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
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Plaintiff,	:	Adversary No. 09-50551 (MFW)
v.	:	
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	
Defendants and Counterclaimants,	:	
and	:	
FEDERAL DEPOSIT INSURANCE CORPORATION,	:	
Additional Defendant for Interpleader claim.	:	**Re: Docket No. 41**

DEBTORS' OPPOSITION TO THE MOTION OF
JPMORGAN CHASE BANK, N.A. TO DISMISS DEBTORS' COUNTERCLAIMS

[1] The Debtors in these Chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395). The Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.

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PRELIMINARY STATEMENT

JPMorgan Chase Bank, National Association ("JPMC") has refused to withdraw its Motion to Dismiss Debtors' Counterclaims (the "Motion to Dismiss") (Docket No. 41) despite the fact that it relies on the identical argument that the Court specifically rejected when it denied JPMC's Motion for Stay of Debtors' Adversary Proceeding (the "Motion to Stay") (Docket No. 31). Just as it has previously, JPMC argues that the counterclaims asserted by Plaintiffs Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment," and together with WMI "Debtors" or "Plaintiffs"), are barred by FIRREA section 1821(d)(13)(D). The Court has already concluded after full argument and briefing, however, that the FIRREA jurisdictional bar does not apply to Debtors' counterclaims because they are not asserted against the Federal Deposit Insurance Corporation (the "FDIC") and do not seek assets in receivership. Accordingly, JPMC's Motion to Dismiss must be denied. Furthermore, by persisting with its Motion to Dismiss despite the fact that its position has already been rejected, JPMC has imposed unnecessary burdens both on the Debtors and on the Court. Debtors therefore respectfully request that the Court direct JPMC to pay Debtors' fees incurred responding to the present motion.

SUMMARY OF ARGUMENT

JPMC relies on the identical argument in support of its Motion to Dismiss as it advanced previously in support of its unsuccessful Motion to Stay. Specifically, JPMC argues that Debtors' claims against JPMC to recover assets which are not in receivership are somehow barred under section 1821(d)(13)(D) of FIRREA. The Court rejected that precise argument when it denied the Motion to Stay, holding that the FIRREA jurisdictional bar does not apply to Debtors' counterclaims because those claims are directed to "property that is no longer in the hands of the FDIC." (Tr. 6/24/09 at 93.) By asking that the Court revisit this settled issue,

JPMC is openly pursuing a strategy of inefficiency and delay. The Court's ruling is the law of the case, and JPMC's Motion to Dismiss must be denied.

The Court's ruling, in addition to standing as law of the case, was plainly correct. As Debtors argued in their Opposition to JPMC's Motion to Stay, it is settled in the Third Circuit that claims asserted against a successor bank pertaining to assets transferred out of receivership are not subject to the jurisdictional bar under FIRREA. *See Rosa v. RTC*, 938 F.2d 383 (3d Cir. 1991); *Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A.*, 43 F.3d 843 (3d Cir. 1994). That is exactly the scenario now before this Court. By JPMC's own account, Debtors have asserted a series of claims pertaining to assets "sold to JPMC by the FDIC" pursuant to the Purchase and Assumption Agreement Whole Bank, dated September 25, 2008 (the "P&A Agreement"). (Mot. to Dismiss at 10.) As the Court has already recognized, such an action does not implicate FIRREA, but falls squarely within the Court's exclusive jurisdiction.

JPMC also makes the flawed argument that Debtors' claims, even to the extent that they are not barred by any specific provision of FIRREA, must be dismissed on the basis that they conflict with some general "federal banking law." The Supreme Court has expressly held, however, that there is no federal common law that supplements the specific statutory provisions of FIRREA. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). Congress has determined precisely how far to extend the jurisdictional bar under that statute, and, as discussed and ruled upon by the Court, that bar simply does not apply here. Furthermore, the only remaining FIRREA provision that JPMC invokes, section 1828(u), includes specific language—language that JPMC egregiously redacts from its purported quotation of the statute—that renders that provision plainly inapplicable to the situation before this Court.

JPMC has now pursued the identical argument from different angles in multiple motions, but its position ultimately leads to the same dead end. As the Court has already determined, FIRREA is not a bar to Debtors' Counterclaims against JPMC. By nevertheless continuing to press this issue, including in its Motion to Dismiss and in its separate Motion to Withdraw the Reference, JPMC is imposing unreasonable burdens both on the Debtors and on the courts. JPMC's only apparent purpose in doing so, moreover, is continued delay and continued use of funds that should be paid to Debtors. Debtors therefore respectfully request that the Motion to Dismiss be denied, and that JPMC be directed to pay the costs incurred by Debtors in defending this motion.

BACKGROUND

A. The DC Action

On September 25, 2008, WMB was closed and placed into receivership with the FDIC. On the same day, the FDIC sold substantially all of WMB's assets, including the stock of its subsidiary WMB fsb, to JPMC for $1.88 billion, pursuant to the P&A Agreement. As required by section 1821(d) under FIRREA, the FDIC set December 30, 2008, as the last day to file claims against WMB or the FDIC in its capacity as receiver. On December 30, 2008, Debtors filed a series of claims against WMB in receivership.

