Docket #12727 Date Filed: 06/10/2021

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
WASHINGTON MUTUAL, INC., *et al.*,[1]	Case No. 08-12229 (MFW)
Reorganized Debtors.	**Ref. Docket Nos. 12715, 12718, and 12725**

REPLY OF WMI LIQUIDATING TRUST IN SUPPORT OF MOTION TO REOPEN THE CHAPTER 11 CASE OF WASHINGTON MUTUAL, INC. FOR THE LIMITED PURPOSE OF (I) ENFORCING THE EXCULPATION, INJUNCTION, RELEASE, AND DISCHARGE PROVISIONS OF THE DEBTORS' JOINT CHAPTER 11 PLAN AND CONFIRMATION ORDER AND (II) IMPOSING SANCTIONS

WMI Liquidating Trust (the "Trust"), as successor to Washington Mutual, Inc. ("WMI") and WMI Investment Corp. (together with WMI, the "Reorganized Debtors," and prior to the effective date of the Plan (as defined below), the "Debtors"), hereby submits this reply (the "Reply") in support of the *Emergency Motion of WMI Liquidating Trust to Reopen the Chapter 11 Case of Washington Mutual, Inc. for the Limited Purpose of (I) Enforcing the Exculpation, Injunction, Release, and Discharge Provisions of the Debtors' Joint Chapter 11 Plan and Confirmation Order and (II) Imposing Sanctions* [Docket No. 12715] (the "Motion")[2] and in response to the Objections[3] of Ms. Alice Griffin ("Griffin"). In support of this Reply, the Trust respectfully states as follows:

[1] The Reorganized Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, were: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Reorganized Debtors had a former address of 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

[3] The "Objections" are defined herein, collectively, as (i) the *Objection of Alice Griffin to Emergency Motion of WMI Liquidating Trust to Reopen the Chapter 11 Case of Washington Mutual, Inc. for the Limited Purpose of (I) Enforcing the Exculpation, Injunction, Release, and Discharge Provisions of the Debtors' Joint Chapter 11 Plan and Confirmation Order and (II) Imposing Sanctions* [Docket No. 12718] (the "Initial Objection") and (ii) the *Supplemental Objection of Alice Griffin to Emergency Motion of WMI Liquidating Trust to Reopen the Chapter 11 Case of Washington Mutual, Inc. for the Limited Purpose of (I) Enforcing the Exculpation, Injunction, Release, and*

1. Through the Objections, Griffin continues to cling to theories which have been debunked or are inaccurate foundationally. A prime example of the latter is the assertion by Griffin and other members of Class 19 that they are beneficiaries of the Trust, or, in Griffin's words, "Legacy Holders." They are neither. As set forth in prior pleadings, in accordance with the Final Decree, the only beneficiary of the Trust is a charity designated to receive the remaining limited Trust assets—which assets are being whittled away due to Griffin's actions. Secondly, there is no such thing as a "Legacy Holder" and Griffin was never in possession of, or entitled to, Liquidating Trust Interests. The escrow markers that were generated for the limited purpose of facilitating a distribution of shares of the Reorganized Debtor's common stock that were held in the so-called "Disputed Equity Escrow" are not themselves rights to future distributions of Trust assets or anything of value, nor were they ever. Such escrow markers were a tool; they did not have, and do not have, any value in and of themselves. As such, Griffin's premise for any ongoing interest is once again faulty.

2. Substantively, Griffin repeatedly stretches to distinguish her requests for declaratory relief relating to the implementation of the underwriter settlement from this Court's order overruling Griffin's earlier objection to that same settlement and the subsequent Griffin Appeal. But, nothing therein changes the fact that all of these issues have already been litigated, resolved, and disposed of by this Court and affirmed by two appellate courts.

3. The Litigation is but a mirror image of past actions. Counts one through five of the Amended Complaint seek declaratory judgments that the Trust's implementation of the underwriter settlement was improper and that the Trust serves in a fiduciary capacity to Griffin.

Discharge Provisions of the Debtors' Joint Chapter 11 Plan and Confirmation Order and (II) Imposing Sanctions [Docket No. 12725] (the "Supplemental Objection").

To be clear, the Underwriter settlement was implemented in 2013, six years before Griffin objected to it (and which was the basis for the Court's ruling that Griffin was time-barred from objecting). That same ruling similarly precludes her from repackaging her issues therewith as an objection to "implementation" of the settlement. Any new objection to the Underwriter settlement and its effects on Class 19 either was or could have been asserted in 2019, and therefore is a collateral attack on this Court's order overruling Griffin's objection to the underwriter settlement.

4. Likewise, counts six through nine seek declaratory judgments asserting rights to certain unspecified mortgage-backed securities that Griffin alleges are assets of the Trust that require distribution. These counts contradict this Court's findings in its *Final Decree and Order Closing Reorganized Debtors' Chapter 11 Cases and Terminating Claims and Noticing Services* [Docket No. 12707] (the "Final Decree") which (i) overruled Griffin's objection to the entry of the Final Decree and (ii) authorized the wind-down and dissolution of the Trust following the final charitable distribution. They likewise violate the Plan's release provisions by asserting released claims. Griffin's displeasure with this Court's rulings, and the District Court and Third Circuit's affirmances, does not provide her with an avenue to recommence her challenge to these matters in a new forum.

5. As stated in the Motion, this Court is best suited to provide the Trust with the relief it requires. This Court is all too familiar with the Chapter 11 Cases, the Plan, the Confirmation Order, the Liquidating Trust Agreement, the Final Decree, the parties, and the allegations in this dispute. It would best serve the parties and the interests of judicial economy for this Court to reopen WMI's Chapter 11 Case and consider the Motion to Enforce. Additionally, this Court would be best positioned to enter an order enforcing the provisions of the Plan and Confirmation Order. *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 970 (11th Cir. 2012) ("[T]he court that

issued the injunctive order alone possesses the power to enforce compliance with and punish contempt of that order.") (collecting cases).

6. Accordingly, this Court should overrule the Objections and enter an order granting the relief requested in the Motion, reopening WMI's Chapter 11 Case and adjudicating the *Motion of WMI Liquidating Trust to (I) Enforce the Exculpation, Injunction, Release, and Discharge Provisions of the Debtors' Joint Chapter 11 Plan and Confirmation Order and (II) Impose Sanctions* [Docket No. 12715-B] (the "Motion to Enforce").

A. Counts One through Five of the Amended Complaint Have Been Previously Litigated in This Court and Require Dismissal

7. For the reasons stated in the Motion to Enforce, counts one through five of the Amended Complaint are a window-dressed relitigation of Griffin's objection to the settlement of the underwriters' claims and are barred under the doctrine of res judicata. Griffin grasps onto a theory of a "1% dilution" and complains that the Trust's implementation of the settlement unfairly impacts her interests as a member of Class 19 if the underwriters received securities bearing certain escrow markers[4] rather than a "pro rata" allocation across the various escrow markers. These arguments fail for two simple reasons.

8. Firstly, these allegations suffer from a fatal flaw in that the underwriters did not receive any escrow markers through the settlement. Griffin's claims belie a complete misunderstanding of the settlement, the Plan, the Confirmation Order, and the class mechanisms established by the Bankruptcy Code. All claims and interests within any given class in the Plan are treated equally, and Class 19 is no different. Indeed, this was a requirement for Plan

[4] In the Amended Complaint, Griffin refers to these escrow markers as "CUSIPs" and asserts that each such escrow marker is entitled to different treatment within Class 19. As explained further in this section, Griffin miscomprehends the class structure of the Plan and her belief is incorrect.

confirmation. *See* 11 U.S.C. § 1123(a)(4). Accordingly, every dollar worth of Class 19 interests—whether related to Series R, or Series K, or Trust Preferred Securities (as defined in the Litigation)—receives the same treatment.

9. Put simply, under the Plan and the Bankruptcy Code, it does not matter whether the underwriters received escrow markers (they did not) or, even if they hypothetically did receive one, which escrow marker it would be; every dollar of allowed claim in the class shares the same pro rata recovery based on the total amount of allowed claims in the class, regardless of escrow marker. The sole source of impact on holders of Class 19 interests is the allowance of the underwriters' claim and the dollar amount thereof. This Court, as well as the District Court and Third Circuit, has already adjudicated and affirmed the settlement. Further litigation of counts one through five is no more than a collateral attack on this Court's order and should be enjoined.

10. Moreover, adjudication of these claims is barred by the doctrine of res judicata. "Similarly, '[c]laim preclusion, formerly referred to as res judicata, gives dispositive effect to a prior judgment if a particular issue, although not litigated, could have been raised in the earlier proceeding. Claim preclusion requires: (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privities; and (3) a subsequent suit based on the same cause of action.'" *In re Summit Metals, Inc.*, 477 B.R. 484, 500 (Bankr. D. Del. 2012) (citing *Bd. of Trs. of Trucking Emps. Of North Jersey Welfare Fund, Inc.-Pension Fund v. Centra*, 984 F.2d 495, 504 (3d Cir. 1992)). Nothing about these issues prevented them from being litigated when Griffin first challenged the underwriter settlement and was overruled. In fact, Griffin attempted to assert certain of these allegations in the Griffin Appeal and was rebuffed by the Third Circuit specifically because the argument had been waived by not having been raised in this Court. *See* Amended Complaint ¶ 40; *see also In re Washington Mutual, Inc.*, 848 F. App'x 84 (3d Cir. Mar. 23, 2021)

("Second, Griffin challenges 'how the [settlement] was implemented.' No such argument was raised before the Bankruptcy Court. 'We generally do not consider arguments raised for the first time on appeal and will not do so in this case.'" (citation omitted, bracketed text in original). The Third Circuit determined that Griffin could have raised the issues in earlier litigation and did not, and thus could not now assert such issues. For the exact same reasons, Griffin is prohibited under res judicata from now asserting these same allegations in counts one through five in another court, when this Court's order now precludes her from doing so under principles of res judicata. A final judgment on the merits has been entered overruling Griffin's objection, which was a proceeding involving both Griffin and the Trust. Griffin had every opportunity to assert such allegations in connection with her objection to the underwriter settlement and should be estopped from seeking a do-over to relitigate her complaints in a new forum.

B. Adjudication of Counts Six Through Nine is Similarly Prohibited

11. Throughout her collective 21 pages of Objections, Griffin's only argument with respect to counts six through nine is that they "apply only to Mr. Cooper, which is not, and never has been, under this court's jurisdiction." Initial Objection ¶ 3. Of course, this statement is facially absurd, as Griffin is pursuing Mr. Cooper in its capacity as successor-in-interest to Reorganized WMI, the reorganized debtor in this Chapter 11 Case. The statement is also wrong, as any claims to the alleged mortgage-backed securities would have been released under the Global Settlement Agreement and Plan for the reasons stated in Paragraphs 36–40 of the Motion to Enforce, and therefore do relate to Debtors.

12. In the conclusion to her Initial Objection, Griffin states that "[t]he Trust makes an elaborate and specious argument that this court has jurisdiction over those Counts because the assets discussed in them may have once belonged to WMI. Griffin disagrees. All WMI's legally

owned assets were disclosed in its bankruptcy schedules." Objection at 14. Although this conflicts directly with Griffin's assertions in the Amended Complaint,[5] to the extent that Griffin is prepared to *finally* concede that the alleged mortgage-backed securities were never property of the Debtors or the Trust, and that she therefore has no entitlement to any value on account of such assets, the Trust accepts Griffin's admission. Should that be the case, then counts six through nine—each of which requests declaratory relief relating to the Trust's alleged ownership of mortgage-backed securities—are moot and should be dismissed with prejudice.

13. Assuming that Griffin nonetheless intends to continue the prosecution of counts six through nine, this Court should enter an order enjoining her from doing so. As described in great detail in the Motion to Enforce, the Trust has exhaustively fought to recover assets for the Trust and, prior to entry of the Final Decree, had determined that no further assets, including Litigation Proceeds, existed to be recovered. Furthermore, the Motion to Enforce went into great detail regarding the allegations in counts six through nine, demonstrating why they were released, enjoined, discharged, and exculpated under the Plan and the Confirmation Order. *See* Motion to Enforce, pp. 20-26. Griffin does not dispute this anywhere in her Objections. Rather, Griffin states only that this Court cannot exercise jurisdiction over Mr. Cooper and thus cannot provide the relief requested in the Motion to Enforce. This is incorrect.

14. Importantly, this Court need not exercise jurisdiction over Mr. Cooper or its assets to determine that counts six through nine are barred because they (i) violate the release, injunction, discharge, and exculpation provisions of the Plan, the Confirmation Order, and the Liquidating

[5] *See, e.g.*, Amended Complaint ¶¶ 66-67 ("If the MBS are property of the Trust and are disclosed as such prior to the Trust's dissolution, then the Trust would have to liquidate and disburse the assets as the Trust cannot engage in any business. Plaintiff and other Legacy Holders have standing to request a determination of who owns the MBS because they have interests in all the Disputed Property and if the Trust is the owner, it must distribute the liquidated value of the MBS immediately.").

Trust Agreement, and (ii) have already been litigated fully in this Court and are thus subject to collateral estoppel. To the extent that Griffin seeks to recover alleged mortgage-backed securities for the benefit of Trust beneficiaries, such claims are derivative Debtor claims that were released pursuant to the Plan and the Global Settlement Agreement, each of which were approved by this Court's Confirmation Order. *See* Motion to Enforce ¶ 36. Furthermore, to the extent Griffin purports to be bringing a direct claim against Mr. Cooper for any alleged mortgage-backed securities, this claim is also released pursuant to the Plan and the Confirmation Order because any alleged right to the mortgage-backed securities could and should have been asserted prior to the Effective Date, in advance of providing a release to WMI, the benefits of which flow to Mr. Cooper as successor in interest to Reorganized WMI.[6]

15. Moreover, Griffin's theories regarding the hundreds of billions of dollars' worth of mortgage-backed securities allegedly being withheld from beneficiaries of the Trust have been litigated time and time again, most recently when this Court overruled Griffin's objection to the entry of the Final Decree on precisely this basis. Indeed, at the case closing hearing, when Griffin objected on this very basis, the Court responded that it had already decided the issue as part of her settlement objection:

> MS. GRIFFIN: The trust -- the trust cannot say that there is no possibility of any recovery. The trust can say possibly that there's

[6] Griffin's assertion that Reorganized WMI does not benefit from the release as it is not among the "Released Parties" in the Plan is simply a misunderstanding of the operation of bankruptcy laws. Reorganized WMI is so termed specifically because it has been "reorganized" in chapter 11 and has emerged, free of its pre-bankruptcy liabilities that have been released and discharged. Further, this argument simply ignores the language of the discharge, among other applicable provisions of the Plan, which provides that "all distributions and rights afforded under the Plan and the treatment of Claims and Equity Interests under the Plan, shall be, and shall be deemed to be, in exchange for, and in complete satisfaction, settlement, discharge, and release of . . . all Equity Interests or other rights of a holder of Equity Interests, relating to any of the Debtors or the Reorganized Debtors or any of their respective assets, property and estates, or interests of any nature whatsoever . . . . As of the Effective Date, and in consideration for the value provided under the Global Settlement Agreement to effectuate the Plan, each holder of a Claim or Equity Interest in any Class under this Plan shall be and hereby is deemed to release and forever waive and discharge as against each and any of the Debtors **and the Reorganized Debtors**, and their respective assets, property and estates, all such Claims and Interests." Plan § 41.2 (emphasis added).

> a substantial unlikelihood based on their information, but they cannot say absolutely.
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> THE COURT: A recovery on what?
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> MS. GRIFFIN: A recovery for equity, meaning classes below Class 18. As I said in my --
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> THE COURT: Well, the trust is saying that they have investigated and liquidated all assets.
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> MS. GRIFFIN: Right. ... And I responded to that in my two filings with you, and I stated why I thought that they might not have all the information. And this is simply a point of dispute. I can't prove anything.
>
> THE COURT: **I know, and I had already decided that issue and it's now on appeal.**

Transcript of Hearing dated December 19, 2019, at 17:7–17:24 (emphasis added). These issues have been tried, retried, and disposed of by this Court, and an order is warranted barring Griffin from now asserting them in a new forum in search of a more favorable verdict.

16. Accordingly, the Trust respectfully submits that reopening the Chapter 11 Case of WMI for the limited purpose of considering the Trust's Motion to Enforce and request for sanctions is appropriate and within the Court's discretion. Further, as the Trust moved to reopen the Bankruptcy Case only for the limited purpose of prosecuting the Motion to Enforce, the Trust also requests that any order entered by the Court provide that "Upon the adjudication or other resolution of the Motion to Enforce, the Bankruptcy Case shall be closed."

C. <u>There Exists no Basis or Cause for the Court to Recuse Itself From These Proceedings</u>

17. Lastly, in the Supplemental Objection, Griffin asserts that the Court should disqualify itself for bias as a result of having previously ruled against Griffin. There are no grounds and no cause for the Court to recuse itself from this matter and allegations otherwise are outlandish and unsupported by applicable law. *See*, *e.g.*, *Alston v. Weber Gallagher Simpson Stapleton Fires*

& Newby LLP, 2020 WL 774442, at *1 (D. Del. Feb. 18, 2020) (section 455 "does not provide a basis for recusal where a party is simply displeased with the Court's legal rulings" and "Plaintiff's dissatisfaction with prior decisions is an insufficient basis for recusal"); *Chang v. Delaware*, 2020 WL 871506, at *2 (D. Del. Feb. 21, 2020) (denying motion for recusal because while movant "clearly is dissatisfied with prior decisions" "this is an insufficient basis for recusal."); *Law v. Pierce*, 2019 WL 2420562, at *2 (D. Del. June 10, 2019) ("the bias necessary to require recusal generally 'must stem from a source outside of the official proceedings' [and] 'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.'") (internal citation omitted); *Davis v. Noble*, 2016 WL 6562060, at *1 (D. Del. Nov. 4, 2016) (same). Likewise, the fact that two appellate courts have affirmed the Court's prior ruling certainly indicates that such decision was well reasoned and supported by the facts and applicable law.

NOTICE

18. Notice of this Reply will be provided to: (i) the Office of the United States Trustee; (ii) Griffin; (iii) counsel for Mr. Cooper; and (iv) any party that has requested notice pursuant to Local Rule 2002-1(b). In light of the nature of the relief requested herein, the Trust submits that no other or further notice is necessary.

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CONCLUSION

WHEREFORE the Trust respectfully requests that the Court overrule the Objections and grant the relief requested in the Motion and such other and further relief as the Court may deem just and proper.

Dated: June 10, 2021
Wilmington, Delaware

Respectfully submitted,

/s/ *Marcos A. Ramos*

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