Docket #11141 Date Filed: 3/18/2013

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

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| In re: WASHINGTON MUTUAL, INC., *et al.*[1], | ) | Chapter 11 |
| | ) | Case No. 08-12229 (MFW) |
| | ) | Jointly Administered |
| Debtors. | ) | |
| | ) | Re: Docket No. 11032 |
| | ) | **Hearing Date: March 25, 2013 at 10:30 a.m. (EST)** |

**JOINT OBJECTION OF JOHN MCMURRAY, ALFRED BROOKS, TODD BAKER, THOMAS CASEY, DEBORA HORVATH, DAVID SCHNEIDER, STEPHEN ROTELLA, SEAN BECKETTI, DAVID BECK, ANTHONY BOZZUTI, RAJIV KAPOOR, MARC MALONE, THOMAS E. MORGAN, GENEVIEVE SMITH, RADHA THOMPSON, ANN TIERNEY, DARYL DAVID, KIMBERLY CANNON, MICHAEL REYNOLDSON, CHANDAN SHARMA AND ROBERT BJORKLUND TO WMI LIQUIDATING TRUST'S MOTION TO AMEND THE FIFTH, SIXTH, SEVENTY-NINTH, EIGHTIETH, EIGHTY-FIRST, EIGHTY-SECOND, EIGHTY-FOURTH, EIGHTY-FIFTH, AND EIGHTY-EIGHTH OMNIBUS OBJECTIONS TO CLAIMS**

Claimants John McMurray, Alfred Brooks, Todd Baker, Thomas Casey, Debora Horvath, David Schneider, Stephen Rotella, David Beck, Sean Becketti, Anthony Bozzuti, Rajiv Kapoor, Marc Malone, Thomas E. Morgan, Genevieve Smith, Radha Thompson, Ann Tierney, Daryl David, Kimberly Cannon, Michael Reynoldson, Chandan Sharma and Robert Bjorklund ("**Claimants**"), by and through their undersigned counsel, submit this Joint Objection to "WMI Liquidating Trust's Motion To Amend The Fifth, Sixth, Seventy-Ninth, Eightieth, Eighty-First, Eighty-Second, Eighty-Fourth, Eighty-Fifth, And Eighty-Eighth Omnibus Objections To Claims" [D.I. 11032] ("**Motion**"). In support of this Objection, Claimants, respectfully represent as follows:

[1] The Debtors in these cases are: (i) Washington Mutual, Inc. and WMI Investment Corp.



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## PRELIMINARY STATEMENT

1. WMI Liquidating Trust ("**WMILT**") by and through the Motion seeks to amend nine (9) Omnibus Objections[2] to add objections seeking to disallow claims under 12 U.S.C. § 1828(k), 12 C.F.R. § 163.39 and/or 12 C.F.R. § 359 (Motion, p. 8 ¶ 21)("Amended Objections"). The Motion seeks leave to raise these additional objections after the passing of the deadline for Written Discovery on March 11, 2013; 4 ½ years since Washington Mutual, Inc. ("**WMI**") filed for bankruptcy protection; 3 ¾ years since the filing of the Fifth and Sixth Omnibus Objections; and, more than 6 months after the deadline for filing objections to claims set by the Confirmation Order.

2. The Motion should be denied in its entirety for *inter alia*, the following reasons:

(a) The relief sought, the amending of each of the Omnibus Objections to include the Additional Defenses, is inappropriate as WMILT cannot satisfy the requirements of Federal Rule of Civil Procedure 15 and firmly settled case law for amending pleadings;

(b) The Amended Objections are futile. WMILT does not have standing under 12 U.S.C. § 1828(k) to disallow Claimants' claims. Furthermore, based on the repeated admissions of WMI and WMILT on the Commencement Date, WMI was no longer a savings and loan holding company and was no longer subject to regulation by the OTS or the FDIC. Thus, 12 U.S.C. § 1228(k) and its supporting regulations are inapplicable to WMI and WMILT; and

(c) The Motion fails to set forth in detail exactly which Claimants claims are being objected to and the components of the claims that would be subject to the Amended Objections.

[2] All initial capitalized terms or abbreviations not otherwise defined herein shall have the meaning ascribed to them in the Motion.

3. Given the facts of case, the Claimants as well as all other claimants named in the Omnibus Objection will suffer tremendous prejudice if the Motion is granted – a prejudice that greatly outweighs any prejudice suffered by WMILT. On that basis alone, the Motion should be denied in its entirety.