On January 23, 2009, the FDIC disallowed Debtors' claims in a one-page Notice of Disallowance. Because FIRREA required Debtors to challenge the disallowance of claims within 60 days, Debtors filed a Complaint in the District Court for the District of Columbia, on March 20, 2009, challenging the FDIC's disallowance of claims (the "DC Action").[2] The FDIC

[2] Once a creditor files a claim with the agency, the FDIC has 180 days to either allow or disallow it. 12 U.S.C. § 1821(d)(5)(A)(i). A claimant who is dissatisfied with the agency's determination then has 60 days either to request administrative review or to file
(footnote continued)

in its capacity as receiver issued its Answer to the Complaint, along with a Motion to Dismiss, on June 11, 2009.

B. The Bankruptcy Proceedings

On September 26, 2008, WMI and WMI Investment each commenced a voluntary case pursuant to chapter 11 of the Bankruptcy Code in this Court, and there are now two pending adversary proceedings. First, on March 24, 2009, JPMC filed an action asserting claims to assorted assets that it allegedly purchased pursuant to the P&A Agreement. On May 22, 2009, Debtors filed an Answer and Counterclaims asserting, among other things, affirmative claims under the Bankruptcy Code's avoidance powers and under state law for the avoidance of potentially more than $10 billion in Debtors' assets fraudulently or preferentially transferred to JPMC prior to the commencement of the Debtors' chapter 11 cases pending before this Court (the "Counterclaims").

The second adversary proceeding is the Turnover Action, which Debtors filed on April 27, 2009, asserting an "unquestionable right" to approximately $4 billion in deposits and demanding the return of those funds pursuant to the turnover provision of the Bankruptcy Code, 11 U.S.C. § 542. JPMC filed a Motion to Dismiss the Turnover Action on May 13, 2009, arguing primarily that turnover is unavailable on grounds that there is a genuine dispute as to ownership of the deposits. The Court denied that motion at the hearing held on June 24, 2009 (the "June 24 Hearing"), finding that Debtors' complaint and accompanying exhibits describe a

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suit on the claim. 12 U.S.C. § 1821(d)(6)(A). The claimant is authorized to bring suit either in "the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia." *Id.*

mature debt owed by JPMC to Debtors, without any indication of a genuine dispute as to "the title to the . . . deposit accounts."[3] (Tr. 6/24/09 at 117.)

C. The Court's Ruling Denying JPMC's Motion to Stay and Rejecting JPMC's Current Position

The Court recently denied JPMC's Motion to Stay, along with a similar motion by the FDIC, in which both parties argued that the Turnover Action and Debtors' Counterclaims are barred under section 1821(d)(13)(D). The Court rejected this argument at the June 24 Hearing. Relying on the Third Circuit's decisions in *Rosa* and *Hudson*, the Court held that FIRREA applies only with respect to claims against the FDIC for assets in receivership, and that Debtors' claims against a successor bank, JPMC, are therefore properly before this Court and should not be stayed. (Tr. 6/24/09 at 93-94.) The Court also rejected arguments by the FDIC and JPMC invoking the "first filed rule" as an alternative basis to defer to the DC Action, reasoning that the Court has "exclusive jurisdiction to decide what is property of the estate" and that the DC Action and the Adversary Proceedings involve different claims. (Tr. 6/24/09 at 94-95.) Shortly after rejecting the stay motions, the Court issued a written opinion authorizing Debtors to proceed with Rule 2004 discovery.

JPMC filed its Motion to Dismiss prior to the Court's recent ruling, and its position is based on the identical argument that the Court has now rejected—*i.e.*, that section 1821(d)(13)(D) bars Debtors' Counterclaims against JPMC. (Mot. to Dismiss at 13-21.) In light

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3 On May 19, 2009, Debtors filed their Motion for Summary Judgment in the Turnover Action, in which they present extensive and compelling evidence demonstrating that they in fact own the deposits and that they are entitled to have JPMC promptly remit those funds. Unless the parties agree upon an alternative schedule, JPMC is due to enter its opposition to that motion within 21 days of the Court's ruling at the June 24 Hearing. (*See* Order Granting Expedited Motion of Defendant JPMC for Additional Time to Respond to Debtors' Summary Judgment Motion.)

of the Court's ruling that the bar does not apply, Debtors contacted JPMC, by email dated June 26, 2009, and requested that it withdraw the Motion to Dismiss. JPMC declined to do so without explanation, and has elected instead to continue to pursue an argument that the Court has specifically rejected. As set forth below, the Court's decision is the law of the case, and the Motion to Dismiss must therefore be denied. Furthermore, JPMC's suggestion that Debtors' Counterclaims are somehow precluded by unarticulated "banking law" generally, even to the extent that there is no specific bar under FIRREA, is entirely without merit and must also be rejected.

ARGUMENT

I. THE COURT HAS ALREADY REJECTED JPMC'S POSITION

A. The Court's Holding Rejecting JPMC's Proposed Application of the FIRREA Jurisdictional Bar is the Law of the Case

The law of the case doctrine "limits relitigation of an issue once it has been decided" in an earlier stage of the same litigation. *In re Cont'l Airlines, Inc.*, 279 F.3d 226, 232 (3d Cir. 2002); *see Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir. 1994) ("The law of the case doctrine limits the extent to which an issue will be reconsidered once the court has made a ruling on it."). As the Third Circuit has emphasized, the doctrine promotes finality, consistency, and judicial economy. *See In re City of Phila. Litig.*, 158 F.3d 711, 717-18 (3d Cir. 1998). In light of these considerations, courts "should be loathe" to revisit issues that have already been decided "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Lambert v. Blackwell*, 387 F.3d 210, 237 (3d Cir. 2004) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

In its ruling denying JPMC's Motion to Stay, this Court unequivocally held that the jurisdictional bar set forth in section 1821(d)(13)(D) does not apply to Debtors' Counterclaims against JPMC. The Court explained its holding,

> I do not find FIRREA is a jurisdictional bar to the Debtors' claims to property that is no longer in the hands of the FDIC as receiver, but [is] in the hands of JPMC. I think that's clear from the Third Circuit precedent, which is binding on this Court. *Hudson* made clear that FIRREA only bars claims against a receiver or an institution in receivership.

