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April 18, 2013

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Re: *JPMorgan Chase & Co. v. American Century Companies, Inc.*
C.A. No. 6875-VCN
Date Submitted: January 24, 2013

Dear Counsel:

Defendant American Century Companies, Inc. ("American Century" or the "Company") has moved to compel the production of certain documents and responses to interrogatories by the Plaintiffs, JPMorgan Chase & Co. and JPMAC Holdings Inc. (collectively, "J.P. Morgan").[1] J.P. Morgan opposes the discovery requests for various reasons, including attorney-client and work product privileges. It also complains that some requests are overly broad and unduly burdensome.

[1] Def. American Century Companies, Inc.'s Mot. to Compel Produc. of Docs. & Resps. to Interrogs. ("Def. Mot. to Compel").

I. BACKGROUND

To give some context to the discovery disputes, a concise background is necessary. A more complete description may be obtained from the Court's Memorandum Opinion, dated April 26, 2012, on American Century's motion to dismiss.[2]

This case arises out of a Settlement Agreement between American Century and J.P. Morgan and its affiliates. While resolving various other claims, the parties agreed to arbitrate American Century's breach of contract claims.[3] In connection with the Settlement Agreement, the parties entered into an Option Agreement, which gave American Century the right to buy back its shares from J.P. Morgan, which held a significant investment in the Company.

Under the Option Agreement, the per share purchase price for American Century was to be determined solely and conclusively by an independent advisor—Duff & Phelps ("D&P")—that was employed by American Century. J.P. Morgan had bargained for only a limited right to challenge that determination: "If [J.P.

[2] *JPMorgan Chase & Co. v. Am. Century Cos., Inc.*, 2012 WL 1524981 (Del. Ch. Apr. 26, 2012) ("*JPMorgan*"). Except where noted otherwise, capitalized terms used in this Letter Opinion have the same meaning as those defined in *JPMorgan*. *Id*.
[3] *Id*. at *1.

Morgan] determines in good faith that in its opinion [the Independent Advisor's valuation report] contains a manifest or egregious error in the calculation of the fair market value . . . [of the Shares] . . . it may notify [D&P] and discuss same with [D&P]."[4]

When American Century exercised its right to purchase its shares in July 2011, its arbitration claims against J.P. Morgan were still pending. In fact, by then J.P. Morgan's affiliate had conceded liability in the arbitration and the parties were awaiting the arbitration panel's decision on damages.[5] In August, the arbitration panel awarded an American Century subsidiary approximately $373 million.

J.P. Morgan alleges that American Century breached its implied covenant of good faith and fair dealing under the Option Agreement when it failed to provide D&P with all material information necessary to determine properly the fair market value of American Century's share price. More specifically, J.P. Morgan asserts that American Century failed to disclose the value of its pending arbitration claims against a J.P. Morgan affiliate.[6] Although an award in the arbitration had not yet

[4] Verified Compl. Ex. A (Option Agreement) § 1.3(d); *see also* Def.'s Mot. to Compel ¶ 2.
[5] Opp'n to Def. American Century Companies, Inc.'s Mot. to Compel Produc. of Docs. & Resps. to Interrogs. ("Opp'n to Mot. to Compel") 2.
[6] Verified Compl. ¶ 3.

been made, American Century, according to J.P. Morgan, reasonably knew that its arbitration claims were worth hundreds of millions of dollars, yet failed to disclose this information to D&P so that it could incorporate that information into its determination of the fair value of American Century's share price.[7]

American Century seeks discovery with respect to three categories of information. First, it seeks documents and information relating to the setting of J.P. Morgan's litigation reserve numbers for the arbitration.[8] Second, it requests documents and information relating to J.P. Morgan's decision not to disclose its arbitration exposure in publicly filed reporting documents.[9] Third, it wishes to obtain documents and information regarding J.P. Morgan's "internal valuations of American Century shares" and its "Arbitration exposure" and documents used by J.P. Morgan "director designees Jes Staley and Greg Quental concerning the Arbitration."[10]

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[7] *Id*. at ¶ 4.
[8] Def. Mot. to Compel ¶ 5. These requests are Request for Production ("RFP") Nos. 40-41 and Interrogatory No. 16.
[9] *Id*. These requests are RFP Nos. 36-39 and Interrogatory Nos. 15, 17-19.
[10] *Id*. These requests are RFP No. 18 and Interrogatory Nos. 8-10, 12. American Century had also sought documents concerning the 2009 negotiations of the Option Agreement, but the parties have since resolved that issue. Letter from Robert L. Burns, Esquire, April 10, 2013. At the time, J.P. Morgan could designate two members of American Century's board.

