IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: WASHINGTON MUTUAL, INC., *et al*., Debtors.	Chapter 11 Case No. 08-12229 (MFW) (Jointly Administered) **Hearing Date: August 24, 2009** **Objection Deadline: August 17, 2009**

MEMORANDUM OF LAW OF DENISE CASSESE, GEORGE RUSH AND RICHARD SCHROER IN FURTHER SUPPORT OF MOTION FOR RELIEF FROM AUTOMATIC STAY TO CONTINUE PRE-PETITION CLASS ACTION AGAINST WASHINGTON MUTUAL, INC.

Denise Cassese, George Rush and Richard Schroer (collectively "Movants"), who are each Plaintiffs and certified representatives for the nationwide class certified by the United States District Court for the Eastern District of New York in the action styled, *Cassese, et al. v. Washington Mutual, Inc., et al*, (EDNY Case No. 05-cv-2724) (hereafter the "Pre-Petition Class Action"), by their counsel, hereby submit their reply brief in further support of their motion to modify the automatic stay of 11 U.S.C. §362(a) (*Document No. 857* or "Movants Opening Br.") to allow them to continue the litigation of the Pre-Petition Class Action against Washington Mutual, Inc. ("WMI" or "Debtor"), pending in the United States District Court for the Eastern District of New York since July 6, 2005. This reply memorandum of law also responds to the objection to Movants' motion filed by WMI on August 17, 2009 ("WMI Br."). No other Debtor, party or interested person has objected to Movants' motion.

Preliminary Statement

1. Debtor does not dispute that the Pre-Petition Class Action was pending for 3½ years before this bankruptcy action commenced, is premised on acts, practices and conduct by WMI and its formerly wholly-owned and controlled subsidiaries (most of whom with which WMI shared officers and directors) that are alleged to violate federal, state and common laws and that Judge Spatt in the Eastern District of New York has gained substantial knowledge over the parties' disputes, claims and defenses that will allow that district court to most efficiently determine the liabilities (if any) of all defendants, including WMI.

2. WMI does not attempt to distinguish statements from both Houses of Congress endorsing the conclusion that the automatic stay should be modified to allow pre-petition litigation to proceed in its original forum. WMI also fails to adequately distinguish the many decisions both relying on the statements of Congress and finding "cause" to exist under 11 U.S.C. §362(d) permitting pre-petition litigation (including class actions) to continue in the non-bankruptcy forum where courts are most familiar with the actions and underlying claims.

3. In a transparent effort to overcome the "success on the merits" element of the balancing test for lifting the automatic stay, WMI misstates the record in the Pre-Petition Class Action and avoids mention of the decisions holding that Movants need only show a "very slight" probability of ultimate success. *See* Movants Opening Br. ¶¶38-41. In fact, Movants have thus far successfully prosecuted at least seven counts of their *Second Amended Class Action Complaint* ("SAC") against WMI. It is also wrong, and egregious, for WMI to argue (which it has) that Judge Spatt failed to extend his decision certifying the class to WMI for any reason other than the existence of the automatic stay. Judge Spatt clarified this point explicitly in his class certification decision. *Cassese v. Washington Mutual, Inc.*, 255 F.R.D. 89 (E.D.N.Y.

2008) ("In addition, in light of the bankruptcy filing of WMI, the plaintiffs' counsel represented that the plaintiffs did not oppose a modification of their proposed class definition to exclude WMI until such time as the automatic bankruptcy stay expired.").

4. WMI's claims of the administrative and financial burdens that would ensue from lifting the automatic stay are self-serving arguments that cannot be reconciled with its prior actions. Leaving aside the numerous times WMI has itself sought relief from the automatic stay to further the defense of other pre-petition class actions pending outside this Court, and litigation filed by WMI outside this Court, and the many lawyers WMI has retained and its paying to prosecute and/or defend WMI outside this Court, efficiency is clearly best served by allowing Judge Spatt to continue presiding over the Pre-Petition Class Action pending in the Eastern District of New York since July 6, 2005. The Third Circuit and this Court have held that the possibility of duplicative proceedings in a later-filed bankruptcy (whether in the form of a new adversarial proceeding or a claims estimation hearing) is inferior to allowing a pre-petition lawsuit to continue in its original forum. *See Rocco v. Rocco*, 255 Fed. Appx. 638, 2007 U.S. App. LEXIS 27445, *6-7 (3d Cir. Nov. 28, 2007); *In re Rexene Prods. Co. (Izzarelli v. Rexene Prods. Co.)*, 141 B.R. 574, 575 (D. Del. 1992) Movants Opening Br. at ¶¶ 36, 37, n.7.