(Tr. 6/24/09 at 93.) JPMC's argument in its Motion to Dismiss, which it filed prior to the June 24 Hearing, makes the identical argument that the Court rejected. (Mot. to Dismiss at 15 ("Title 12 . . . bars this Court from adjudicating Debtors' counterclaims, those counterclaims must be dismissed for lack of subject matter jurisdiction").) The Court's ruling now stands as the "law of the case" and precludes JPMC from invoking the same jurisdictional provision that it invoked previously, and that the Court found not to apply, as a basis to dismiss Debtors' Counterclaims. *Cont'l Airlines,* 279 F.3d at 232.

JPMC's relentless effort to pursue the same failed argument in multiple motions highlights the importance of the considerations underlying the doctrine, *i.e.*, finality, consistency and judicial economy. In addition to relying on its discredited interpretation of FIRREA here and in its Motion to Stay, JPMC makes essentially the same argument in its pending Motion to Withdraw the Reference. JPMC is pressing these arguments, moreover, knowing that the FDIC will be pursuing the same position in a motion for leave to take an interlocutory appeal. The Court's ruling rejecting JPMC's argument when it was advanced in the Motion to Stay was informed by extensive briefing and argument by four sophisticated parties—Debtors, the Creditors' Committee, JPMC and the FDIC—and was dictated by Third Circuit precedent, as well as by the language, structure and policies underlying FIRREA. The law of the case doctrine

serves to preserve this ruling, which was fully considered and thoroughly reasoned, while preventing JPMC from bogging down these proceedings through a barrage of motions addressed to the identical issue.[4]

B. The Court's Holding was Correct

The Court was correct to reject JPMC's flawed reading of FIRREA. As detailed in Debtors' Opposition to the Motion to Stay, the FIRREA jurisdictional bar, 12 U.S.C. § 1821(d)(13)(D), does not apply to claims against a successor bank, such as JPMC, concerning assets transferred out of receivership. In fact, that was the Third Circuit's precise holding in *Rosa v. RTC,* 938 F.2d 383, 392-93 (3d Cir. 1991) ("The language of the bar simply states that it applies when there is an institution for which RTC 'has been' appointed receiver. Thus the issue under bar is whether, *at the time the case came before the district court*, RTC had been appointed receiver of the institutions . . . . At the time the complaint was filed, [the successor bank] was in conservatorship, not receivership. Thus, [the successor bank] was not then a depository institution 'for which the Corporation has been appointed receiver.'") (emphasis added).

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4 While courts may of course revisit issues that "impinge on their jurisdictional powers," the Third Circuit directs that they do so only "when extraordinary circumstances warrant such reconsideration." *Pub. Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3d Cir. 1997) (granting reconsideration of standing determination where district court's initial ruling was undermined by subsequent findings based on new evidence); *cf. In re Memorial Estates*, 950 F.2d 1364 (7th Cir. 1991) (law of the case precluded court from reconsidering argument about subject matter jurisdiction); *Parker v. King*, 935 F.2d 1174, 1178 (11th Cir. 1991) (court's power to consider its own subject matter jurisdiction circumscribed by the law of the case doctrine); *McCurry v. Tesch*, 824 F.2d 638, 640 (8th Cir. 1987) (court bound by prior decision in the same case on issue relating to subject matter jurisdiction). As set forth in Section IB, *infra*, there are no "extraordinary circumstances" casting doubt on the Court's decision that section 1821(d)(13)(D) imposes no jurisdictional bar in an action against a successor bank not in receivership.

In *Rosa*, the Court held that the jurisdictional bar under FIRREA did not apply with respect to a claim for ERISA benefits asserted against a successor bank that, as of the filing of the complaint, was not in receivership. In reaching this holding, the Court specifically addressed both provisions of section 1821(d)(13)(D):

> We do not believe [claims against the successor bank] fall under [§ 1821(d)(13)(D)(i)] because they seek neither payment from nor a determination of rights with respect to the assets of a depository institution for which RTC has been appointed receiver . . . . Nor does [§ 1821(d)(13)(D)(ii)] bar these claims. This is so because we construe the 'relating' language of that clause to refer to claims against the very institution whose acts are challenged, which must be an institution for which RTC has been appointed receiver.