II. ANALYSIS

A. *Applicable Standard*

Court of Chancery Rule 26 allows parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[11]

> [T]he standard of relevance . . . is whether the discovery sought is reasonably calculated to lead to admissible evidence. The scope of permissible discovery is broad, therefore "objections to discovery requests, in general, will not be allowed unless there have been clear abuses of the process which would result in great and needless expense and time consumption." The burden is on the objecting party to show why the requested information is improperly requested.[12]

Nonetheless, the Court "may narrow [the] scope [of discovery] to guard against fishing expeditions or to ensure that the discovery sought is properly related to the issues presented in the litigation . . . ."[13]

B. *Documents and Information Regarding the Litigation Reserves*

American Century seeks discovery related to J.P. Morgan's calculation of its litigation reserve numbers with respect to the arbitration claims. J.P. Morgan has

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[11] Ct. Ch. R. 26(b)(1).
[12] *Prod. Res. Gp., L.L.C. v. NCT Gp., Inc.*, 863 A.2d 772, 802 (Del. Ch. 2004) (footnotes omitted) (quoting *Van De Walle v. Unimation, Inc.*, 1984 WL 8270 (Del. Ch. Oct. 15, 1984)).
[13] *Sokol Hldgs., Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *9 (Del. Ch. Aug. 5, 2009) (internal quotation marks omitted).

refused that request by invoking the work product privilege. American Century argues that the work product doctrine does not apply here because the reserve numbers were calculated for a business purpose, and because they were provided to a third-party accountant or regulator, and thus, the privilege was waived. J.P. Morgan contends that the litigation reserve numbers were determined in anticipation of litigation and kept strictly confidential. Even if those numbers were calculated for the dual purpose of financial reporting, it argues, Delaware law still affords it protection under the work product doctrine.

American Century alternatively asserts that even if the litigation reserve numbers are privileged, J.P. Morgan has put at-issue the value of the arbitration claims, and therefore, as a matter of fairness, J.P. Morgan should not be allowed to preclude discovery on an issue "central" to the litigation. In response, J.P. Morgan argues that the litigation reserves are not required for the truthful resolution of the matter.

The work product doctrine is referenced in Court of Chancery Rule 26(b)(3), which states:

> [A] party may obtain discovery of documents . . . under paragraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[14]

Application of the work product doctrine turns in part on why the document was produced. If a document was generated "because of litigation," then it is likely privileged.[15] If the document was created for some other reason, such as a business purpose, then it is likely not protected. Importantly, Delaware courts have expressly rejected the primary purpose test, which asks whether the primary purpose of the document was for litigation, in favor of the "because of litigation" test.[16]

American Century stresses that litigation reserves are created primarily for a business purpose, namely, to satisfy public disclosure requirements. However, it relies heavily on cases that favor the "primary purpose test" and that do not

[14] Ct. Ch. R. 26(b)(3).
[15] If the document was prepared in anticipation of litigation, then it could still be subject to discovery if the party seeking discovery could establish that it has a substantial need for it and would otherwise suffer undue hardship.
[16] *Hexion Specialty Chems., Inc. v. Huntsman Corp*., 959 A.2d 47, 52 (Del. Ch. 2008).

actually address litigation reserves.[17] It also asserts that disclosure to a third-party waives the protection.