5. Lastly, WMI's claim that by granting Movants' motion "will open the floodgates" to a host of <u>non-existent</u> motions to lift the automatic stay is not only the height of speculation, but insulting to the ability and discretion of this Court to properly apply Section 362(d). Contrary to WMI's argument, that fact that approximately 180 other pre-petition litigations exist where WMI is a defendant, and <u>none have filed motions seeking relief from the automatic stay</u> in the nearly 11 months since this bankruptcy action was filed, demonstrates that the burdens and prejudices proffered by WMI are untrue and exaggerated. The fact that two motions to lift the

stay were filed after Movants filed their motion (both granted by this Court), further shows that other claimants are not awaiting resolution of Movants' motion to pursue their rights.

Debtor Has Twice Sought Relief From the Automatic Stay To Assist the Defense of a Putative Class Action a Derivative Action and Other Actions

6. WMI opposes Movants' motion to lift the automatic stay, but has twice sought relief from the automatic stay to allow its insurance providers to pay defense costs in a putative class action pending in the United States District Court for the Western District of Washington. *See Document Nos. 365, 750.* WMI fails to reconcile its conflicting positions.

7. As stated by Debtor:

> As detailed move fully below, like the motion requesting the relief granted by the First Stay Modification Order, the purpose of this motion is to remove any impediments caused by the bankruptcy filing to the ability of WMI's third party insurers to immediately commence payment of the outstanding and ongoing defense costs and fees that current or former directors and former officers of WMI or WMI's subsidiaries [] have incurred and are incurring in connection with their role as defendants in the ERISA Litigation.

Document No. 750 at ¶2.

8. WMI argued in support of its motions that cause existed pursuant to 11 U.S.C. §362(d) to modify and lift the automatic stay.

9. This Court granted both motions to modify and lift the automatic stay filed by WMI. *See Document No. 445* (Dec. 16, 2008); *Document No. 894* (April 14, 2009). As a result, hundreds of thousands of dollars, if not more, in insurance proceeds belonging to Debtors' bankruptcy estate have been paid to assist the continuation of class action and derivative litigation pending in the United States District Court for the Western District of Washington.

Debtors Have Commenced Litigation Outside This Bankruptcy Court

10. WMI contends that Movants' motion should be denied insofar as it will cause the expenditure of monies and divert the time and attention of Debtor and its many, many lawyers

and law firms from this bankruptcy proceeding. Those arguments fall away upon the recollection that WMI has commenced litigation outside this Bankruptcy Court, which presumably is being funded with assets from the Debtor's bankruptcy estate.

11. On March 20, 2009, WMI commenced a lawsuit in the United States District Court for the District of Columbia against the Federal Deposit Insurance Company. That action is styled *Washington Mutual, Inc. v. FDIC* (Case No. 09-cv-00533-RMC). This Court has referred to that action as the "DC Action," wherein WMI alleges 5 counts against the FDIC. *See Docket No. 1219* (June 24, 2009).

12. According to the docket report for the DC Action, WMI has retained the services of 6 lawyers from 2 law firms to prosecute its claims in the DC Action. Those firms are Weil, Gotshal & Manges LLP and Quinn Emanuel Urquhart Oliver & Hedges, LLP.

13. Both firms submit claims for compensation to be paid from the WMI's bankruptcy estate. For example, Quinn Emanual's "First Interim Fee Application" sought the payment of $1,655,505 in fees and expenses incurred from April 3, 2009 through May 30, 2009. *Document No. 1412*.[1] *See also Document No. 1462 ("Fifth Monthly Application of Weil, Gotshal & Manges LLP for Allowance of Compensation for Services Rendered and for Reimbursement of Expenses as Co-Counsel to the Debtors and Debtors in Possession for the Period from February 1, 2009 through April 30, 2009").*

This Court Has Granted Two Subsequent Motions to Modify the Automatic Stay

14. Subsequent to the filing of Movants' motion, two other motions to modify and lift the automatic stay were filed in this Court.

