

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
Washington Mutual, Inc., <u>et al.</u> ,)	Case No. 08-12229 (MFW)
)	
Debtors.)	(Jointly Administered)
)	Re: D.I. 11032
)	
)	Hrg Date: March 25, 2013

OBJECTION AND JOINDER OF CERTAIN CLAIMANTS TO WMI LIQUIDATING TRUST’S MOTION FOR LEAVE TO AMEND THE FIFTH, SIXTH, SEVENTY-NINTH, EIGHTIETH, EIGHTY-FIRST, EIGHTY-SECOND, EIGHTY-FOURTH, EIGHTY-FIFTH, AND EIGHTY-EIGHTH OMNIBUS OBJECTIONS TO CLAIMS

Michelle McCarthy, Robert Batt, Randy Melby, Steven Stearns, Scott Shaw and Patricia Schulte (collectively, the “Claimants”), by and through undersigned counsel, hereby object (the “Objection”) to the WMI Liquidating Trust’s Motion For Leave To Amend The Fifth, Sixth, Seventy-Ninth, Eightieth, Eighty-First, Eighty-Second, Eighty-Fourth, Eighty-Fifth, And Eighty-Eighth Omnibus Objections To Claims (the “Motion”). In support of this Objection, Claimants respectfully represent as follows:

FACTUAL AND BACKGROUND

I. WMI Bankruptcy

1. Washington Mutual, Inc. (“WMI”) and a related entity, WMI Investment Corp. (collectively with WMI, the “Debtors”) each filed voluntary petitions under Chapter 11 of title 11, United States Code (the “Bankruptcy Code”) and commenced the above-captioned cases on September 26, 2008 (the “Petition Date”). The Debtors remained in possession and control of their assets until they confirmed their Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the “Plan”) by Order dated February 23, 2012. Upon information and belief the effective date of the Plan was March 19,



2012. On the effective date certain of the Debtors' assets were transferred to the WMI Liquidating Trust (the "WMILT") for administration under the Plan.

2. At all relevant times prior to September 25, 2008, WMI owned Washington Mutual Bank ("WMB") and through its ownership of WMB, indirectly owned WMB's subsidiaries including Washington Mutual Bank.

3. On September 25, 2008, the director of the Office of Thrift Supervision directed the FDIC to take immediate possession of the assets of WMB as receiver. The FDIC in its role as receiver then sold substantially all of the assets of WMB to JPMorgan Chase Bank, National Association ("JPMC"). The assets of WMB constituted, indirectly, substantially all of the operating banking assets of WMI.

II. Claimants' Claims

4. Prior to September 25, 2008, Claimants were employed by WMI and/or its affiliated entities. As part of their employment, Claimants were parties to Change in Control Agreements (the "CICs"). Pursuant to their CICs, Claimant was entitled to certain compensation, as set forth in the CICs, if their employment was terminated without cause or they resigned under certain circumstances within two years following a "change in control."¹

5. After the FDIC's seizure and sale of WMI's banking assets, each of the Claimants was terminated.

6. As a result of their termination, Claimants have filed proofs of claim (the "Claims") in these cases with respect to the compensation due to them under the CICs. Pursuant

¹ For purposes of his CIC, a "change in control" was defined in paragraph 5(f)(1)(5) to include "[t]he sale or transfer (in one transaction or a series of related transactions) of all or substantially all of Washington Mutual, Inc.'s assets to another Person (other than a Subsidiary) whether assisted or unassisted, voluntary or involuntary." Claimants believe, and therefore aver, that the FDIC seizure and subsequent sale of assets to JPMC constituted an involuntary sale or transfer of substantially all of WMI's operating banking assets.

to the terms of the CICs, the Claims are based on Claimants' entitlement to compensation because they were terminated following a change in control.

III. Claim Objections

7. On August 15, 2012, WMILT filed the Seventy-Ninth Omnibus (Substantive) Objection to Claims (the "Seventy-Ninth Omnibus Objection"). On August 15, 2012, WMILT also filed the Eighty-First Omnibus (Substantive) Objection to Claims (the "Eighty-First Omnibus Objection"). On August 15, 2012, WMILT also filed the Eighty-Second Omnibus (Substantive) Objection to Claims (the "Eighty-Second Omnibus Objection," and, together with the Seventy-Ninth Omnibus Objection and the Eighty-First Omnibus Objection, the "Objections"). Pursuant to the Objections, WMILT objected to the Claims on the basis that the Claims were purportedly filed against the wrong party. Claimants have filed responses to the Objections.

8. On October 15, 2012, the Court entered the Agreed Order Establishing Procedures And Deadlines Concerning Hearing On Employee Claims And Discovery In Connection Therewith (the "Scheduling Order"). Among other things, the Scheduling Order set a deadline for service of Permitted Written Discovery (as such term was defined in the Scheduling Order) of December 10, 2012. On January 7, 2013, the Court entered the Agreed Order Amending Scheduling Orders With respect To Employee Claims Hearing And Adversary Proceedings (the "Amended Scheduling Order"). Among other things, the Amended Scheduling Order extended the deadline for parties to respond to Permitted Written Discovery by sixty days.

IV. Motion

9. On February 19, 2013, the WMILT filed the Motion. By the Motion, the WMILT requests leave to amend the Objections to include additional bases for the disallowance of the

Claims and to have such amendments relate back to the date of the filing of the Objections. The Motion cites no reason why the additional bases were not included in the Objections given that the WMILT's claims reconciliation process is far along.

OBJECTION

10. Bankruptcy Rule 7015 provides that amendments to claims shall be governed by Rule 15 of the Federal Rules of Civil Procedure, Fed. R. Bankr. P. 7015, which commits the decision to grant or deny leave to amend to the trial court's sound discretion. See also, Coventry v. United States Steel Corp., 856 F.2d 514, 518 (3d Cir. 1988).

11. The United States Supreme Court in Foman v. Davis, 371 U.S. 178 (1962), referred to several factors courts should analyze when determining whether leave to amend should be permitted such as undue delay, bad faith or dilatory motive, undue prejudice to the appealing party by virtue of allowance of the amendment, and futility of amendment. Foman, 371 U.S. at 182. The Third Circuit has adopted the "Foman Factors" in determining whether leave to amend is warranted. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1434 (3rd Cir. 1997) (listing five factors taken into account to assess the propriety of a motion for leave to amend: (1) undue delay, (2) bad faith, (3) dilatory motive, (4) prejudice, and (5) futility of amendment).

12. The critical inquiry is whether the opposing party would be unduly prejudiced by the amendment. In re Wilson, 96 B.R. 257, 263 (9th Cir. BAP 1988); United States v. Hougham, 364 U.S. 310, 316 (1960). Here, the new bases identified by the WMILT raise a number of factual issues that will require additional discovery. As set forth above, discovery deadlines for Permitted Written Discovery have passed. Claimants were not previously aware of the additional bases now raised by the WMILT and have had no opportunity to conduct discovery on such bases. Because Claimants have not had any opportunity for discovery on the new theories

raised by the WMILT, and the discovery deadlines have now expired, Claimants are plainly prejudiced by the WMILT's late amendments.

13. Permitting the amendment would necessitate a continuation of the previously agreed upon scheduling order and delay in the adjudication of the Objections. A tremendous amount of resources have already been expended in order to comply with the Amended Scheduling Order. Claimants have already responded to the WMILT's discovery requests and produced a voluminous amount of documents under the current schedule approved by the Court. Moreover, the Court has scheduled hearing dates for the Objections in early June. Given that the Claimants have already waited over 4 years for payment of the amounts due to them under the CICs, the further delay that would be caused by the WMILT's requested amendments weighs heavily against permitting the amendments to the Objections.

14. Based on the above, leave to amend is not warranted in this case and the proposed amendments to the Objections should not be permitted.

15. Claimants join in any other objections to the Motion filed by other Claimants to the extent such objections are not inconsistent with the arguments set forth herein.

WHEREFORE, for all the above reasons, Claimants request that the Court enter an order (i) denying the Motion and (ii) granting such other and further relief as is just and equitable.

**GELLERT SCALI BUSENKELL & BROWN,
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Dated: March 18, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused true and correct copies of the foregoing document to be served via first-class mail, postage prepaid upon the following:

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