The process of setting litigation reserve numbers (as well as the actual litigation reserve numbers themselves) "reveal[s] the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim."[18] "By their very nature [litigation reserve numbers] are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product."[19] Moreover, under Delaware law, which applies the "because of litigation" test,[20]

[17] For example, American Century cites *United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21 (1st Cir. 2009) and *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982). *Textron* addressed whether the work product privilege applied to "tax accrual work papers" and arguably created a test limiting the work product doctrine to documents that were "prepared for use in possible litigation." *Textron*, 577 F.3d at 29-30. *El Paso* also dealt with tax work papers and applied the primary purpose test. *El Paso*, 682 F.2d at 543-44. *See also United States v. Adlman*, 134 F.3d 1194, 1198-1203 (2d Cir. 1998) (discussing the distinction between the primary purpose test and the "because of litigation" test and adopting the latter, and also noting hypothetically, that documents estimating what "should be reserved for litigation losses" should be protected under the work product doctrine).

[18] *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987).

[19] *Id.* at 401.

[20] The test is described as "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, 8 *Federal Practice & Procedure* § 2024 (3rd ed.). For other courts that have adopted this test, *see Adlman*, 134 F.3d at 1202 (listing the Third, Fourth, Seventh, Eighth, and D.C. Circuits as applying this test).

"work product protection is not precluded merely because the [document] may also serve a business function."[21]

J.P. Morgan worked collaboratively with its in-house and outside legal counsel to determine litigation reserve numbers for the arbitration claims asserted against it. It also avers that the litigation reserve numbers were not communicated to a third-party accountant or regulator.[22] Consequently, the Court is persuaded that the litigation reserve numbers for the arbitration claims were created—in large part—because of litigation, and, therefore, are protected by the work product doctrine.[23] Although the litigation reserves were eventually aggregated and disclosed publicly for an important business purpose, the work product privilege is not destroyed for that reason.[24] Indeed, even if J.P. Morgan had disclosed the litigation reserve numbers for the arbitration claim to a third party—which it avers

[21] *Rohm & Haas Co. v. Dow Chem. Co.*, 2009 WL 537195, at *2 (Del. Ch. Feb. 26, 2009).
[22] Aff. of Michael Coyne ¶¶ 8-10.
[23] American Century focuses on the work product doctrine. However, the litigation reserves are likewise protected by the attorney-client privilege. *See* D.R.E. 502. The "attorney-client privilege generally protects the [confidential] communications between a client and an attorney acting in his professional capacity." *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010) (internal quotation marks omitted) (quoting *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992)).
[24] *See Rohm & Haas Co.*, 2009 WL 537195, at *2 ("There is no persuasive reason to deny work product protection because the document has these marks of business purpose, if it was prepared because of the anticipated litigation.") (internal quotation marks omitted) (quoting *Pfizer v. Advanced Monobloc Corp.*, 1999 WL 743868, at *4 (Del. Super. Sept. 20, 1999)).

it has not—that disclosure would not necessarily preclude work product protection.[25]

Less clear, however, is whether J.P. Morgan has waived the work product or the attorney-client privilege by putting American Century's share price at-issue in this litigation. The at-issue waiver applies when: "(1) the party injects the communications themselves into the litigation, or (2) the party injects an issue into the litigation, the truthful resolution of which requires an examination of the confidential communications."[26] "Application of the at-issue exception is guided by considerations of 'fairness and discouraging use of the attorney-client privilege as a litigation weapon.'"[27]

As to the first prong, J.P. Morgan has not interjected any privileged communications into this litigation. Moreover, J.P. Morgan asserts that it will not rely upon the confidential communications relating to its determination of the

[25] *See United States v. Deloitte LLP*, 610 F.3d 129, 139-140 (D.C. Cir. 2010) (noting that the voluntary disclosure of work product to an independent auditor "does not necessarily waive work-product protection . . . because it does not necessarily undercut the adversary process . . . disclosing work product to a third party can waive protection if 'such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.'") (quoting *Rockwell Int'l Corp. v. U.S. Dept. of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001)).
[26] *Sokol Hldgs., Inc.*, 2009 WL 2501542, at *6 (internal quotation marks omitted) (quoting *Tenneco Auto. Inc. v. El Paso Corp.*, 2001 WL 1456487, at *3 (Del. Ch. Nov. 7, 2001)).
[27] *Id.* at *6 (quoting *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992)).

litigation reserve numbers or the numbers themselves. With respect to the second prong, the parties frame the relevant issue differently, and disagree over whether the truthful resolution of the issue requires disclosure—under protection of a confidentiality order—of J.P. Morgan's litigation reserve numbers.

