COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

October 31, 2013

Robert L. Burns, Esquire
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801

Andre G. Bouchard, Esquire
Bouchard Margules & Friedlander, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801

Re: *JPMorgan Chase & Co. v. American Century Companies, Inc.*
C.A. No. 6875-VCN
Date Submitted: July 2, 2013

Dear Counsel:

Plaintiffs, JPMorgan Chase & Co. and JPMAC Holdings Inc. (collectively, "JPMorgan"), have moved to compel Defendant American Century Companies, Inc. ("American Century") to produce documents responsive to its Request for Production No. 32 ("RFP 32"). RFP 32 seeks documents "referring or relating to the value of [American Century's] claims in the Arbitration." The Court has already ordered JPMorgan to produce comparable documents despite JPMorgan's

assertion of the attorney-client privilege.[1] The Court accepted that JPMorgan's own contemporaneous valuation of the claim in the Arbitration rendered those comparable documents discoverable under the "at-issue" exception to the attorney-client privilege. American Century, in turn, has asserted its rights under the attorney-client privilege and the work product doctrine to avoid responding to RFP 32.

At the core of JPMorgan's complaint is its contention that American Century failed to disclose to Duff & Phelps, the entity performing the arbitration function, all material information necessary to value fairly American Century's stock. American Century, in response, has asserted that it did provide Duff & Phelps with appropriate and necessary information.

What American Century provided to Duff & Phelps is not the real issue presented by JPMorgan's motion to compel. It is not a question of evidence presented in the Arbitration, whether through its expert or otherwise. Instead, the issue, for present purposes, is what was American Century's own valuation of (or

[1] *JPMorgan Chase & Co. v. Am. Century Cos., Inc.*, 2013 WL 1668393, *2-5 (Del. Ch. Apr. 18, 2013) (the "Letter Opinion"). Terms defined in the Letter Opinion are used here for convenience.

anticipated outcome based on) the claims that it was asserting in the Arbitration? Its estimates should have provided the best guidance for Duff & Phelps with respect to the fair value of those claims in its valuation effort. As noted in the Letter Opinion, information of this nature may be critical to resolving a pivotal issue in this action.

The information which JPMorgan seeks, for the same reasons as set forth in the Letter Opinion, is, at the outset, protected by both the attorney-client privilege and the work product doctrine. In the Letter Opinion, the Court concluded that JPMorgan had waived its attorney-client privilege under the "at-issue" doctrine; that doctrine applies when "the party injects an issue into the litigation, the truthful resolution of which requires an examination of the confidential communications."[2] The Court further noted that "[a]pplication of the 'at-issue' exception is guided by considerations of 'fairness and discouraging use of the attorney-client privilege as a litigation weapon.'"[3]

[2] *Id.* at *3 (quoting *Sokol Hldgs., Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *6 (Del. Ch. Aug. 5, 2009)).
[3] *Id.* (quoting *Sokol Hldgs., Inc.*, 2009 WL 250152, at *6).

JPMorgan's "inject[ing] an issue" was done more clearly. Yet, American Century also injected the issue of its assessment of the Arbitration during discovery in this action. In its answer to JPMorgan's Second Set of Interrogatories, American Century asserted that it had "provide[d] all information necessary to enable [Duff & Phelps] to accurately determine [its stock's] fair market value."[4] JPMorgan cannot fully determine whether American Century provided "all information necessary" without discovery and a comparison of what valuation information American Century had and what potential subset of that information it actually provided to Duff & Phelps. Thus, it waived the attorney-client privilege to its valuation of the Arbitration with this response.[5]

It should be noted that American Century is not deemed to have waived its attorney-client privilege to its valuation of the Arbitration, as guided by its attorneys, because JPMorgan was deemed to have waived its attorney-client privilege with respect to its valuation of the Arbitration. If that were the proper

[4] Def.'s Resp. and Objections to Pls.' Second Set of Interrogs., Resp. to ¶ 15.
[5] Similarly, as with JPMorgan in the Letter Opinion, American Century has waived its protection under the work product doctrine because this information is critical to a "pivotal" issue and there effectively is no other way for JPMorgan to gain access to this information. *JPMorgan Chase & Co.*, 2013 WL 1668393, at *2-3 (citing Ct. Ch. R. 26(b)(3)).

approach, one party could put a privileged matter at issue, be deemed to have waived its attorney-client privilege, and, through its own machinations, find a way to pierce the attorney-client privilege held by an adverse party. There is a certain element of fairness that comes with both sides having to provide comparable information, but the attorney-client privilege cannot be avoided so easily.

Nonetheless, the "at-issue" exception to the attorney-client privilege is guided by notions of fairness. In this instance, a joint loss of the attorney-client privilege comports with the fairness notion, but the notion of fairness also guides the Court in determining the scope of the information which must be provided. The scope that is appropriate in this case is substantially the same as the scope outlined in the Letter Opinion.[6] To that comparable extent, JPMorgan's motion to compel is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[6] *Id.*