## JURISDICTION AND VENUE

4. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 158 and 1334. This is a core proceeding pursuant to 18 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

## ADDITIONAL RELEVANT FACTS

5. Exhibit "A" to the Voluntary Petition [D.I. 0001] states that "**Prior to the commencement of this chapter 11 case**, Washington Mutual, Inc. had numerous direct and indirect subsidiaries, including Washington Mutual Bank and Washington Mutual Bank fsb." [D.I. 0001] (emphasis added). This is an admission that on the Commencement Date WMI was not a "depository institution holding company."

6. In "The Declaration of Stewart M. Landefeld in Support of The Debtors' Chapter 11 Petitions and First-Day Motions" [D.I. 0013]("Declaration"), Mr. Landefeld testifies under penalty of perjury that:

> As a **former** savings and loan holding company, WMI was also subject to regulation by the OTS prior to the Bank Receivership and the Commencement Date.

Declaration ¶9 (emphasis added).

7. In numerous pleadings filed by WMI and/or WMILT the following judicial admission is made:

> **Prior to the Commencement Date, WMI operated as a savings and loan holding company** that owned Washington Mutual Bank ("WMB") and, indirectly, such bank's subsidiaries, including Washington Mutual Bank fsb ("WMBfsb"). Like all savings and loan holding companies, **WMI was subject to regulation by the Office of Thrift Supervision (the "OTS").** WMB and WMBfsb, in turn, like all depository institutions with federal thrift charters, **were**

> subject to regulation and examination by the OTS. In addition, WMI's banking and nonbanking subsidiaries were overseen by various federal and state authorities, including the Federal Deposit Insurance Corporation ("FDIC").

*See example,* Motion, p. 2, ¶3 (emphasis added). This is a judicial admission that on and after the Commencement Date WMI was not a savings and loan holding company and was not subject to regulation by the OTS. A similar admission is contained in the Court approved "Disclosure Statement for the Seventh Amended Joint Plan of Affiliated Debtors Pursuant To Chapter 11 of the United States Bankruptcy Code" [D.I. 9179] ("Disclosure Statement") which provides in its pertinent part:

> **Prior to the Petition Date, WMI was a multiple savings and loan holding company that owned Washington Mutual Bank ("WMB") and, indirectly, WMB's subsidiaries, including Washington Mutual Bank fsb ("FSB").** As of the Petition Date, WMI also had several non-banking, non-debtor subsidiaries. Like all savings and loan holding companies, **prior to the Petition Date, WMI was subject to regulation by the Office of Thrift Supervision (the "OTS").** WMB and FSB, in turn, like all depository institutions with federal thrift charters, were subject to regulation and examination by the OTS. In addition, WMI's banking and non-banking subsidiaries were overseen by various federal and state authorities, including the Federal Deposit Insurance Corporation ("FDIC").

Disclosure Statement [D.I. 9179], pp. 1-2.

8. The "Seventh Amended Joint Plan of Affiliated Debtors Pursuant To Chapter 11 of the United States Bankruptcy Code" [D.I. 9759] ("Plan") provides at section 26.1 that the deadline for objecting to claims is 180 days following the Effective Date of the Plan, September 14, 2012 ("Claims Objection Deadline"). Plan [D.I. 9759]. At no time prior to September 14, 2012 did WMILT seek to extend the deadline.

9. The Amended Order extended the deadlines set forth in the Employee Claims Scheduling Order. Among other things, the Amended Order provides that the deadline for responding to Written Discovery is March 11, 2013, witness lists are to be filed and exchanged by March 18, 2013 and the hearing date to consider the change of control issues raised by the Omnibus Objections is June 3, 2013.

10. The Motions to Amend which were heard by this Court on March 7th, were based on an entirely different set of facts and circumstances.

**THE RELIEF REQUESTED BY THE MOTION IS NOT APPROPRIATE UNDER FEDERAL RULE OF CIVIL PROCEDURE 15 AND FIRMLY ESTABLISHED CASE LAW**

11. This Court should not permit the filing of the Additional Defenses in the Amended Objections because WMILT cannot satisfy the requirements of Federal Rule of Civil Procedure 15 ("Rule 15"). Rule 15 provides that "[t]he court should freely give leave when justice so requires." The crucial 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, 81 S.Ct. 13, 18, 5 L.Ed.2d 8 (1960). As set forth herein, granting the Motion will result in a grave injustice to Claimants and derail their efforts to obtain a timely ruling from this Court on their filed proofs of claim.

12. In deciding whether to grant leave to amend, courts balance a number of factors to determine when "justice so requires" leave to amend. FRCP 15; 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1487. The United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L.Ed. 2d 222 (1962), referred to several factors courts should analyze when confronted with a request for leave to amend under Rule 15, stating:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the appealing party by virtue of allowance of the amendment, futility of amendment, etc. – the sought relief should, as the rules require, be "freely given."