The discovery of the litigation reserve numbers for the arbitration claims would undoubtedly be relevant here, a fact that J.P. Morgan does not dispute. Having another data point would provide at least some insight into whether the valuation was fair and was based on all material information. If J.P. Morgan had valued the arbitration claims as an insubstantial sum, that might provide an inference that American Century had little need to disclose the arbitration claims to D&P. If J.P. Morgan's valuation had approached or exceeded the actual award amount, then that information might raise an inference that both American Century and J.P. Morgan should have notified D&P of its valuation.[28]

J.P. Morgan attempts to frame the scope of this litigation narrowly: did American Century comply with its obligation to inform D&P of all material information related to its arbitration claims? Thus, it asserts that its litigation

[28] J.P. Morgan had a limited right to challenge D&P's fair value determination. The Court does not need to decide now whether J.P. Morgan had any obligation to notify D&P of material information relating to its valuation.

reserves would provide little, if any, insight into that question, and they would also not be required for the resolution of that issue.

In response, American Century relies on *Tenneco Automotive Inc.*[29] for the proposition that a "plaintiff injects an issue into the litigation when it 'should have foreseen' that the defendant would require discovery of the issue as part of its defense."[30] In *Tenneco*, the Court held that a plaintiff waived privilege over certain attorney-client communications where the complaint alleged that the defendant did not give adequate notice to the plaintiff about certain settlements that the defendant was required to disclose under the parties' agreement.[31] Importantly, a finding of waiver was proper because it was foreseeable that the defendant would seek to expose the plaintiff's own knowledge and because attorney-client communications were the only source of that information.[32]

J.P. Morgan has not used the attorney-client privilege offensively in the sense that it will rely upon privileged information or documents to establish a reasonable fair value estimate of the arbitration claims. However, having injected

[29] 2001 WL 1456487, at *3-4.
[30] Def. American Century Companies, Inc.'s Reply Br. in Further Supp. of its Mot. to Compel Produc. of Docs. & Resps. to Interrogs. ("Def.'s Reply Br.") 13.
[31] *Tenneco*, 2001 WL 1456487, at *3-4.
[32] *Id*.

the valuation issue into the litigation, and then, having denied American Century discovery on the matter, J.P. Morgan has unfairly hindered American Century's defense.

Just as in *Tenneco*, where the plaintiff's own knowledge was at issue, J.P. Morgan could have reasonably foreseen that American Century would seek to expose J.P. Morgan's own beliefs as to the valuation of the arbitration claims as a defense. That information would be helpful in resolving whether American Century failed to provide material information, whether the fair value determination was reasonable, and why J.P. Morgan did not independently notify D&P of its valuation. Moreover, the information is also necessary for the truthful resolution of this case. Under certain circumstances it may be plainly unfair for J.P. Morgan to attack American Century's actions if J.P. Morgan had been complicit in any valuation errors or had made similar estimates as American Century and failed to disclose them to D&P. Except for American Century's valuation, there is also probably no better contemporaneous estimate of the

arbitration claims—devoid of any hindsight bias—than J.P. Morgan's own analysis.[33]

In addition to being fair, producing this information under a confidentiality order will not burden or harm J.P. Morgan. The litigation reserves were made years ago for litigation that is no longer ongoing. Thus, J.P. Morgan will not be inappropriately harmed.[34] Accordingly, the Court holds that J.P. Morgan, having put at-issue the valuation of the arbitration claims, has waived its attorney-client privilege to the litigation reserve discovery and therefore, must produce responsive documents.[35]