Id. at 394. Thus, when it rejected JPMC's argument previously, this Court properly adhered to the Third Circuit's holding that the jurisdictional bar under FIRREA applies only to claims "against a receiver or an institution in receivership." (Tr. 6/24/09 at 93-94.) Furthermore, as the Court recognized, Debtors do not assert either type of claim here. (*Id.*)

Demonstrating that it has no real answer for *Rosa*, JPMC made the absurd suggestion during the June 24 Hearing that *Rosa* was somehow "overruled" (Tr. 6/24/09 at 58) by the Third Circuit's subsequent decision in *National Union Fire Insurance Co. v. City Savings F.S.B.*, 28 F.3d 376 (3d Cir. 1994). *See Interfaith Cmty Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 704 (3d Cir. 2005) ("It is well settled in this Circuit that a three-judge panel may not overrule a decision by an earlier panel."). The Court in *National Union* held that a declaratory judgment action *against the receiver of a failed bank*, concerning insurance policies that were *assets in receivership*, was governed by FIRREA. That is fully consistent with *Rosa's* holding that the jurisdictional bar under FIRREA applies only to claims either for assets in receivership or against the receiver—in fact, the claims in *National Union* met both of those criteria. It is not surprising,

therefore, that the Court in *National Union*, far from purporting to "overrule" *Rosa*, in fact relied on that decision in support of its holding.[5]

In a case decided after *National Union*, the Third Circuit once again reaffirmed the holding of *Rosa*. *See Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A.*, 43 F.3d 843 (3d Cir. 1994). The *Hudson* Court invoked *Rosa* for the specific proposition that the jurisdictional bar under section 1821(d)(13)(D)(i) "applied only to claims against failed institutions while (ii) applied to claims against the failed institutions specified in (i) as well as to claims against the receiver of such institutions." *Id.* at 847 n.10; *see also id.* at 852 ("[*Rosa*] held that claims against the receiver, as well as claims against the failed institution, were subject to the 'statutory exhaustion requirement' of administrative review"). The *Hudson* Court further explained that the specific policy concern underlying the FIRREA jurisdictional bar was to ensure that "claims against the receiver" and "claims against the [failed depository] institution" would be treated in the same way so that the FDIC would not be required to "defend actions at various locations throughout the country." *Id.* at 849. This action does not involve claims against the FDIC, and it does not involve claims for assets in receivership. Rather, Debtors' Counterclaims are directed to assets against a successor bank, and those claims are therefore

5 The Third Circuit also emphasized in *National Union* that its willingness to apply the jurisdictional bar under Section 1821(d)(13)(D) to an action that plaintiffs could not otherwise advance through the FIRREA administrative claims process was strictly limited to declaratory judgment actions. *Id.* at 391 ("[W]here an action is not *merely declaratory* in nature, but rather asserts a *right to payment*, a complete bar to such a right-to-payment action in administrative proceedings and in courts of law would appear to constitute an unconstitutional deprivation of due process, since the holder of the right to payment would never have an opportunity to be heard concerning property allegedly owed her.") (emphasis in original). Debtors' Counterclaims seek recovery of billions of dollars, and are obviously not directed to declaratory relief.

specifically authorized by *Rosa*, *National Union* and *Hudson*.[6] The Court was correct when it made that determination previously, and there is no "extraordinary circumstance" casting doubt on its decision.

II. JPMC FAILS TO IDENTIFY ANY BANKING LAW PROVISION THAT BARS THIS ACTION

A. Debtors' Claims Against JPMC Do Not Conflict With "Federal Banking Law"

Unable to rely on the specific jurisdictional bar under FIRREA, JPMC resorts to arguing that Debtors' Counterclaims pose a "direct challenge" to the FDIC's regulatory authority and must therefore be dismissed as contrary to general "federal banking law." (Mot. to Dismiss at 21.) Both of the premises underlying this argument are fundamentally wrong. First, Debtors are not advancing a "direct challenge" to the authority of the FDIC. Rather, in an adversary proceeding that JPMC initiated, Debtors are asserting bankruptcy and state law Counterclaims against JPMC, seeking assets that are not in receivership. The FDIC's interests in these proceedings, to the extent it has any interest at all, are plainly indirect. And, as discussed, the

6 Rather than acknowledge the Third Circuit's clear holding in *Rosa* (as reaffirmed in *Hudson*), JPMC again relies on the Sixth Circuit's decision in *Village of Oakwood v. State Bank & Trust Co.*, 39 F.3d 373 (6th Cir. 2008). Even if *Oakwood* could somehow override the law of this circuit—and plainly it cannot—the holding in that case is fully consistent with Debtors' position. The plaintiffs in *Oakwood* based their claim on an alleged breach of duty *by the receiver*, in connection with uninsured deposits that were *never transferred out of receivership*. *Id.* at 376; *see also Village of Oakwood v. State Bank & Trust Co.*, 519 F. Supp. 2d 730, 739 (N.D. Ohio 2007) ("Through this agreement, the FDIC transferred some liabilities to [the successor bank], but [the successor bank] did not assume liability for uninsured deposits or the actions of the FDIC."). Thus, while plaintiff ostensibly sued a third party bank in an effort to excuse its failure to adhere to the FIRREA claims process, its claim was truly against the receiver and concerned assets that the receiver still possessed; thus, it was barred. Here, in obvious contrast, the assets at issue are not in receivership, and Debtors' claims are in fact against a successor bank.

Third Circuit has already held that FIRREA imposes no jurisdictional obstacle to a claim for damages against a successor bank. *Rosa,* 938 F.2d at 393.

