

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re : Chapter 11
: :
WASHINGTON MUTUAL, INC., et al.,¹ : Case No. 08-12229 (MFW)
: :
Debtors. : Jointly Administered
: :
Ref. Docket No. 74

**FDIC'S STATEMENT, RESPONSE AND LIMITED OBJECTION
TO MOTION OF DEBTORS PURSUANT TO SECTIONS 105(A), 361, 362
AND 542(B) OF THE BANKRUPTCY CODE SEEKING APPROVAL OF A
STIPULATION AND AGREEMENT CONCERNING DEPOSIT ACCOUNTS AT
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION**

The Federal Depository Insurance Corporation (the "FDIC"), by its attorneys DLA Piper LLP (US) and Young Conaway Stargatt & Taylor, LLP, files this statement, response and limited objection (the "Response")² to the Motion of the Debtors Pursuant to Sections 105(a), 361, 362 and 542(b) of the Bankruptcy Code Seeking Approval of a Stipulation and Agreement Concerning Deposit Accounts at JPMorgan Chase Bank, National Association (the "Motion") filed by the above-referenced debtors and debtors in possession (the "Debtors") seeking approval of the stipulation (the "Stipulation") between the Debtors and JPMorgan Chase, N.A. ("JPMC"). In support of this Response, the FDIC respectfully states:

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

² The submission of this Response shall in no way constitute a submission by the FDIC to the jurisdiction or authority of the Bankruptcy Court for the resolution of this, or any other regulatory matter involving the Debtors and the FDIC. Nor is this Response an admission that this Court is the appropriate forum for disputes related to the FDIC or the deposit accounts which are the subject of the Motion.



PRELIMINARY STATEMENT

The Debtors are seeking, through shortened notice, authorization to effect the transfer of some \$4.4 billion in funds. There are several potential bases for the FDIC, as regulator and receiver, to have an interest in the funds which are the subject of the Motion. The FDIC does not seek to interfere with the administration of these cases. Nor, at this point, does it make a claim to the funds which are the subject of the Motion. However, all the facts related to the Debtors' and their subsidiaries have not yet been established and, once these facts are determined, the FDIC may have significant claims against the Debtors and to the funds.

In light of the FDIC's statutory authority, the seriousness of the issues, the amount of the funds to be transferred and the fact that the Debtors have no need to use the funds at this time, there is no need to disturb the status quo. The Debtors cannot pay their unsecured creditors prior to confirmation of a plan and they have substantial other resources to fund the administrative expenses of their chapter 11 cases.

Accordingly, any rights the FDIC has to the funds should be protected and the approval of the Stipulation should not affect the FDIC's rights in any fashion. To accomplish this end, at minimum, the FDIC should be granted the same protections afforded to JPMC under the Stipulation.

This Response is intended to reserve all rights on behalf of the FDIC with respect to the Motion and Stipulation in the event a satisfactory stipulation with the Debtors is not reached in advance of the hearing.

BACKGROUND

1. On September 26, 2008 (the "Petition Date"), Washington Mutual, Inc. ("WMI") and Washington Mutual Investment Corp. ("WMI Investment", and together with WMI, the "Debtors") each commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Court").

2. The Debtors are authorized to continue operating their businesses and managing their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

3. On October 3, 2008, the Court entered an order, pursuant to 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing the joint administration of the Debtors' chapter 11 cases.

4. WMI is a holding company incorporated in the State of Washington. WMI is the direct parent of WMI Investment, which serves as an investment vehicle for WMI and holds a variety of securities. WMI Investment is incorporated in the State of Delaware.

5. Prior to the Petition Date, WMI was a savings and loan holding company that owned Washington Mutual Bank ("WMB") and such bank's subsidiaries, including Washington Mutual Bank fsb ("WMBfsb"). WMI also has certain non-banking, non-debtor subsidiaries. Like all savings and loan holding companies, WMI was subject to regulation by the Office of Thrift Supervision (the "OTC").

6. WMB and WMBfsb, in turn, like all depository institutions with federal thrift charters, were subject to regulation and examination by the OTS. In addition, WMI's banking and nonbanking subsidiaries were regulated by various federal and state authorities, including the FDIC.

7. On September 25, 2008, the Director of the OTS, by order number 2008-36, appointed the FDIC as receiver for WMB and advised that the receiver was immediately taking possession of WMB (the "Receivership"). Immediately after its appointment as receiver, the FDIC sold substantially all the assets of WMB (the "Sale"), including the stock of WMBfsb, to JPMC pursuant to that certain Purchase and Assumption Agreement, dated as of September 25, 2008 (the "Purchase Agreement"). The FDIC, as receiver, retained certain interests and assets under the Purchase Agreement.

8. The Debtors allege that they and certain of WMI's nondebtor subsidiaries allegedly had funds on deposit at WMB in the approximate amount of \$707,000,000 (the "WMB Funds"). In addition, WMI allegedly had funds on deposit at WMBfsb in the approximate amount of \$3,668,000,000 (the "WMBfsb Funds", and together with the WMB Funds, the "Funds").