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[33] This case differs factually from the Court's recent decision in *In re Comverge, Inc. S'holder Litig.*, 2013 WL 1455827, at *3 (Del. Ch. Apr. 10, 2013), in which it rejected the plaintiff's argument that the at-issue waiver applied. The Court held that the "examination of privileged communications is not required for the truthful resolution of this litigation because the Comverge Defendants merely seek to rely on the fact that they sought and obtained legal advice rather than that they relied on the substance of privileged communications to prove that the Board was fully informed." Here, in contrast, J.P. Morgan, by filing suit, has injected the issue of American Century's fair value into the litigation, and that issue necessarily requires an examination of how J.P. Morgan valued the arbitration claims, and whether it should have independently notified D&P of its valuation.

[34] While "finding a waiver is both rare and discretionary because of the wide-ranging and often harsh implications of such a decision[,]" the at-issue waiver here is limited to the unique circumstances of this case, especially the fact that the disclosure of such information will cause little, if any, harm. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 2008 WL 498294, at *4 (Del. Super. Jan. 14, 2008).

[35] The litigation reserve discovery pertains to RFP Nos. 40-41, and Interrogatory No. 16.

With respect to the work product doctrine, "[w]aiver of the attorney-client privilege does not automatically relinquish the protection provided by the work product doctrine."[36] The work product doctrine is overcome when the "party seeking discovery has substantial need of the materials" and cannot obtain without undue hardship the "substantial equivalent of the materials by other means."[37] However, the rule specifically protects the "mental impressions, conclusions, opinions, or legal theories" of the party's attorney.[38] This type of work product—known as "opinion" work product—is only discoverable under Delaware law when a more stringent standard is met. "A court will protect opinion work product unless the requesting party can show that it is *directed to the pivotal issue* in the current litigation and the need for the information is *compelling*."[39] Here, American Century has met this more demanding standard. The litigation reserves are directed to the pivotal issues of how each party had calculated the value of the arbitration claims and whether either party should have informed D&P of its

[36] *Williams Union Boiler v. Travelers Indem. Co.*, 2003 WL 22853534, at *1 (Del. Super. July 31, 2003).
[37] Ct. Ch. R. 26(b)(3).
[38] *Id*.
[39] *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *11 (Del. Ch. Nov. 13, 2002) (italics in original).

valuation. Moreover, absent that information, American Century may be unfairly prejudiced in its defense. Thus, American Century is entitled to the litigation reserve discovery even though it is opinion work product.

C. *Documents & Information Concerning J.P. Morgan's Analysis of Its Arbitration Exposure in Publicly Filed Documents*[40]

American Century also seeks the production of "[a]ll documents concerning the disclosure (or non-disclosure) of the Arbitration in connection with regulatory filings made by [J.P. Morgan], including 10-Ks, 10-Qs, and 8-Ks."[41] The parties' dispute over this discovery request closely mirrors their debate over the discovery of the litigation reserve numbers.[42]

J.P. Morgan resists this discovery request on the grounds of attorney-client privilege. According to J.P. Morgan, the determination of what to disclose in regulatory filings "involved attorneys employed by [J.P. Morgan] and were

[40] According to J.P. Morgan, there are no documents that are responsive to RFP Nos. 37-39 and no information responsive to Interrogatory Nos. 15, and 17-19. Therefore, the only request at issue here is RFP No. 36. Opp'n to Mot. to Compel 16 n.7.
[41] Def. Mot. to Compel Ex. A (Def.'s First Requests for Produc. of Docs.) at ¶ 36.
[42] For example, American Century argues that it is entitled to J.P. Morgan's analysis of its arbitration exposure because that information was produced for business or regulatory reporting purposes. As it argued on the litigation reserves debate, American Century contends that J.P. Morgan has placed at-issue that analysis, and therefore, it should be produced, notwithstanding any applicable privilege. *See* Def. Mot. to Compel 8.

conducted in connection with rendering legal advice to [J.P. Morgan]."[43] As to the at-issue exception, J.P. Morgan asserts the same arguments it offered with respect to the litigation reserve numbers.

