UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

	:	**Chapter 11**
In re:	:	
	:	**Case No. 08-12229 (MFW)**
WASHINGTON MUTUAL, INC., et al.,	:	**(Jointly Administered)**
	:	
Debtors.	:	**RE: Docket No. 1183**
	:	**Hearing Date: July 27, 2009 at 2:00 p.m. ET**
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OBJECTION BY THE WASHINGTON MUTUAL, INC. NOTEHOLDERS GROUP TO DEBTORS' MOTION PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019(a) FOR APPROVAL OF SETTLEMENT WITH JPMORGAN CHASE BANK, N.A.

TO THE HONORABLE MARY F. WALRATH,
UNITED STATES BANKRUPTCY JUDGE

The Washington Mutual, Inc. Noteholders Group (the "Noteholders") hereby objects (the "Noteholders' Objection") to the motion (the "9019 Motion") [Docket[1] No. 1183] by Washington Mutual, Inc. ("WMI") and WMI Investment Corporation ("WMI Investment," together with WMI, the "Debtors") pursuant to section 105(a) of title 11 of the United States Code (the "Bankruptcy Code") and rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for approval of a compromise and settlement with JPMorgan Chase Bank N.A. ("JPM") regarding the treatment of the WaMu Savings Plan (the "Savings Plan") pursuant to the terms of the Agreement

[1] *Unless otherwise noted, all docket numbers herein refer to the docket in the Chapter 11 Cases (as* defined below) before this Court.

Regarding WaMu Savings Plan (the "Settlement Agreement"), dated June 16, 2009, and respectfully represents as follows:

I. PRELIMINARY STATEMENT

1. Through the settlement proposed in the 9019 Motion, the Debtors have reversed their previous position that if JPM wanted to assume the Savings Plan, it must also assume the pending litigation associated therewith. The Noteholders object to, and ask this Court to deny, the proposed Settlement Agreement because the Debtors have failed to offer an explanation for why they have decided to retain the Pending Litigation, have not provided evidence of the potential exposure related to that litigation, and have apparently entered into a one-sided agreement that benefits JPM at the expense of the estates. The Noteholders submit that the Debtors should be required to provide this basic information as a matter of law and also because the Debtors' counsel has admitted to a conflict in matters concerning JPM. Thus, based on the information and representations in the 9019 Motion, the Court does not have a sufficient factual basis before it to approve the Settlement Agreement.

II. PROCEDURAL HISTORY

2. On September 25, 2008, the Director of the Office of Thrift Supervision ("OTS"), by order number 2008-36, appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for Washington Mutual Bank ("WMB"), which also owned Washington Mutual Bank fsb ("WMBfsb"), and the FDIC sold substantially all assets of WMB to JPM pursuant to the Purchase and Assumption Agreement: Whole Bank (the "Purchase Agreement") dated September 25, 2008.

3. On September 26, 2008 (the "Petition Date"), each of the Debtors commenced with this Court a voluntary case (together, the "Chapter 11 Cases") pursuant to chapter 11 of the Bankruptcy Code. As of the date hereof, the Debtors continue to operate their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. On October 3, 2008, this Court entered an Order [Docket No. 25] pursuant to Bankruptcy Rule 1015(b) authorizing joint administration of the Chapter 11 Cases.

5. On October 15, 2008, the United States Trustee for the District of Delaware (the "US Trustee") appointed an official committee of unsecured creditors (the "Committee").

6. The Noteholders filed both a Notice of Appearance and Request for Papers [Docket No. 101] and a Verified Statement of White & Case LLP Pursuant to Bankruptcy Rule 2019 [Docket No. 102] with this Court on October 20, 2008.

7. On March 20, 2009, the Debtors commenced a civil action against the FDIC in the U.S. District Court for the District of Columbia, Washington Mutual, Inc. v. Fed. Deposit Ins. Corp., Case No. 09-00533 (RMC) (the "DC Action") by the filing of a complaint that identified the Savings Plan as an asset of the Debtors' estates. (Compl. ¶¶ 52-55.) JPM intervened as defendant and asserted counterclaims on March 30, 2009 [D.C. Docket No. 4], which included seeking a declaratory judgment that the Savings Plan should be turned over to JPM. (Counterclaim ¶ 5, pp. 19-20.)