9. Neither the Debtors nor JPMC have been able, except as to a limited number of accounts, to locate "any deposit account agreements establishing the Accounts, any other agreements regarding the maintenance of or withdrawals from the Accounts or any signature cards or other specification of any authorized signatories with respect to the Accounts." Stipulation at 2. In addition, "[t]he aggregate amounts described in the Stipulation and herein are based on information provided by [JPMC] and are subject to further review by the Debtors." Motion, ¶ 8, n.2.

10. On October 14, 2008, the Debtors filed the Motion seeking the Court's approval of the Stipulation.

THE FDIC'S STATUTORY POWERS AND RESPONSIBILITIES

11. One of the primary functions of the FDIC is to dispose of a failed institution's assets in a way that "maximizes the net present value return from the sale or other disposition" of assets under its control. Id.; 12 U.S.C. § 1441a(b)(3)(C)(i); IBJ Schroder Bank & Trust Co. v. RTC, 26 F.3d 370, 1994 WL 262009, at * 1 (2d Cir. 1994). Congress expressly granted the FDIC, as conservator or receiver, the power to transfer a failed institution's assets "without any approval, assignment, or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G)(i)(II).

12. Thus, to the extent the FDIC, in any of its capacities, has any interest in the Funds, the disposition of the Funds falls squarely within the powers and functions of the FDIC. As of this date, the FDIC has been unable to determine whether all or any part of the Funds are property of the Debtors, WMB or WMBfsb or whether the Debtors have any obligation to WMB or WMBfsb which would give rise to a right of setoff by the FDIC against the Funds.

13. The FDIC³ has broad discretion in discharging their statutory responsibilities. Mosseri v. FDIC, 2001 U.S. Dist. LEXIS 18899 (S.D.N.Y. Nov. 19, 2001); see e.g., 12 U.S.C. § 1821(d)(2)(J)(ii) (permitting the FDIC to take "any action" that "the [RTC] determines is in the best interests of the depository institution, its depositors, or the [RTC]"); see also, 12 U.S.C. §§ 1821(c)(13)(B)(ii), 1821(d)(2)(G)(i)(II), 1823(d)(4).

³ In 1995, the powers of the Resolution Trust Corporation ("RTC") were transferred to the FDIC. Accordingly, the case citations referring to the RTC apply to the FDIC.

14. Further, this broad discretion is subject to very limited interference from the courts. “[N]o court may take any action . . . to restrain or affect the exercise of powers or functions of the [RTC] as a conservator or receiver.” Mosseri v. FDIC, 2001 U.S. Dist. LEXIS 18899 (S.D.N.Y. Nov. 19, 2001)(citing 12 U.S.C §1821(d)(2)(J)); see also, Calise Beauty Sch. v. Riley, 941 F. Supp. 425, 429 (S.D.N.Y. 1996)(determining that a court may only issue an order affecting exercise of power under FIDA where the [RTC] was attempting the exercise of a function or power that is clearly outside the statutory authority (citing Volges v. Resolution Trust Corporation, 32 F.3d 50 (2d Cir. 1994)); Ward v. Resolution Trust Corporation, 996 F.2d 99, 103 (5th Cir. 1993) (per curiam).

15. This anti-injunction provision “is but part of a broader scheme enacted to allow the FDIC expeditiously to wind up the affairs of defunct savings and loan institutions without judicial interference.” Volges v. Resolution Trust Corp., 32 F.3d 50, 52 (2d Cir. 1994); see, e.g., 12 U.S.C. § 1821(d)(13)(C) (prohibiting courts from attaching or executing upon [RTC] assets); id. § 1825(b)(2) (prohibiting involuntary sale, foreclosure, or placement of liens upon RTC property); see also RTC v. Diamond, 18 F.3d 111, 113 (2d Cir. 1994), petition for cert. filed, 62 U.S.L.W. 3757 (May 5, 1994); Telematics Int'l, Inc. v. NEMLC Leasing Corp., 967 F.2d 703, 705-06 (1st Cir. 1992). “Consistent with that purpose, the anti-injunction provision is a direct manifestation of Congress's intent to prevent courts from interfering with the [RTC] in the exercise of [their] statutory powers.” Volges v. Resolution Trust Corp., 32 F.3d 50, 52 (2d Cir. N.Y. 1994).

16. The FDIC has been in negotiations with the Debtors in connection with the Motion. The FDIC believes it will enter into a satisfactory stipulation with the Debtors that provides the FDIC the same protections afforded to JPMC under the Stipulation, thus preserving the status quo while the FDIC continues to fulfill its statutory duties.

17. This Response is intended to reserve all rights on behalf of the FDIC with respect to the Motion and Stipulation in the event the appropriate stipulation is not reached.

Date: October 20, 2008
Wilmington, Delaware

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