The Court agrees with J.P. Morgan that the analysis underlying the decisions not to disclose the arbitration claims in regulatory filings is protected by the attorney-client privilege. Moreover, there is no evidence that J.P. Morgan has waived the privilege by sharing that information with a third-party. Compliance with regulatory requirements often involves confidential communications between business personnel and in-house counsel. The attorney-client privilege appropriately attaches to those communications in which legal advice is rendered and confidentiality is maintained.[44] Here, American Century's request is directed to a question that is legal in nature, namely, the materiality of the arbitration claims—or, in other words, compliance with securities regulations.[45] J.P. Morgan

[43] Opp'n to Mot. to Compel 18.
[44] *See Amirsaleh v. Bd. of Trade of New York, Inc.*, 2008 WL 241616, at *2 (Del. Ch. Jan. 17, 2008) (noting that communications with in-house counsel are often privileged where the communication relates to legal advice).
[45] American Century contends that "the type of information requested by RFP No. 36" is more "correctly characterized as business and accounting advice." Def.'s Reply Br. 11 n.10. In support of that contention, it cites *Couch v. United States*, 409 U.S. 322, 335 (1973), arguing that, as to mandatory filings (in this case, an income tax return), "[w]hat information is not disclosed is largely in the accountant's discretion, not petitioner's." This case is not applicable

has averred that the "decision on whether to include or exclude a matter depends on its relative materiality based on legal counsel's analysis of the exposure represented by the particular matter."[46] Communications of this nature are protected.[47]

The at-issue waiver of the litigation reserves might seem to compel a similar result here. To the extent that this discovery request involves a valuation of the arbitration claims, J.P. Morgan has waived its privilege with respect to those documents for the same reasons as discussed previously. However, J.P. Morgan's decision to disclose or not to disclose the arbitration claims was based on whether

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here. First, it examines whether there is an accountant-client privilege. Second, it does not touch on filings with the Securities and Exchange Commission (the "SEC") and the rendering of legal advice that occurs to make those filings. For similar reasons, *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), which involves an independent accountant's tax accrual work papers, is also not helpful to American Century.

[46] *See* Aff. of Michael Coyne ¶¶ 11-13 (stating that the "decision not to include the Arbitration among the litigation disclosures was a product of legal advice by myself and my colleagues and outside counsel for J.P. Morgan.").

[47] See *Jedwab v. MGM Grand Hotels, Inc*., 1986 WL 3426, at *3 (Del. Ch. Mar. 20, 1986) ("Even a superficial understanding of the process by which the [SEC] filings are prepared by lawyers and other advisors of a client permits one to understand that . . . modifications [to drafts of SEC filings] are made as a result of communications between a client or its representatives and its lawyers. Thus, new information disclosed from comparing drafts of SEC filings with the filed documents themselves necessarily relates to and may inferentially disclose communications between a client and its lawyers charged with preparing the final documents. Communications of this kind are clearly made 'for the purpose of facilitating the rendition of professional legal services' and lie at the heart of the confidential communications that the lawyer-client privilege seeks to protect.").

those claims were material to J.P. Morgan, not American Century. J.P. Morgan has not waived its privilege with respect to these documents because whether the arbitration claims were material to J.P. Morgan is not required for the truthful resolution of whether D&P was properly informed of the potential value of the arbitration claims.

American Century, nonetheless, argues that how J.P. Morgan assessed the materiality of the arbitration claims will shed light on whether it knew that the claims were material with respect to American Century's valuation. It similarly argues that "whether the alleged information American Century allegedly withheld was 'material' may be impacted by evidence of what [J.P. Morgan] considered in its determinations and analysis of materiality . . . ."[48]

Access to that discovery might be helpful, but it might not be. J.P. Morgan dwarfs American Century in size. What is material to J.P. Morgan is likely to be very different from what is material to American Century. Moreover, American Century will have access to J.P. Morgan's litigation reserve numbers. Those numbers will likely support inferences of whether J.P. Morgan or American

[48] Def.'s Reply Br. 13.