15. The first subsequent motion was filed by MSG Media, a division of Madison

[1] Movants express no opinion as to Quinn Emanuel's compensation request, and acknowledge that Quinn Emanuel may be providing services to Debtors in addition to representation in the DC Action.

Square Garden, L.P. *Docket No. 983*. This Court granted that motion to modify and lift the automatic stay, upon "having determined that the legal and factual bases set forth in the Motion and at the Hearing establish sufficient cause for the relief granted herein (to the extent applicable and to the extent such relief is necessary); and for the reasons stated by the Court on the record at the Hearing." *Document No. 1057* (May 20, 2009).

16. A motion to modify and lift the automatic stay was also filed by The Relizon Company. *Document No. 1112*. This Court granted that motion as well. *Document No. 1396* (July 28, 2009).

Cause To Lift the Automatic Stay Is Generally Found To Exist In Pre-Petition Litigation

17. Following the lead of Congress, the courts generally find "cause" present under Section 362(d) to permit pre-petition litigation to be litigated in its original forum. *See* Movants Opening Br. 25-27, 34, 36.

18. The legislative history from the House of Representatives discussing "cause" to satisfy relief from the automatic stay includes the following:

> As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case .... the facts of each request will determine whether relief is appropriate under the circumstances.

H.R. Rep. No. 595, 95th Cong., 1st Sess., 343 (1977), *Reprinted in* (1978) U.S. Code Cong. & Ad. News 6300. A Senate report discussing the same topic noted:

> It will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere.

19. Senate Rep. No. 989, 95th Cong., 2nd Sess., 50, *Reprinted in* (1978) U.S. Code

Cong. & Ad. News 5836. *Accord In re Rexene Prods.*, 141 B.R. at 576 ("The legislative history indicates that cause may be established by a single factor such as 'a desire to permit an action to proceed in another tribunal,' or lack of any connection with or interference with the pending bankruptcy case.[] H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 343-344 (1977)."); *SCO Group, Inc*., 395 B.R. 852, 857 (Bankr. D. Del. 2007) (Cause exists "'when necessary to permit litigation to be concluded in another forum, particularly if the nonbankruptcy suit involves multiple parties or is ready for trial.'") (quoting Lawrence P. King, *Collier on Bankruptcy 362.07[3][a]* (15th ed. 2006)); *In re: Provincetown Boston Airline, Inc., (Provincetown Boston Airline, Inc. v. Miller)*, 52 B.R. 620, 623 (M.D. Fla. 1985) ("[T]he courts in numerous jurisdictions have recognized Congress' clear intention to allow previously filed actions to continue despite the automatic stay provisions of §362(a)."); *In re Continental Airlines, Inc. (American Airlines, Inc. v. Continental Airlines, Inc.)*, 152 B.R. 420, 426 (D. Del. 1993).[2]

WMI Has Misstated the Record in the Pre-Petition Class Action

20. The balancing test applied by this Court requires Movants to demonstrate only a "very slight" probability of success on the merits to gain relief from the automatic stay. *In re SCO Group*, 395 B.R. at 859; *In re Continental Airlines*, 152 B.R. at 426; *In re Rexene Prods,* 141 B.R. at 578 (the required showing as to movant's probability of success on the merits is "very slight."). WMI does not deny these decisions recite the appropriate standard to apply this element of the balancing test.

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[2] *See also United States v. Inslaw, Inc*., 932 F.2d 1467, 1474 (D.C. Cir. 1991) ("Like the defendant in *Northern Pipeline*, the Department has been hauled in front of the bankruptcy court simply because Inslaw filed for bankruptcy, and Inslaw has succeeded in convincing the bankruptcy court to adjudicate its contract, tort (conversion), trade secret, and administrative law (impartiality) disputes with the Department, although the court had no basis under the Bankruptcy Code to do so. Because the Department has taken no actions since the filing of the bankruptcy petition that violate the automatic stay, the bankruptcy court must, as both a statutory and constitutional matter, defer to adjudication of these matters by other forums.") (Emphasis added).

21. Perhaps realizing its inability to dispute the strength of Movants' claims, Debtor has taken a few "liberties" with the decisions rendered in the Pre-Petition Class Action, which require correction.