8. On March 24, 2009, JPM instituted an adversary proceeding

JPMorgan Chase Bank, N.A. v. Washington Mutual, Inc., Adv. Case No. 09-50551 (Bankr. D. Del.) by filing a complaint (the "JPM Complaint") [Docket No. 807] seeking, inter alia, a determination that JPM be permitted to immediately assume sponsorship of the Savings Plan without making payments to the Debtors and without acquiring the pending litigation associated with the Savings Plan. (JPM Compl. ¶¶ 144, 146, 224-229; 9019 Motion ¶ 10.) JPM contended that it had purchased the Savings Plan pursuant to the Purchase Agreement (JPM Compl. ¶ 148) and had no obligation to assume any of the liabilities associated with such pending litigation (JPM Compl. ¶ 227.)

9. On April 8, 2009, Debtors filed an application (the "Quinn Application") [Docket No. 888] seeking to retain Quinn Emanuel Urquhart Oliver & Hedges LLP ("Quinn") as special litigation and conflicts counsel. Debtors represented that their general bankruptcy counsel, Weil, Gotshal & Manges LLP ("Weil Gotshal") had previously advised the Court and parties in interest "of the need for the Debtors to utilize conflicts counsel in certain circumstances involving [JPM]" and that Quinn's retention was therefore necessary. (Quinn App. ¶¶ 16-17.)

10. Through Quinn, Debtors answered (the "Answer") [Adv. Case Docket No. 23] the JPM Complaint on May 29, 2009. In the Answer, Debtors denied that JPM had purchased the Debtors' interest in the Savings Plan, and the Debtors counterclaimed seeking a declaratory judgment that the Savings Plan was property of the Debtors' estates. (Ans. ¶¶ 168-71.) Debtors also argued that if JPM did purchase the Savings Plan in the Purchase Agreement, it must be held responsible for the claims and litigation related thereto. (9019 Motion ¶11.)

III. BACKGROUND[2]

11. Prior to the Petition Date, WMI sponsored the Savings Plan for the employees of WMI and WMB (and its subsidiaries). The Savings Plan was maintained as a tax qualified plan under section 401(a) of the Internal Revenue Code.

12. While the Debtors have not disclosed the full extent of litigation that may be pending related to the Savings Plan, substantial and significant claims against the Debtors' estates are alleged in just the class action case of Washington Mutual, Inc. ERISA Litigation, Lead Case No. C07-1874 (MJP) (W.D. Wash.) (together with any other litigation related to the Savings Plan, the "Pending Litigation") regarding breaches of fiduciary duties by WMI and the individually named defendants (i.e., former WMI directors) in managing the Savings Plan. In the single instance cited above, the plaintiffs claim that through mismanagement the defendants lost over $250 million of their retirement savings and seek compensation in excess of that amount. (ERISA Litig. Compl. ¶¶ 7, 181, 191, 215, 220.)

13. Contrary to the previously consistent position of the Debtors with regard to the Savings Plan, the 9019 Motion now seeks approval of a settlement whereby JPM assumes the Savings Plan but not the liabilities associated with the pending litigation related to that plan. (9019 Motion ¶ 12.)

14. Despite Quinn's handling of the litigation involving JPM, Weil

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[2] Certain of the facts in this section are recounted herein from the Debtors' 9019 Motion and are not an admission of the truth, accuracy, or completeness of such facts and the Noteholders reserve all of their rights with respect thereto should such representations of the facts prove untrue, inaccurate, or incomplete.

appears as counsel of record on the 9019 Motion.

15. In aggregate, the Noteholders own over $3.3 billion dollars of the Debtors' securities, making the Noteholders the major stakeholders in these Chapter 11 Cases. The Debtors, however, failed to apprise the Noteholders of their negotiations with JPM or the proposed "compromise" contained in the 9019 Motion—specifically the Debtors' reversal in position with regard to the liabilities associated with the pending litigation related to the Savings Plan.

