

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re : **Chapter 11**

:

WASHINGTON MUTUAL, INC., et al.,¹ : **Case No. 08-12229 (MFW)**

: **(Jointly Administered)**

:

Debtors. : **Hearing Date: December 17, 2010 at 10:30 a.m. (ET)**

: **Obj. Deadline: November 29, 2010 at 4:00 p.m. (ET)**

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**DEBTORS' MOTION PURSUANT TO SECTION 554(a)
OF THE BANKRUPTCY CODE FOR AUTHORIZATION TO
ABANDON WMI'S EQUITY INTERESTS IN WASHINGTON MUTUAL BANK**

Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment"), as debtors and debtors in possession (together, the "Debtors"), hereby file this motion (the "Motion") for an order authorizing, but not directing, WMI and its chapter 11 estate to abandon their equity interests in Washington Mutual Bank ("WMB"), and respectfully represent:

Jurisdiction

1. 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.

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.



Background

2. On September 26, 2008 (the "Commencement Date"), WMI and its wholly-owned subsidiary, WMI Investment, each commenced with this Court a voluntary case pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") (together, the "Chapter 11 Cases"). The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On October 3, 2008, the Court entered an order, pursuant to Bankruptcy Rule 1015(b), authorizing the joint administration of the Chapter 11 Cases.

3. On October 15, 2008, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors' Committee"). On January 11, 2010, the U.S. Trustee appointed an official committee of equity security holders (the "Equity Committee") in these Chapter 11 Cases.

WMI's Business

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

5. On September 25, 2008, the OTS, by order number 2008-36, closed WMB, appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for WMB (the "FDIC Receiver") and advised that the FDIC Receiver was immediately taking possession of WMB's assets (the "Receivership"). Immediately after its appointment as receiver, the FDIC sold substantially all the assets of WMB, including the stock of WMBfsb, to JPMorgan Chase

Bank, National Association (“JPMC”) pursuant to that certain Purchase and Assumption Agreement, Whole Bank, dated as of September 25, 2008 (the “Purchase Agreement”).

6. WMI’s assets include all the outstanding stock of WMB (the “WMB Stock”), its interest in its non-banking subsidiaries, and more than \$4 billion of cash that WMI and its non-banking subsidiaries (including WMI Investment) had on deposit at WMB and WMBfsb immediately prior to the time the FDIC was appointed as receiver. WMI continues to own all the WMB Stock and WMB continues to be a member of the WMI Tax Group (as defined below).

7. On March 20, 2009, as set forth in the Debtors’ complaint (the “Complaint”) filed in the United States District Court for the District of Delaware (the “D.C. Court”), the Debtors asserted numerous liquidated and unliquidated claims against the FDIC, in its capacity as receiver for WMB and in its corporate capacity, on account of WMI’s status as a creditor.² These claims totaled in excess of \$6.8 billion, and together with claims by other parties against the FDIC, far exceeded the assets of the WMB receivership. In the Complaint, the Debtors also asserted certain claims on account of WMI’s status as the holder of the WMB Stock (the “WMB Stock Claims”).

8. Most recently, on October 6, 2010, the Debtors filed their *Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* (as it has been and may be amended, the “Plan”), and a related disclosure statement (the

² In its capacity as a creditor, WMI claimed, among other things, that (i) the FDIC dissipated WMB’s assets by selling substantially all the assets of WMB to JPMC rather than liquidating WMB’s assets, and thus the FDIC breached its statutory duty to maximize the net present value return of such assets, and therefore owes damages to WMI; (ii) the FDIC’s wasting of WMB’s assets constitutes a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution; (iii) the FDIC’s refusal to compensate WMI for property taken in the receivership constitutes a conversion of WMI’s property, actionable under federal law; and (iv) the FDIC’s refusal to compensate WMI for property taken in the Receivership constitutes a conversion of WMI’s property.