Second, there is no general "federal banking law" that can be invoked to supplement the specific provisions of FIRREA in order to protect any supposed interests of the FDIC in this proceeding. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994); *see also Atherton v. FDIC*, 519 U.S. 213, 226 (1997) (holding that "[t]here is no federal common law that would create a general standard of care applicable" to a claim by the FDIC alleging negligence against former directors of a failed bank). In *O'Melveny*, the FDIC invoked federal common law, in a suit against the former counsel of a failed bank for negligence and breach of fiduciary duty, as a basis to defeat the defense, under state law, that the knowledge of the failed bank's corrupt officers could be imputed to the bank (and, thus, to the FDIC). The Court explained its decision rejecting the FDIC's argument and holding that the state law defense was available: "It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." 512 U.S. at 83. Similarly, in *FDIC v. Deglau*, 207 F.3d 153 (3d Cir. 2000), the FDIC invoked the common law *D'Oench* doctrine as a basis to bar plaintiff, a loan guarantor who sought to open a judgment in the FDIC's favor, from invoking unofficial side agreements that purportedly released him from his loan obligation. The Court rejected the FDIC's position, explaining that Section 1823(e), a FIRREA provision addressed to the enforceability of written agreements, "is comprehensive and detailed, and under *O'Melveny* and *Atherton* we do not think *D'Oench* is needed to supplement it." *Id.* at 171.

Thus, it is well settled that there is no "federal banking law" that supplements FIRREA in order to further any general policy concerns underlying that statute. To the extent that Congress believed it was necessary to prevent certain actions to ensure that the FDIC could perform its work, it enacted numerous detailed provisions under FIRREA, including section 1821(d)(13)(D). As the Court has already held, that bar does not apply to claims for assets held by successor banks, and, as such, it does not apply here. By asking that the Court nevertheless dismiss Debtors' Counterclaims on the basis of vaguely described "federal banking law," JPMC is essentially asking that the Court invent a common law jurisdictional bar that would supplement the specific provisions that Congress saw fit to include within "the extensive framework of FIRREA." *O'Melveny*, 512 U.S. at 83. That is a request without any legal basis and it should plainly be rejected. *Id.*; *see also Deglau*, 207 F.3d at 166 ("where Congress has promulgated a comprehensive and detailed statute [*i.e.*, FIRREA], the court must presume that state law rather than federal common law governs matters unaddressed in the federal statute. . . . ") (citing *O'Melveny*, 512 U.S. at 85-88); *RTC v. Fidelity & Deposit Co. of Md.*, 205 F.3d 615, 626 (3d Cir. 2000) (finding "no basis for fashioning a federal rule of decision to resolve" dispute involving the FDIC).[7]

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[7] Counterclaims Ten and Fourteen assert state law claims and therefore fall squarely within the Supreme Court's specific holding in *O'Melveny* that there is no federal banking common law that displaces state law. As discussed in the text, JPMC's attack on Debtors' other Counterclaims, which arise under federal statute, defies long-standing precedent rejecting the implied repeal of one federal statute by another. To the extent JPMC believes that Title 12 should protect it, *O'Melveny* teaches that any purported "gap" in the statutory scheme is a matter JPMC should take to Congress, not the courts. *See also Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 910 (3d Cir. 1994) ("It is by now axiomatic that 'the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.' Absent ambiguity in the statute, we cannot allow policy to guide our analysis."). As the text of 12 U.S.C. § 1828(u) reveals,
(footnote continued)

Furthermore, Debtors' claims are specifically authorized under or preserved by the Bankruptcy Code. *See* 11 U.S.C. §§ 541, 542, 544, 547, 548, 550. At bottom, then, JPMC is arguing that FIRREA, even to the extent that its specific statutory bar does not apply, implicitly supersedes Debtors' right to pursue causes of action that are authorized by another federal statute. JPMC can only advance this dubious argument by ignoring a long line of authority that highly disfavors any determination that one federal statute has impliedly repealed another. *See Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, __, 127 S. Ct. 2518, 2532 (2007) ("While a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'") (citations omitted); *Delgado v. Stegall*, 367 F.3d 668, 675 (7th Cir. 2004) ("The Supreme Court has said that where two federal statutes can coexist, the later one is not to be deemed to have repealed the earlier one unless there is some indication of a congressional intent to do so, even though the result may be (though not in this case) to give the plaintiff a choice of federal remedies."). It is inappropriate for any court to reach such a result "unless the later statute 'expressly contradict[s] the original act' or unless such a construction is 'absolutely necessary . . . in order that the words [of the later statute] shall have any meaning at all.'" *Nat'l Ass'n*, 127 S. Ct. at 2532; *Figard v. PHH Mortgage Corp.*, 382 B.R. 695, 711 (Bankr. W.D. Pa. 2008) ("There are only two ways in which one federal statute may implicitly repeal the other: when Congress has clearly expressed their intention to do so, or where there is an irreconcilable conflict between the two statutes"). There is nothing in FIRREA—and nothing that JPMC points to—to suggest that Congress, when it

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see Section II.B *infra*, Congress has specifically identified a limited set of circumstances, not present here, in which avoidance actions are prohibited in the banking context. That is a far cry from JPMC's blunderbuss attempt to eviscerate entire areas of law.

enacted FIRREA, meant to take the extraordinary step of impliedly repealing significant portions of the Bankruptcy Code, and to thereby deprive debtors of their right to assert avoidance claims against a private entity seeking assets not in receivership.