III. JURISDICTION AND VENUE

16. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§1408 and 1409.

IV. RELIEF REQUESTED

17. For the reasons set forth herein, the Noteholders request that this Court deny Debtors' 9019 Motion because (i) it does not adequately disclose necessary information regarding the issues that the Debtors seek approval to settle, and thus does not provide the court with a proper basis for determining the reasonableness of the proposed compromise; and (ii) the proposed settlement is not in the best interests of the Debtors' estates because proposed Settlement Agreement is too one-sided and does not protect the interests of the estates or its creditors.

V. BASIS FOR RELIEF

18. While the Debtors cite numerous cases in the 9019 Motion for the propositions that the approval of proposed settlements need only be reasonable, fair and

in the best interests of the estate, they neglect to provide the fundamental information necessary for the Court to make such determinations with respect to the Settlement Agreement.

19. The burden of proof is on the Debtors to persuade the Court that the compromise is fair and reasonable. In re Key3media Group, Inc., 366 B.R. 87, 93 (Bankr. D. Del. 2005). A bankruptcy court "may not simply accept the trustee's word that the settlement is reasonable, nor may [it] merely 'rubber-stamp' the trustee's proposal." LaSalle Nat'l Bank v. Holland (In re American Reserve Corp.), 841 F.2d 159, (7th Cir. 1987). The court must exercise its own independent and informed judgment when considering a settlement proposal and,

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 419, 424 (1968) (reversing and remanding approval of a settlement as part of plan of reorganization where there were no factual findings by the court or facts in the record sufficient for the court to make an informed, independent decision with regard to the compromise);[3] Myers v. Martin (In re Martin), 91 F.3d 389 (3d Cir. 1996) (stating that "the bankruptcy court must be apprised of all relevant information that will enable it to determine what course of action will be in the best interest of the estate.") (emphasis

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[3] "The standards for approval of a settlement under section 1123 are generally the same as those under Rule 9019. . . ." In re Coram Healthcare Corp., 315 B.R. 321, 335 (Bankr. D. Del. 2004); In re Texaco, Inc., 84 B.R. 893, 901 (Bankr. S.D.N.Y. 1988).

added); Rafool v. Goldfarb Corp. (In re Fleming Packaging Corp.), 2007 Bankr. LEXIS 4234 (Bankr. C.D. Ill. Dec. 20, 2007) ("The court may not simply accept the trustee's representation that the settlement is reasonable. Instead, the court must apprise itself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement.").

20. The relevant information required for an informed, independent determination of whether a proposed settlement is fair and in the best interests of the estate are actual facts and not conclusory statements or allegations proffered by the debtor. TMT Trailer, 390 U.S. at 437 ("To make an informed and independent judgment, however, the court needs facts, not allegations."). The Debtors offer no facts in the 9019 Motion to enable the Court to make such an informed and independent determination; instead they allege that there will be significant "cost savings" to warrant the approval of the Settlement Agreement. (9019 Motion ¶ 18-19.)

21. The Noteholders do not dispute the cost-saving benefits to the estates from not having to litigate the JPM claims related to the Savings Plan—but merely saving the cost of such litigation, without establishing the probability of success or how those costs compare to the liabilities of the associated litigation that the Debtors propose to retain, cannot itself form the basis for compromising the interests of the estates as Debtors propose here. See TMT Trailer, 390 U.S. at 435 ("Litigation and delay are always the alternative to settlement, and whether that alternative is worth pursuing necessarily depends upon a reasoned judgment as to the probable outcome of litigation.").

22. Here, not only have the Debtors failed to present any facts or evidence regarding the exposure facing the estates in the Pending Litigation that the Debtors propose to retain liability for, they have failed to address the ramifications of retaining the liability for the Pending Litigation while surrendering the Savings Plan to JPM.

23. Additionally, that Weil appears as counsel of record on the 9019 Motion raises a serious question as to whether it—and not Quinn, which was retained to handle litigation involving JPM due to Weil's conflicts—was Debtors' primary advisor on the terms of the settlement and whether such advice fundamentally impugns the process by which Debtors agreed to those terms. It is difficult to imagine that a law firm could conclude that either a current-client conflict or a conflict with its business interests bars it from adequately representing its client's interests in litigating an issue, and yet also conclude that it can adequately represent those interests in settling the same issue.