“Disclosure Statement”). Embodied in the Plan is a proposed Amended and Restated Settlement Agreement, dated October 6, 2010 (the “Global Settlement Agreement”) that resolves certain disputes among the Debtors, JPMC, the FDIC Receiver, the FDIC in its corporate capacity, and certain other parties in interest. Pursuant to the Global Settlement Agreement, on the effective date thereof (which will also be the effective date of the Plan), the Debtors will be barred from pursuing the litigation pending in the D.C. Court, as part of the general release of the Debtors’ claims against the FDIC. See Global Settlement Agreement, § 5.3(c).

9. By orders, dated July 22, 2010 and July 28, 2010, the Court approved the appointment of Joshua R. Hochberg, as examiner (the “Examiner”), to investigate (a) the claims and assets that may be property of the Debtors’ estates that are proposed to be conveyed, released or otherwise compromised and settled under the Plan and the Global Settlement Agreement, including all Released Claims, as defined in the Global Settlement Agreement, and the claims and defenses of third parties thereto and (b) such other claims, assets and causes of action which will be retained by the Debtors and/or the proceeds thereof, if any, distributed to creditors and/or equity interest holders pursuant to the Plan, and the claims and defenses of third parties thereto. On November 1, 2010, the Examiner published his report (the “Examiner’s Report”), concluding that the consideration to be paid to the Debtors’ estates pursuant to the Global Settlement Agreement, in the form of assets or releases to the Debtors, is reasonable. (See Examiner’s Rep. at 1.) The Examiner Report neither discusses nor appears to consider or attribute value to the WMB Stock Claims in assessing the reasonableness of the proposed settlement.

10. On October 21, 2010, the Court entered an order approving the Disclosure Statement, and establishing solicitation and voting procedures with respect to the Plan. A

hearing to consider confirmation of the Plan, including approval of the Global Settlement Agreement, is scheduled to commence on December 1, 2010.

Consolidated Federal Income Tax Filings and Worthless Stock Deduction

11. WMI and its domestic corporate subsidiaries (collectively, the “WMI Tax Group”), including WMB, join in the filing of consolidated federal income tax returns.

Notwithstanding the institution of the receivership proceeding and subsequent sale of WMB’s assets to JPMC pursuant to the Purchase Agreement, WMB continues to be a member of the WMI Tax Group by reason of WMI’s continued right, title, and interest in the WMB Stock.

12. The Debtors are precluded from claiming a worthless stock deduction in respect of the WMB Stock so long as WMB remains a member of the WMI Tax Group (or until the WMB receivership is completed and WMB distributes all of its remaining assets). Treas. Reg. §§ 1.165-5(i) and 1.1502-80(c). Pursuant to governing Treasury regulations, however, upon abandoning the WMB Stock, WMI should be able to claim a worthless stock loss deduction (in the estimated amount of approximately \$5 billion) on its consolidated federal income tax return for the taxable year in which the abandonment occurs.

13. The potential value of the worthless stock deduction depends, in significant part, on the deduction being allowed prior to the effective date of the Plan (the “Effective Date”). Section 382 of the Internal Revenue Code limits the deduction of certain pre-change losses recognized subsequent to the date of an “ownership change.” See 26 U.S.C. § 382. Pursuant to section 382, if a corporation experiences an ownership change, the amount of its pre-change losses – including certain losses or deductions that are economically accrued but unrecognized as of the date of the ownership change – that may be utilized to offset post-change income generally is subject to an annual limitation. See *id.* at § 382(a), (h). If the

worthless stock deduction is recognized prior to (but in the same taxable years as) the date of the ownership change, the resulting net operating loss for the change year may be pro-rated between the pre- and post-change portions of the taxable year, such that the post-change portion would not be subject to the annual limitation. See id. at § 382(d)(1); Treas. Reg. § 1.382-6.

14. Based on their valuation of the WMB Stock, the Debtors have determined that the WMB Stock (including the WMB Stock Claims) is, in and of itself, worthless, and furthermore, that the potential significant tax savings that may result from a worthless stock loss deduction upon the abandonment of the WMB Stock justifies its abandonment prior to the Effective Date.