The absurdity of JPMC's position is demonstrated by the fact that numerous courts, upon finding no applicable jurisdictional bar under FIRREA, have authorized claims against a receiver, or claims pertaining to assets once in receivership, without ever suggesting that such causes of action might be barred on account of general "federal banking law." *See, e.g., Henrichs v. Valley View Dev.*, 474 F.3d 609, 614 (9th Cir. 2007) (holding that FIRREA did not bar plaintiff's claim concerning defaulted loan because the FDIC, which was appointed receiver for the failed bank that issued the loan, had assigned all of its right, title and interest in the loan to a third-party); *FDIC v. McFarland*, 243 F.3d 876, 887 n.42 (5th Cir. 2001) (permitting creditor's claims concerning mortgage liens to proceed because the FDIC had relinquished ownership thereby nullifying the jurisdictional bar of FIRREA); *Auction Co. of America v. FDIC*, 141 F.3d 1198, 329 (D.C. Cir. 1998) (holding that FIRREA did not bar company's breach of contract claims against the FDIC); *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492 (3d Cir. 1996) (permitting mortgage foreclosure action to proceed even though the actions of the receiver were implicated); *In re Parker N. Am. Corp.*, 24 F.3d 1145, 1154 (9th Cir. 1994) (allowing preference action by the debtor against RTC because the action is "in substance an action to determine whether the RTC actually has an asset rather than an action seeking a determination of rights with respect to the assets of a depository institution") (citations and internal quotation marks omitted); *In re All Season's Kitchen, Inc.*, 145 B.R. 391 (Bankr. D. Vt. 1992) (holding that debtor's complaint attacking the validity of FDIC's lien was properly before the Bankruptcy Court pursuant to 28 U.S.C. §§ 1334(b) and

157(b)(2)(A)). None of these actions could have gone forward if JPMC were correct that "federal banking law" somehow strips plaintiffs of claims that they are otherwise entitled to pursue merely on the basis that such claims, insofar as they involve assets once in receivership, pose a perceived "challenge" to the authority of the FDIC.

It is not surprising that JPMC's cited authority provides no support for its untenable position. JPMC relies primarily on two decisions from the Federal Circuit addressed to takings claims against the government or federal agencies. *See Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1996); *Cal. Housing Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992). In both decisions, the Federal Circuit held that the bank seizures at issue were appropriate and the plaintiffs were not entitled to compensation. *See Branch*, 69 F.3d at 1583 (finding no takings); *Cal. Housing Sec., Inc.*, 959 F.2d at 960 ("The government's occupation and seizure of Saratoga did not constitute a compensable physical taking under the fifth amendment."). These holdings have nothing whatsoever to do with Debtors' claims here: This is not a takings action, it is not an action against the FDIC or against the federal government, and it is not an action challenging the decision to place WMB into receivership in the first instance. The very fact that a private litigant such as JPMC would rely on these inapposite decisions as the primary authority in support of its argument demonstrates that it is advancing a position without any basis in the law.

In sum, Congress enacted FIRREA with the specific jurisdictional bar that it deemed necessary to ensure that the FDIC would be able to serve its role. That bar is section 1821(d)(13)(D). And where it does not apply, as here, there is no "federal banking law" that prevents claimants from pursuing causes of action specifically authorized under the Bankruptcy Code and applicable state law. Furthermore, JPMC's over-heated suggestion that Debtors' Counterclaims place the entire bank regulatory system at risk could not be further off the mark.

Debtors' claims do not challenge the bank regulatory system and are not even asserted against the FDIC—rather, they are traditional causes of action asserted against a successor institution, JPMC. Furthermore, there is no policy that would be served by denying a debtor, and, by implication, its creditors, any redress whatsoever to recover assets for the benefit of a bankrupt estate. JPMC has tried from multiple angles to make the same failed argument—*i.e.*, that FIRREA bars Debtors from asserting claims against a successor bank—and its Motion to Dismiss should be denied.

B. JPMC Blatantly Distorts the Language and Scope of Section 1828(u)(1)

JPMC's next argument is nothing less than frivolous. JPMC asserts that WMI's Counterclaims 1 and 2, which seek the avoidance and recovery of approximately $6.5 billion in capital contributions from WMI to WMB, are barred under 12 U.S.C. § 1828(u)(1). (Mot. to Dismiss at 25.) But JPMC is only able to advance this argument by blatantly mischaracterizing the terms of the cited provision. As excerpted by JPMC, section 1828(u)(1) prohibits:

> [C]laim[s] against any Federal banking agency (including in its capacity as conservator or receiver) for the return of assets of an affiliate or controlling shareholder of the insured depository institution transferred to, or for the benefit of, an insured depository institution by such affiliate or controlling shareholder of the insured depository institution, or a claim against such Federal banking agency for monetary damages or other legal or equitable relief in connection with such transfer . . . .

(Motion to Dismiss at 25.) However, the very next passage – a passage that JPMC avoids quoting through the strategic placement of an ellipses – provides that this bar applies only, "if at the time of the transfer (A) the insured depository institution is subject to any direction issued in writing by a Federal banking agency to increase its capital . . . ." JPMC cannot point to any allegation in the Counterclaims indicating the existence of a written direction within the meaning of this provision (and, in fact, there was no such written direction). That leaves JPMC simply to

ignore this requirement by omitting the pertinent statutory language from its brief. With this glaring omission corrected, it is clear that section 1828(u)(1), by its express terms, is inapplicable to Counterclaims 1 and 2 and that JPMC's argument must therefore be rejected.[8]

Section 1828(u) does not apply for a second reason. Section 1828(u) expressly applies only to "claim[s] against any Federal banking agency . . . ." 12 U.S.C. § 1828(u)(1). As discussed, Debtors' Counterclaims are not against the FDIC – they are against JPMC. Furthermore, the limitation to federal banking agencies is intentional. The legislative history of section 1828(u), which is quoted in note 8 *supra*, indicates that the final version of section 1828(u) was intended to limit claims "against a Federal banking agency," and not against a private entity, like JPMC, that was a transferee of assets of an insured depository institution.

Finally, section 1828(u), far from supporting JPMC's position, actually disproves it. As discussed in Section II.A *supra*, JPMC contends that "federal banking law," even in the absence of a specific statutory bar, divests Debtors of their rights under the Bankruptcy Code and state law. The Supreme Court in *O'Melveny*, however, rejected the proposition that there is a federal banking common law; instead, FIRREA displaces state law only to the extent that FIRREA

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[8] JPMC makes a similar material omission in describing the legislative history of section 1828(u). JPMC argues that as the "provision's text and legislative history make clear, Congress' specific intention in enacting Section 1828(u) was 'protecting the Federal banking agencies and the deposit insurance funds from claims . . . for the return of capital infusions' in a depository institution brought by the institution's holding company." (Mot. to Dismiss at 25 (quoting in part H.R. Rep. No. 106-434, at 183 (1999)).) The remaining text of the relevant legislative history, however, demonstrates that section 1828(u) was intended as a *limited* defense to fraudulent transfer and preference claims. *See, e.g.*, H.R. Rep. No. 106-434, at 183 (1999) (Conf. Rep.), *reprinted in* 1999 U.S.C.C.A.N. 245, 276 ("The substitute narrows and clarifies the circumstances under which a Federal banking agency would be protected from a claim . . . . Third, section 730 specifies that no person may bring a claim against a Federal banking agency for monetary damages, return of assets, or for other legal or equitable relief in connection with such transfer, consistent with certain limitations. The House amendment only referred to claims for monetary damages or for the return of assets or other property . . . .").

"specifically create[s] special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." 512 U.S. at 86. Here, section 1828(u) specifically displaces a limited universe of fraudulent transfer and preference statutes, demonstrating that federal banking law permits such claims except in those limited circumstances.[9] This proposition is consistent with the rule set forth in *O'Melveny*; JPMC's argument is clearly not.

C. JPMC Seeks To Avoid A Factual Dispute By Mischaracterizing Debtors' Complaint

JPMC buries its final argument in a footnote, contending that Counterclaims 1 and 3, which seek to avoid the transfer of certain capital contributions and trust securities, must be dismissed because "WMI received reasonably equivalent value for those investments as a matter of law." (Mot. to Dismiss at 26, n. 12.) As its basis for this argument, JPMC reports that "WMI's pleading acknowledges that its capital contributions and transfer of trust securities were pursuant to its regulatory obligations as a savings and loan holding company to bolster the financial health of its wholly owned banking subsidiary." (*Id.* (citing Counterclaims at ¶¶ 13-25, 32-42).) In fact, the Counterclaims do not include any such assertion, and there are thus no allegations in the pleading to support JPMC's position on a motion to dismiss. Furthermore, JPMC does not even identify the specific regulations that supposedly support its argument.

Even if there were an allegation that the transfers were made pursuant to some regulatory obligation, *BFP v. RTC*, 511 U.S. 531 (1994) does not stand for the proposition that a contribution by a bank holding company to its subsidiary to satisfy such obligations is, as a

[9] The only claims displaced under section 1828(u) are constructive fraudulent transfer claims and preference claims asserted against "Federal banking entities" in the limited circumstances covered by sections 1828(u)(1)(A) and (B). Any actual fraudulent claims are expressly excluded from section 1828(u)'s bar for all purposes, *see* 12 U.S.C. § 1828(u)(2), and any constructive fraudulent transfer claims and preferences not subject to sections 1828(u)(1)(A) and (B) can be asserted.

matter of law, reasonably equivalent value. In fact, the Supreme Court in *BFP* "emphasize[d]" that its opinion "covers only mortgage foreclosures of real estate," *id.* at 537 n.3, and a number of courts have limited that decision to prepetition mortgage foreclosures challenged under Bankruptcy Code section 548(a)(2)(A). *See, e.g., In re Miller*, 454 F.3d 899, 902 (8th Cir. 2006) (holding that *BFP* does not control mortgage foreclosure sale that occurred postpetition); *In re Fordu*, 201 F.3d 693, 709 n.19 (6th Cir. 1999) (refusing to extend the *BFP* holding to the domestic relations area, such as transfers of property, recognizing that "the Supreme Court took pains to limit its decision to the real estate mortgage foreclosure context"). JPMC's remaining authority, far from supporting its Motion to Dismiss, confirms that the complaint raises factual questions that cannot be resolved at this juncture. *See, e.g., In re Fruehauf Trailer Corp.*, 444 F.3d 203 (3d Cir. 2006) (affirming a district court judgment, following extensive testimony and a three-day bench trial, to avoid a transfer under Bankruptcy Code section 548); *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 646-48 (3d Cir. 1991) (reversing district court decision voiding loan guarantee as fraudulent conveyance, reasoning, based on fact-intensive analysis, that evidence at 2-day bench trial failed to establish an absence of reasonably equivalent value).

Debtors have adequately pled that WMI did not receive reasonably equivalent value for the Capital Contributions and for the transfer of the Trust Securities, and there is no basis to dismiss those claims. *See Branch v. FDIC*, 825 F. Supp. 384, 399 (D. Mass. 1993) (denying motion to dismiss constructive fraud claims relating to debtor parent corporation's transfers to solvent bank subsidiary, and noting that "[w]hether a transfer is made for fair consideration is a question of fact."); *see also Federalpha Steel LLC Creditors' Trust v. Federal Pipe & Steel Corp.*, 368 B.R. 679, 692-93 (N.D. Ill. 2006) (holding that whether debtor received reasonably

equivalent value in exchange for releases contained in withdrawal agreement with LLC member involved fact questions that could not be resolved on motion to dismiss); *Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp*, 351 F. Supp. 2d 79, 105-06 (S.D.N.Y. 2004) (same).