24. "[B]ankruptcy court approval requires a bankruptcy judge to assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." In re Martin, 91 F.3d at 393. How can the Court determine if the costs of further litigating whether JPM purchased the Savings Plan from the FDIC, and the Pending Litigation with it, outweigh the potential liability associated with the Pending Litigation if the Debtors do not offer any evidence as to the potential exposure or probability of success of the Pending Litigation? The Court cannot assess or balance the competing interests in this case because the Debtors have not given the Court enough facts.

25. The glaring lack of facts in the 9019 Motion regarding issues that are central to an informed assessment of the proposed Settlement Agreement prompts a question as to whether the Debtors have performed the kind of analysis required to enter not only this Settlement Agreement, but any settlement regarding the Savings Plan. Rather than a compromise, the Settlement Agreement appears on its surface to be a mere surrender to JPM. That is, JPM wanted to assume the Savings Plan without any of the associated Pending Litigation, and the Debtors seem to have given JPM what it wanted without receiving much more than simply not having to litigate the issue further.

26. Where a proposed settlement agreement is so one-sided that it is no longer a compromise of a dispute but rather just a surrender of the debtor's rights, the court should not approve the proposal. Cf. In re Selected Cases in Which the Chapter 13 Trustee Seeks Relief Against Countrywide Home Loans, Inc., 396 B.R. 138, 144 (Bankr. W.D. Pa. 2008) (finding a proposed settlement too favorable to one side and stating, "[p]erhaps there is a justifiable reason for such a one-sided allocation, but the information which has been submitted to date . . . is not sufficient to make that case."). A debtor owes fiduciary duties to the estate and all creditors. See, e.g., In re Martin, 91 F.3d at 394. The Debtors cannot forfeit rights of the estate in dereliction of their duty to protect those interests—especially here, where retaining the liability for the Pending Litigation could wind up costing the estates hundreds of millions of dollars.

27. The lack of disclosure regarding how the Debtors have arrived at their decision to reverse their previous position and now retain the Pending Litigation leaves the Court with little alternative but to deny the settlement, given that it seems

singularly favorable to JPM, without justifying such radical concessions.

28. Another factor that courts consider in determining the reasonableness of a proposed settlement is the "the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." In re Heritage Org., LLC, 375 B.R. 230, 260 (Bankr. N.D. Tex. 2007) (quoting In re Cajun Elec. Power Coop., Inc., 119 F.3d 349, 356 (5th Cir. 1997)). Here, because the Debtors failed to include other parties in the negotiation process and the arm's length nature of the negotiations received no attention in the 9019 Motion, there can be no assurance that the conflicts inherent in these Chapter 11 Cases—that many of the former officers of Debtors are now officers in JPM—did not unfairly prejudice the proposed settlement given the purported compromise that gives JPM essentially what it wanted and requires JPM to give up very little in return.

VI. CONCLUSION

29. WHEREFORE, based on the foregoing, the Noteholders respectfully request that this Court deny the 9019 Motion as an unreasonable compromise of the disputed liabilities related to the Savings Plan and thus not in the best interests of the Debtors' estates.

Dated: July 15, 2009

Wilmington, Delaware

FOX ROTHSCHILD LLP

By: _____

Jeffrey M. Schlerf, Esq. (No. 30 7)
Eric M. Sutty, Esq. (No. 4007)
Citizens Bank Center
919 North Market Street, Suite 1600
Wilmington Delaware 19801
Telephone: (302) 654-7444

-and-

WHITE & CASE LLP
Thomas E Lauria
Wachovia Financial Center
200 South Biscayne Boulevard
Suite 4900
Miami, FL 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

-and-

Of Counsel:
KASOWITZ BENSON TORRES &
FRIEDMAN LLP
Paul M. O'Connor III
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700

Attorneys for the Washington Mutual, Inc. Noteholders Group