Century should have disclosed their valuations of the arbitration claims. The Court, therefore, is not persuaded that discovery into J.P. Morgan's decision to disclose or to not disclose the arbitration claims is so essential that it is required for the truthful resolution of determining whether D&P was properly informed of the value attributable to the arbitration process.[49]

D. *American Century's Request for Interrogatory Numbers 8, 9, 10, and 12*

American Century also seeks information regarding J.P. Morgan's valuation of American Century shares, estimates of the arbitration exposure, and analysis of the per share purchase price for any options exercised by American Century under the Option Agreement. J.P. Morgan objects to these interrogatories as overbroad, unduly burdensome, and not the proper focus of interrogatories. Having previously referred American Century to its upcoming document production and deposition testimony in accordance with Court of Chancery Rule 33(d),[50]

[49] *See Tenneco*, 2001 WL 1456487, at *4 ("Because the 'at issue' exception exists to protect a party from the unfair application of the attorney-client privilege, the limitations on the exercise of the privilege must be no greater than that which is essential to achieve the exception's purposes.").

[50] Ct. Ch. R. 33(d) ("Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served . . . and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving

J.P. Morgan requests that the Court order, pursuant to Court of Chancery Rule 33(c), that the "interrogator[ies] . . . not be answered until after designated discovery has been completed or until a pretrial conference or other later time"[51] because the requested information can be more efficiently produced "through document requests and deposition testimony."[52] American Century, in response, contends that the responses to interrogatories can "help to both shape and narrow discovery in its early stages."[53]

The Court agrees with J.P. Morgan that the information sought from these interrogatories may be more efficiently addressed by the forthcoming document production and deposition testimony. American Century may receive answers to many of its interrogatories from the depositions and documents produced. If those means do not produce all the information requested, then J.P. Morgan should answer those interrogatories to the extent that they are not overbroad and irrelevant. As one example of an overbroad request, Interrogatory Number 8 seeks

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the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."). J.P. Morgan has also provided a list of persons who are most knowledgeable about the issues requested in these interrogatories.

[51] Ct. Ch. R. 33(c).

[52] Opp'n to Mot. to Compel 21.

[53] Def.'s Reply Br. 16 (internal quotations omitted).

information regarding any valuation that J.P. Morgan performed of American Century at any time from the commencement of arbitration, which amounts to over two years. In the Court's opinion, this interrogatory would be more reasonable if it was limited to a shorter period of time preceding the arbitration award (*i.e.*, six months or less) because these valuations are likely to be much more relevant.[54]

At this time, the Court will deny American Century's motion to compel Interrogatory Numbers 8, 9, 10, and 12.

E. *RFP No. 18: Documents Utilized by Staley & Quental Regarding the Arbitration*

American Century seeks "[a]ll documents in the possession, custody or control of either of the [J.P. Morgan] Directors concerning the Arbitration."[55] J.P. Morgan objects to the document request as being overboard, burdensome, and irrelevant. Because Staley and Quental were J.P. Morgan's designees on American Century's board, and because they were intimately involved in the arbitration, J.P. Morgan argues that the document request "encompasses potentially every

[54] The significant factor in the valuation of American Century is whether the value of the arbitration claims was included. J.P. Morgan's affiliate did not concede liability until May 2011, three months before the arbitration award. Thus, it is likely that valuations from this period will be far more relevant than older valuations.
[55] Def.'s Mot. to Compel Ex. A.

document relating to a two-year-long Arbitration."[56] American Century counters by arguing that the document request is necessarily and appropriately limited to "documents provided to or generated by *members of the American Century Board* regarding the arbitration."[57]

The Court agrees that this discovery request, while generally relevant, is overbroad. It has the potential to require the production of documents that are completely irrelevant to the valuation issues at stake in the litigation. Accordingly, the Court will narrow that document request to include only those documents that set forth information regarding the valuation of the arbitration claims. American Century's motion to compel RFP No. 18 is granted to that extent.

III. CONCLUSION

As set forth above, the Court grants in part and denies in part American Century's motion to compel the production of documents and responses to interrogatories.

[56] Opp'n to Mot. to Compel 24.
[57] Def.'s Reply Br. 16.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K