Relief Requested

15. By this Motion, the Debtors seek, pursuant to section 554(a) of the Bankruptcy Code, an order authorizing, but not directing, WMI to abandon all its rights, title, and interest with respect to the WMB Stock to the FDIC, as receiver of WMB, including any recovery rights with respect thereto or that derive therefrom that WMI holds in its capacity as shareholder of WMB.³

Authorizing the Debtors and Their Estates to Abandon the WMB Stock, in Their Sole Discretion, Is Warranted

16. Section 554(a) of the Bankruptcy Code provides that a debtor in possession “after a notice and hearing . . . may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11 U.S.C. § 554(a). The right to abandon property is, except for certain exceptions inapplicable in the present case, unfettered. Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot., 474 U.S. 494, 507

³ Unless and until the Debtors abandon the WMB Stock, the Debtors reserve all rights with respect to all of their claims arising from and with respect to the WMB Stock, whether or not asserted, including, without limitation, the WMB Stock Claims, and nothing herein is intended to suggest that those claims are not legally or factually valid.

(1986); In re Unidigital, Inc., et al., 262 B.R. 283, 287 (Bankr. D. Del. 2001) (explaining that, “in order to fit into the Midlantic exception, the debtor must be attempting to abandon property in contravention of state or local laws or regulations designed to protect the public”) (citation omitted).

17. It is well-established that a debtor may abandon property in which no equity or value remains. See, e.g., In re Res. Tech. Corp., 430 F.3d 884, 887 (7th Cir. 2005) (“The normal use of § 554 is to give up an interest in real estate that is burdened by a debt so large that the equity value is negligible or negative.”); In re Feinstein Family P’ship, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2000) (“It is now almost universally recognized that where the estate has no equity in a property, abandonment is virtually always appropriate because no unsecured creditor could benefit from the administration.”) (citations omitted); see also In re Pilz Compact Disc, Inc., 229 B.R. 630, 645 (Bankr. E.D. Pa. 1999) (authorizing debtor to abandon inventory that was not a useful asset to the bankruptcy estate). With regard to the abandonment of a cause of action specifically, a court need not determine whether a debtor will prevail on its claim, but need only find that the debtor exercised “business judgment reflecting good faith upon a reasonable basis within the scope of the trustee’s authority.” In re Fulton, 162 B.R. 539, 540 (Bankr. W.D. Mo. 1993).

18. The Debtors have determined that the WMB Stock is of no value to the Debtors’ estates. The Debtors submit that the WMB Stock is illiquid and that WMB’s liabilities significantly exceed the assets remaining in the Receivership. The Debtors also have considered the strengths and weakness of the pending WMB Stock Claims and the likelihood of prevailing thereon. Due to the complexity of the WMB Stock Claims, and the related litigation, the

litigation risks associated with pursuing such claims, and the insolvency of the Receivership, the Debtors have concluded that the WMB Stock Claims have no realizable value.⁴

19. In addition, in contrast to the worthless nature of the WMB Stock (including the WMB Stock Claims), the Debtors may recognize potential tax savings from incurring a worthless stock loss deduction prior to the Effective Date. By abandoning the WMB Stock prior to, but in the same taxable year as, the Effective Date, WMI and its chapter 11 estate will be able to recognize for federal income tax purposes the precipitous devaluation of the WMB Stock as a loss, a portion of which will not be subject to the annual limitation under the section 382 of the Internal Revenue Code. Such loss may be carried forward and potentially applied against income in futures years to substantially reduce the tax burden of WMI, as a Reorganized Debtor. On the other hand, if the loss (estimated at approximately \$5 billion) is recognized after the Effective Date, it would be useable annually only to the extent of approximately \$5 million per year, at best (based on the resulting section 382 annual limitation). Thus, the Debtors submit that authorizing WMI to abandon the WMB Stock prior to the Effective Date will enable WMI to potentially recognize significant value from the worthless stock deduction.

20. Consequently, the Debtors submit that advance authorization to abandon the WMB Stock, if and when WMI believes abandonment is appropriate, is warranted. Because the WMB Stock has no independent value, and likely will continue to be of inconsequential value to WMI's estate going forward, the requirements for abandonment are satisfied at such time as WMI may choose to abandon the WMB Stock. Accordingly, granting advance

⁴ In the event that WMI does not abandon the WMB Stock, and the Court approves the Global Settlement Agreement, on the effective date thereof, the WMB Stock Claims (along with all the Debtors' other claims asserted against the FDIC) will be deemed released.

authorization to abandon the WMB Stock is not adverse to the interests of WMI's estate or its creditors, and is necessary to potentially realize the benefits identified above.