III. DEBTORS SHOULD BE AWARDED FEES AND COSTS INCURRED OPPOSING JPMC'S MOTION TO DISMISS

Although litigants generally bear their own costs, when an attorney "multiplies the proceedings in any case unreasonably and vexatiously," the attorney "may be required by the court to satisfy personally the excess costs, expenses and attorney fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. It is appropriate for a court to assess sanctions upon an attorney under § 1927 "where an attorney has: (1) multiplied proceedings; (2) unreasonably and vexatiously; (3) thereby increasing the cost of the proceedings; (4) with bad faith or with intentional misconduct." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 188 (3d Cir. 2002). Bad faith can be inferred where "a claim is advocated despite the fact that it is patently frivolous or where a litigant continues to pursue a claim in the face of an irrebuttable defense." *Loftus v. Se. Pa. Transp. Auth.*, 8 F. Supp. 2d 458, 461 (E.D. Pa. 1998); *see also Boykin v. Bloomsburg Univ. Of Pa.*, 905 F. Supp. 1335, 1346 (M.D. Pa. 1995).

JPMC has unreasonably "multiplied" these proceedings, and thereby increased Debtors' costs, by asserting the identical failed arguments in its Motion to Dismiss (and in its Motion to Withdraw the Reference) as it previously advanced without success in its Motion to Stay. Moreover, Debtors contacted JPMC following the Court's ruling on June 24 to request that, in light of the Court's finding that the FIRREA jurisdictional bar does not apply to Debtors' Counterclaims, JPMC withdraw its Motion to Dismiss. Rather than spare Debtors and the Court the burden of addressing an issue that has already been resolved, JPMC elected to proceed with

its motion. This was especially egregious, moreover, since JPMC is aware that this Court and/or the District Court will be called upon to address this issue yet again in at least two other pleadings—the pending Motion to Withdraw the Reference, and the FDIC's impending motion for leave to take an interlocutory appeal. Furthermore, to the extent that JPMC has raised any "new" issue in its Motion to Dismiss, its argument is entirely frivolous – as discussed, JPMC has invoked section 1828(u) by blatantly misrepresenting the scope and meaning of that provision through the use of a strategically placed ellipses omitting its key language.

These tactics should not be tolerated. Debtors have already prevailed on the issue of whether FIRREA acts as a bar to this Court's subject matter jurisdiction, and their limited estates should not have to sustain the costs of defending a repetitive motion that rests on an argument the Court has already resolved in its favor. *See In Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1254 (2d Cir.), *cert. denied*, 506 U.S. 820 (1992). In *Virgin*, the district court imposed sanctions on a defendant who re-submitted a motion that had been previously denied. The district court held that the filing of the motion "was not justified by existing law or by a good faith argument for extension, modification or reversal of existing law." *Id.* Although the Second Circuit reversed the district court's ruling on the underlying motion, the court upheld the district court's imposition of sanctions. According to the Second Circuit, "we cannot say that the court abused its discretion in finding that the NMB's position in making its motion was not justified." *Id.* at 1255.

It is essential that the Court exercise its discretion to ensure that this massive bankruptcy move forward at an efficient pace without being delayed unnecessarily through repeated examination and re-examination of issues that have already been fully resolved. By pressing the same settled issue in multiple pleadings, and by tacking on additional frivolous arguments,

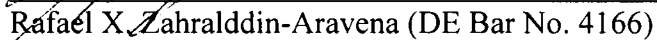
JPMC has demonstrated that its primary goal in this litigation is delay. Debtors respectfully request that the Court make clear that this is not a valid strategy going forward by imposing sanctions against JPMC as authorized under 28 U.S.C. § 1927.

CONCLUSION

For the reasons discussed, Debtors respectfully request that the Court deny JPMC's Motion to Dismiss Debtors' Counterclaims and impose sanctions against JPMC as authorized under 28 U.S.C. § 1927.

Dated: July 2, 2009
Wilmington, Delaware

ELLIOTT GREENLEAF



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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
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Plaintiff,	:	Adversary No. 09-50551 (MFW)
v.	:	
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	
Defendants and Counterclaimants,	:	
and	:	
FEDERAL DEPOSIT INSURANCE CORPORATION,	:	
Additional Defendant for Interpleader claim.	:	

CERTIFICATE OF SERVICE REGARDING THE DEBTORS' OPPOSITION TO THE MOTION OF JPMORGAN CHASE BANK, N.A. TO DISMISS DEBTORS' COUNTERCLAIMS

I, Neil R. Lapinski, Esquire, Delaware counsel to Washington Mutual, Inc. and WMI Investment Corp., hereby certify that I caused copies of the Debtors' Opposition to the Motion of

[1] The Debtors in these Chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395). The Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.

JPMorgan Chase Bank, N.A. to Dismiss Debtors' Counterclaims to be served on July 2, 2009 to all Notice Parties via hand delivery on all local parties; and via U.S. First Class Mail upon the remaining parties listed on the attached service list.

Dated: July 2, 2009
Wilmington, Delaware

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