*Foman*, 371 U.S. at 182.

13. The Third Circuit has employed the "*Foman* Factors" in determining whether a trial court properly granted or denied leave to amend a pleading. *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); *Riley v. Taylor*, 62 F.3d 86, 90 (3rd Cir. 1995) (adopting and applying the *Forman* factors; *Grayson v. Mayview State Hospital*, 293 F.3d 103, 108 (3rd Cir. 2002) (holding that a under FRCP 15(a), leave to amend "must be granted in the absence of undue delay, bad faith, dilatory motive, unfair prejudice, or futility of amendment."); see also *Shane v. Fauver*, 213 F.3d 113, 115 (3rd Cir. 2000).

14. The following analysis of the "*Foman* Factors" as used by the 3rd Circuit shows that WMILT cannot satisfy the "*Foman* Factors" and leave to file the Additional Defenses contained in the Amended Objections should be denied in this case:

(a) **Bad Faith.**

Filing the Motion at this very late stage of the Employee Claim litigation without any explanation carries the indicia of bad faith. There exists absolutely no reason why WMI and/or WMILT could not have raised the Additional Defenses prior to the expiration of the Claims Objection Deadline. Furthermore, WMILT could have sought to extend the time to file objections to claims. It did not. Local Bankruptcy Rule 3007-1(f)(3) provides that "An Objection based on substantive grounds, other than incorrect classification of a claim, shall include **all substantive objections to such claim**." LBR 3007-1(f)(3)(emphasis added). WMI and WMILT failed to comply with this local rule and now without any explanation seek to amend the Omnibus Objections to include the Additional Defenses. Furthermore, the Amended Objections are woefully inadequate leaving all claimants to guess if their claim is being objected to and if so what portion of their claim is the subject of the objection.

(b) **Undue Delay.**

WMI and WMILT have inexplicably delayed asserting the Additional Defenses for over four years. While delay on its own is usually not reason enough for a court to deny a motion to amend, the longer the delay, the greater the presumption against granting leave to amend. *King v. Cooke*, 26 F.3d 720, 723 (7th Cir. 1994). In

fact, leave to amend has been properly denied on the basis of delay alone, where the delay was severe and unexplained. That is the case here! The Additional Defenses, while futile, are not based on new law or new facts. The Additional Defenses could have been raised at any time after the Commencement Date and before the Claims Objection Deadline. Instead, WMILT waited until late February to raise the Additional Defenses and inform Claimants of its intent to move the Court for leave to amend its objections to claim (most of which were filed immediately prior to the deadline for bringing such objections). Given WMILT's inexcusable delay, coupled with the futile nature of the proposed amendments and the prejudice to the Claimants, the Court should deny the Motion in its entirety.

(c) **Prejudice to Opposing Party.**

WMILT should not be granted leave to amend the Omnibus Objections to include the Additional Defenses because to do so is unduly prejudicial to Claimants. Courts have considered prejudice as the most important and most often used reason to deny leave to amend. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1487 (2nd ed. 1990). Prejudice and undue delay are inherent in an amendment asserted after the close of discovery. *Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F3d 1132, 1139 (9th Cir. 1998) (motion "on eve of discovery deadline" properly denied because it would have required reopening discovery, thus delaying proceedings); *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999). Per this Court's orders, the Employee Claims Scheduling Order and the Amended Order, the deadline for propounding Written Discovery was December 10, 2012 and responses to Written Discovery were due by March 11, 2013. These dates have long passed.

The proposed Additional Defenses require significant additional discovery as the Additional Defenses seek to disallow unspecified portions of claims under 12 U.S.C. § 1828(k) and its supporting regulations. These Additional Defenses are fact based and

if the Motion is granted extensive discovery is required to flesh out whether the unspecified claims are "golden parachute payments," whether WMI was insolvent at the requisite time, whether there was a determination that WMI was in troubled condition, whether WMI was assigned a composite rating of 4 or 5 or unsatisfactory by appropriate regulators. The prejudice to the Claimants will be that resolution of their claims will be unduly delayed and the costs associated with litigating each of their claims will be significantly increased.

WMILT cannot ignore its obligation to Claimants to assert its defenses at the outset of litigation. WMILT now seeks to assert futile claims after Written Discovery has concluded, 4 ½ years after the Commencement Date and just a few days short of 4 years after the Claims Bar Date. It is patently unfair to require Claimants to expend additional time and money defending another set of objections that could have been raised years ago and certainly before the expiration of the Claims Objection Deadline.