21. Based upon the foregoing, the Debtors submit that that the relief requested is appropriate.

Notice


22. No trustee has been appointed in these Chapter 11 Cases. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) counsel for the Creditors' Committee; (iii) counsel for the Equity Committee; and (iv) parties entitled to receive notice in these Chapter 11 Cases pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, WMI submits that no other or further notice need be provided.

No Previous Request

23. No previous request for the relief sought herein has been made to this or any other Court.

WHEREFORE the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as it deems just and proper.

Dated: November 12, 2010
Wilmington, Delaware



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ATTORNEYS TO THE DEBTORS
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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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In re	: Chapter 11
	:
WASHINGTON MUTUAL, INC., <u>et al.</u>,¹	: Case No. 08-12229 (MFW)
	: (Jointly Administered)
	:
Debtors.	: Hearing Date: December 17, 2010 at 10:30 a.m. (ET)
	: Obj. Deadline: November 29, 2010 at 4:00 p.m. (ET)
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NOTICE OF MOTION AND HEARING

PLEASE TAKE NOTICE that on November 12, 2010, the above-captioned debtors and debtors in possession (the “Debtors”) filed the **Debtors’ Motion Pursuant to Section 554(a) of the Bankruptcy Code for Authorization to Abandon WMI’s Equity Interests in Washington Mutual Bank** (the “Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

PLEASE TAKE FURTHER NOTICE that any objections or responses to the Motion must be filed in writing with the Bankruptcy Court, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon and received by the undersigned counsel for the Debtors on or before **November 29, 2010 at 4:00 p.m. (ET)**.

PLEASE TAKE FURTHER NOTICE that, in the event that one or more responses to the Motion are timely filed, the Motion shall be considered at a hearing before The Honorable Mary F. Walrath at the Bankruptcy Court, 824 North Market Street, 5th Floor, Courtroom 4, Wilmington, Delaware 19801 on **December 17, 2010 at 10:30 a.m. (ET)**.

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

PLEASE TAKE FURTHER NOTICE THAT IF NO RESPONSES TO THE
MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH
THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE RELIEF
REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: November 12, 2010
Wilmington, Delaware



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*Attorneys for the Debtors and
Debtors in Possession*

Exhibit A
Proposed Order

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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

**ORDER AUTHORIZING WASHINGTON MUTUAL, INC.
TO ABANDON ITS EQUITY INTERESTS IN WASHINGTON MUTUAL BANK**

Upon the motion, dated November 12, 2010 (the "Motion"),² of Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (together, the "Debtors"), for entry of an order, pursuant to section 554(a) of the Bankruptcy Code, authorizing, but not directing, WMI to abandon WMI's and WMI's estate's equity interests in Washington Mutual Bank ("WMB"), all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the parties listed therein, and it appearing that no other or further notice need be provided; and the Court having determined that the relief sought in the Motion is in the best interests of the Debtors, their creditors, and all parties in interest; and the Court having

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

² Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Motion.

determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefore, it is

ORDERED that the Motion is granted; and it further

ORDERED that, pursuant to section 554(a) of the Bankruptcy Code, WMI and its chapter 11 estate are authorized, in their sole and absolute discretion, at any time, to abandon their equity interests in the WMB Stock; and it is further

ORDERED that, upon WMI's and its chapter 11 estate's abandonment of the WMB Stock, WMI and its estate shall automatically be deemed to have surrendered and relinquished all of their right, title and interest to the WMB Stock, including any recovery rights and/or litigation claims with respect thereto; provided, however, that such abandonment shall not constitute a withdrawal or release of any claims asserted by WMI as a creditor of WMB against the FDIC, in its capacity as receiver for WMB or in its corporate capacity on account of WMI's status as a creditor, and shall not constitute a withdrawal or release of any rights under the Global Settlement Agreement; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order.

Dated: December __, 2010
Wilmington, Delaware

THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE