documents at any time and in any manner without regard to the impact on the proceedings, especially on exceedingly short notice.

5. Moreover, the Debtors have produced over 29,000 files that constitute attorney-work product, comprising over 325,000 total pages, but notwithstanding the Debtors' request, the Equity Committee has refused to identify which of these documents it plans to use at the Confirmation Hearing,

6. Many parties in interest likely will be present at the Confirmation Hearing, and many members of the public and the media are also likely to attend. For this reason, the hearing has been moved to a larger courtroom. Allowing the Equity Committee to close the courtroom each time it may wish to use Debtors' work product materials will be highly disruptive of the proceedings. Numerous parties, counsel, and spectators may be obliged to move in and out of the courtroom each time the Equity Committee seeks to introduce a new document or question a new witness. As such, the Equity Committee's proposal will substantially lengthen the hearing and burden all participants. In light of the fact that the Committee has been unwilling to work with the Debtors to minimize disruption, the Court should select the procedure that is the least disruptive.

7. Under 11 U.S.C. §§ 105, 107, and Rule 9018 of the Federal Rules of Bankruptcy Procedure, this Court has the power to issue appropriate orders to protect confidential information, including closing the courtroom if necessary. Both the Debtors and the Equity Committee agree that this type of work product information should be maintained as confidential, especially from potential adverse parties. But the Court has the discretion to fashion an appropriate method of receiving confidential evidence that is

the least disruptive to the orderly presentation of the hearing. *See In re Global Crossing, Ltd,* 295 B.R. 720, 723-24 (Bankr. S.D.N.Y. 2003) (discussing generally the options available to the Court to protect confidential evidence); *see also 9* Alan Resnick, Collier on Bankruptcy U 5001.03[2], at page 5001-6 (15th ed. Rev.2003) ("Proceedings should be held *in camera* only to the extent required to protect the particular interest.").

8. The Debtors propose that the least disruptive manner for the Equity Committee to introduce these documents would be to submit them to the Court for *in camera* review, along with any written argument it seeks to make about them. *See Valero Energy Corp.* v. *United States,* 569 F.3d 626, 631 (7th Cir. 2009) (approving a court's *in camera* review of documents claimed to be privileged, rather than holding an *ex parte* hearing). This approach would allow the Court the benefit of the Equity Committee's views about the significance of these documents without having to clear a crowded courtroom, perhaps multiple times.

9. Alternatively, the Court should require the Equity Committee, before the Confirmation Hearing begins, to identify which of these documents it intends to introduce, and at what points during the hearing it intends to use them, in order to minimize the disruption to all participants.

Dated: December 1, 2010 y.
Wilmington, Delaware //Axv^.

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