Furthermore, as discussed herein, the Additional Defenses are futile so requiring Claimants to expend extensive time and money litigating additional objections is unduly prejudicial to these Claimants who have been waiting patiently for over 4 years to have their claims addressed and resolved.

It is noteworthy that nowhere in the Motion does WMILT explain why, despite being represented by no less than two reputable law firms that handle numerous sizeable complex bankruptcy cases, it failed to include the Additional Defenses during the applicable time period. Instead, WMILT argues that it should be granted leave to file the Amended Objections to include the Additional Defense which recently became known to WMILT. Motion, p. 10 ¶ 24. There is absolutely no excuse for WMI and WMILT's failure to raise the Additional Defenses years ago and certainly before the Claims Objection Deadline. Public policy demands that the Motion be denied.

(d) **The Additional Defenses Are Futile.**

As discussed in detail below, the Additional Defenses are futile. *See* detailed discussion at pp. 10-11. WMILT does not have standing under 12 U.S.C. § 1828(k)(1-2) which specifically provides in its pertinent part that "the [FDIC] may prohibit or limit, by regulation or order, any golden parachute payment" and "shall prescribe by, regulation, the factors to be considered by the [FDIC] in taking any action" to avoid a golden parachute payment. The Federal Deposit Insurance Act does not provide WMILT with the right to disallow claims under statutes and regulations put in place for the FDIC. Moreover, neither WMILT nor WMI have been a "depository institution holding company" since before the Commencement Date. This is a fact admitted in numerous pleadings and affidavits filed with this Court. *See* Voluntary Petition [D.I. 0001], Declaration [D.I. 0013], Disclosure Statement [D.I. 9179], Motion [D.I. 11032]. For these reasons which are discussed in greater detail below, the Additional Defenses are futile.

(e) **Dilatory Tactics by Claimant.**

Claimant submits that WMILT has exercised dilatory tactics. WMILT did not raise the Additional Defenses in some cases for 3 ¾ years after the filing of certain of the Omnibus Objections. WMILT has failed to provide a single explanation for why these Additional Defenses were not raised earlier. Contrary to the contentions of WMILT, the Additional Defenses are not simply new legal theories based on the same facts. Rather the Additional Defenses are new legal theories based on a whole host of additional facts. Were the unidentified payments "golden parachute payments"? Did the OTS or FDIC make a determination that WMI is in a troubled condition? Was WMI assigned a composite rating of 4 or 5 or unsatisfactory by its appropriate federal regulator? *See* 12 C.F.R. § 359.1(f)(iii)(B).

Granting the Motion will result in undue delay with respect to the resolution of Employee Claims. The allowance of the Additional Defenses will require months of

additional discovery and the legal costs associated with that discovery. The additional time and money required to litigate is part of WMILT's strategy to wear the Claimants down. These tactics are dilatory.

**THE ADDITIONAL DEFENSES ARE FUTILE**

15. Title 11, section 1828(k) of the United States Code states that only the FDIC has standing to seek to prohibit any alleged golden parachute payment pursuant to that section. WMILT does not have standing under 12 U.S.C. § 1828(k)(1-2) which specifically provides in its pertinent part that "the [FDIC] may prohibit or limit, by regulation or order, any golden parachute payment" and "shall prescribe by, regulation, the factors to be considered by the [FDIC] in taking any action" to avoid a golden parachute payment. The United States Supreme Court has held that "the question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative" where "a statute by its terms grants no private rights to any identifiable class." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 576 (1979). For a statute to create such private rights, its text must be "phrased in terms of the persons benefited." *Cannon* v. *University of Chicago,* 441 U.S. 677, 692, n. 13 (1979). Indeed, § 1828(k) grants the FDIC sole authority to regulate and prohibit golden parachutes as part of the larger regulatory and enforcement scheme provided for the FDIC by 12 U.S.C. Ch. 16 and is not phrased in terms related to any class of persons benefitted by that section and certainly does not specify a class which would include WMILT. As such, § 1828(k) does not create a private right of action, implied or otherwise, in WMILT for the disallowance and any of Claimants' claims. Nor does 12 C.F.R. 359.0, *et seq.* provide WMILT with standing to enforce the federal statutory and regulatory law prohibiting golden parachute payments.