22. First, WMI states that the Eastern District of New York granted dismissal of certain claims against all "Defendants." WMI Br. ¶8. In fact, only a single defendant (WMBFA) filed a motion to dismiss any of Movants' claims alleged in the SAC. In his decision resolving WMBFA's motion to dismiss, Judge Spatt sustained five claims against WMBFA, and in a reconsideration decision permitted the re-pleading of another claim. *See* Movants Opening Br. ¶¶ 6-8 (citing decisions). Perhaps more pertinent to the instant motion, WMI did not move to dismiss any claims alleged in the SAC, and thus the Court has not resolved any motion to dismiss filed by WMI (or any defendant other thank WMBFA). *Id*.

23. Second, WMI's contention that Judge Spatt's class certification decision held that "Movants do not have claims against [WMI, WMBfsb, WMHLI and state-chartered WMB] …", WMI Br. at 11, 32, is incorrect for numerous reasons: i) Judge Spatt's class certification decision resolved only issues of class certification and not the merits of any "claim" as to any defendant; ii) even if Judge Spatt had not certified a class of absent class members, a denial of class certification would have had no effect on the claims of the named plaintiffs (here Movants); and iii) Judge Spatt explicitly reserved all findings as to WMI due to the existence of the automatic stay. *Cassese*, 255 F.R.D. 89 (E.D.N.Y. 2008) ("In addition, in light of the bankruptcy filing of WMI, the plaintiffs' counsel represented that the plaintiffs did not oppose a modification of their proposed class definition to exclude WMI until such time as the automatic bankruptcy stay expired.").[3] For that same last reason, WMI's belief that Judge Spatt's class

[3] It is also incorrect that Judge Spatt's declined to extend certification over defendants WMBfsb, WMHLI and state-chartered WMB, each then a subsidiary of WMB. However, that issue is irrelevant for the instant motion.

certification decision held that Movants lack standing to assert their individual and representative claims against WMI is also clearly false. WMI Br. ¶26.

24. Third, Movants' class certification motion as to WMI is fully-briefed and ready for decision by Judge Spatt should this Court grant Movants' motion. *Cassese*, 255 F.R.D. 89 (E.D.N.Y. 2008) ("In addition, in light of the bankruptcy filing of WMI, the plaintiffs' counsel represented that the plaintiffs did not oppose a modification of their proposed class definition to exclude WMI until such time as the automatic bankruptcy stay expired.") (Emphasis added). WMI's belief that Movants would be required to appeal Judge Spatt's class certification decision prior to that court deciding the class certification motion as to WMI is without basis. *See* WMI Br. ¶¶ 26, 30.

25. Fourth, WMI contends that Movants' motion to lift the automatic stay is inappropriate because the Pre-Petition Class Action is not ready for resolution on the merits of Movants' claims. WMI Br. ¶27. However, WMI also represents that it is ready to move for summary judgment in the Pre-Petition Class Action. WMI Br. ¶10.

26. Fifth, the fact that WMI believes (*see* WMI Br. ¶¶ 30, 32) itself immune from liability based the alleged wronging committed in the names of its wholly-owned and controlled subsidiaries, from which activities WMI endorsed, profited and reported, is a matter of substantial disagreement among the parties, has been briefed before Judge Spatt, and is ripe for adjudication by Judge Spatt. Contrary to WMI's position, numerous courts have certified classes against WMI or denied motions to dismiss borrowers' claims in class actions naming WMI as a defendant. *See Alexander v. Washington Mut., Inc*., 2008 U.S. Dist. LEXIS 50523 (E.D. Pa. June 30, 2008) (motion to dismiss claims against WMI, WMBfsb and WMBFA denied) *reconsid. denied* 2008 U.S. Dist. LEXIS 61256 (E.D. Pa. Aug. 4, 2008); *In re Washington Mut.*

RESPA Fee Litig. (*McElaney v. Washington Mut. Inc.*), Order (E.D.N.Y. 02-CV-5944 (SMG) June 6, 2008) (settlement class preliminarily certified in action against WMI, WMHLI and WMB); *McKell v. Washington Mut., Inc.*, 49 Cal. Rptr. 3d 227, 234 (Cal. App. Sept. 18, 2006) (reversing decision granting demurrer of claims against "Washington Mutual, Inc., and its divisions and/or subsidiaries"). *See also Brandow v. Washington Mut. Bank*, 2008 Ohio 1714, 2008 Ohio App. LEXIS 1491, *7 (Ohio Ct. App. Apr. 10, 2008) (affirming class for imposing untimely Recording Fees against "Washington Mutual Bank (or Washington Mutual Home Loans, Inc. or any other entity acquired or merged with or otherwise now a part of Washington Mutual Bank, including any of its affiliates, subsidiaries, and/or related lending institutions)").

The New York District Court Has Ordered the
Pre-Petition Class Action To Resume Litigation In September 2009

27. Shortly after Movants filed their motion to modify and lift the automatic stay in this Court to proceed against WMI in the Pre-Petition Class Action, Judge Spatt granted a stay of the Pre-Petition Class Action until 180 days after March 14, 2009. That stay was requested by the FDIC, as Receiver for Washington Mutual Bank, who is a defendant in the Pre-Petition Class Action.

28. Following the order staying the Pre-Petition Class Action until September 2009, counsel for Movants and WMI stipulated to adjourn Movants' motion from the June omnibus hearing to the August 24, 2009 omnibus hearing scheduled by this Court. *See Document No. 1003*.

29. In his decision staying of the Pre-Petition Class Action through September 2009, Judge Spatt disclosed his intention to subsequently permit the litigation to proceed. He also believed that efficiency would be best served by keeping all parties on the same schedule. *See Cassese v. Washington Mutual, Inc.*, Memorandum of Decision and Order at 11-12 (E.D.N.Y.

Case No. 05-cv-2724, April 6, 2009). To the extent Movants' motion to lift the stay against WMI is granted, Judge Spatt extended that finding to the plaintiffs' claims against WMI.

30. Movants agree that judicial economy and efficiency will be best served if they are permitted to resume their claims against WMI in September 2009, the same time Movants' case is permitted to proceed against the other defendants (all prior WMI subsidiaries) in the Pre-Petition Class Action.

The Claims Asserted In the Pre-Petition Class Action Are Non-Core

31. WMI does not provide any support for its belief that the claims asserted in the Pre-Petition Class Action, premised on events that occurred prior the filing of this bankruptcy action, are core claims. To avoid providing support for its position, WMI contends the issue is irrelevant. WMI Br. ¶22.

32. Movants, on the other hand, have provided this Court with statutory and case law support for its position that the claims asserted in the Pre-Petition Class Action are non-core claims. *See* Movants Opening Br. ¶¶ 18-22. Movants agree that the instant motion is a core proceeding.

33. WMI attempts to paint Movants' discussion of the core / non-core as an argument that this Court is completely without jurisdiction to resolve the underlying claims in the Pre-Petition Class Action. WMI Br. ¶13. Correctly stated, the bankruptcy code and case law indicates that this Court possesses limited jurisdiction over non-core matters. As it pertains to granting other pre-petition litigation relief from the automatic stay, the distinction has been held to be relevant. *See United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Ass'n (In re United States Lines, Inc.)*, 197 F.3d 631, 640 (2d Cir. 1999) ("However, by not granting the bankruptcy court exclusive jurisdiction over non-core matters, 'it is clear that in

1984 Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court.'") (quoting *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1157 (3d Cir. 1989)).[4]

34. Regardless of whether the claims asserted in the Pre-Petition Class Action are core or non-core, Movants' have argued that efficiency and the balancing test for applying Section 362(d) favor granting relief from the automatic stay.

Dated: Wilmington, Delaware
August 19, 2009

Respectfully submitted,

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[4] *See also Chabot v. Wash. Mut. Bank (In re Chabot)*, 369 B.R. 1, 18 (Bankr. D. Mont. 2007) ("A motion to modify or terminate the automatic stay is a core bankruptcy proceeding, wholly separate and distinct from WaMu's foreclosure proceedings. By itself, modification or termination of the stay does not advance WaMu's foreclosure proceedings at all. WaMu might proceed with its foreclosure remedies after obtaining relief from the stay or it may elect to do nothing, or it may reach a settlement or other resolution with the Debtor. WaMu's motion to modify stay filed pursuant to a specific provision of the Bankruptcy Code, 11 U.S.C. §362(d), is not in any respect part of WaMu's process of seeking non-judicial foreclosure proceedings.").

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