16. In any event, and assuming *arguendo* that WMILT has standing, based on the plain reading of the text of § 1828(k), WMILT's attempts to seek the disallowance of Claimants' claims on the basis of that section are futile. Section 1828(k) and, necessarily, 12 C.F.R. § 359.2 only limit or prohibit golden parachute payments by "an insured depository

institution or *covered company*" which meets certain conditions. 11 U.S.C. § 1828(k)(4)(A) (emphasis added). "Covered company" means "any depository institution holding company" or "any other company who *controls* an insured depository institution." 12 U.S.C. § 1828(k)(5)(D) (emphasis added). A "depository institution holding company" means a bank holding company which is defined by 12 U.S.C. §1841 and which generally is "any company which has control over a bank." 12 U.S.C. § 1813(w)(1-2); 12 U.S.C. § 1841(a)(1). Thus, payments from a company that does not have control over a bank at the time of payment are not golden parachute payments pursuant to § 1828(k) and are not prohibited by 12 C.F.R. § 359.2. *Faign v. Signature Grp. Hold., Inc.*, 2012 Cal. App. LEXIS 1231, at *32 (Cal. App. Nov. 6, 2012) (holding that payments by a former bank after it had ceased its banking business were not subject to FDIC regulation).

17. WMILT has admitted numerous times that, after the FDIC seized all of WMB's assets on September 25, 2008, WMI was no longer a bank holding company and, indeed, only owned 33 "Non-Banking Subsidiaries." Disclosure Statement [D.I. 9179] at 49-54; Declaration [D.I. 0013] at ¶9; Voluntary Petition [D.I. 0001] at Exhibit A. Thus, WMI is not a *covered company* under § 1828(k). As a result, any payments made by WMI to Claimants after September 25, 2008, such as those yet to be made pursuant to the Claims, are not subject to § 1828(k) and are not prohibited by 12 C.F.R. 359.2. *See Faign*, 2012 Cal. App. LEXIS 1231, at *32. For these reasons, the Additional Defenses are futile.

**THE ADDITIONAL DEFENSES SHOULD NOT RELATE BACK TO THE OMNIBUS OBJECTIONS**

18. The Additional Defenses do not arise out of the conduct, transaction or occurrence set out or attempted to be set out in the original pleading, the Omnibus Objections. This is a requirement of Rule 15 (c). Contrary to the contentions of WMILT, the Additional Defenses do not arise out of the same facts set forth in the Omnibus Objections. *See* Motion, p. 12, ¶ 30 and Omnibus Objections. The Omnibus Objections never mention the federal

regulations, golden parachute or any facts that are necessary for establishing disallowance of a claim based on the Federal Regulations and 12 U.S.C. § 1828(k)(1). The Additional Defenses are indeed new defenses based on a whole host of new facts.

19. Perhaps the reason the Amended Objections are so inadequate is because WMILT does not want to concede that it needs to plead additional facts to support the Additional Defenses. As stated earlier, the Amended Objections never state the specific claims to which WMILT is objecting and fail to set forth which component of the claim it is objecting as well as necessary details to support the Additional Defenses. Rather, WMILT simply seeks to add the following language to the Omnibus Objections: "Many of the claims asserted by the claimants are also subject to disallowance as a result of the operations of 12 C.F.R. § 163.39 and/or 12 C.F.R. § 359, as applicable. *See* 12 U.S.C. § 1828(k); 12 C.F.R. §163.39 *et seq*" Motion, p. 8, ¶21. The Additional Defenses necessitate reliance on facts that are not contained in the Omnibus Objections and are not set forth in the Amended Objections. Thus, not only should the Additional Defenses not relate back, but the Additional Defenses as currently pleaded are inadequate.

## CONCLUSION

Based on the foregoing, Claimants respectfully request that this Court deny the Motion in its entirety.

Dated: March 18, 2013

PHILLIPS, GOLDMAN & SPENCE, P.A.

*/s/ Stephen W. Spence*

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**CERTIFICATE OF SERVICE**

I, CELESTE A. HARTMAN, Senior Paralegal, do hereby certify that I am over the age of 18, and that on March 18, 2013, I caused a copy of the foregoing *Joint Objection of John McMurray, Alfred Brooks, Todd Baker, Thomas Casey, Debora Horvath, David Schneider, Stephen Rotella, David Beck, Sean Becketti, Anthony Bozzuti, Rajiv Kapoor, Marc Malone, Thomas E. Morgan, Genevieve Smith, Radha Thompson, Ann Tierney, Daryl David, Kimberly Cannon, Michael Reynoldson, Chandan Sharma and Robert Bjorklund to WMI Liquidating Trust's Motion to Amend the Fifth, Sixth, Seventy-Ninth, Eightieth, Eighty-First, Eighty-Second, Eighty-Fourth, Eighty-Fifth, and Eighty-Eighth Omnibus Objections to Claims* upon the following persons via email.

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Under penalty of perjury, I certify the foregoing to be true and correct.

*/s/ Celeste A. Hartman*
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