UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON MUTUAL, INC., and WMI INVESTMENT CORP., Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as receiver of Washington Mutual Bank, and FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, Defendants.	Case No. 1:09-cv-00533 RMC

PLAINTIFFS' OPPOSITION TO THE BANK BONDHOLDERS' MOTION TO INTERVENE AS DEFENDANTS

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Plaintiffs Washington Mutual, Inc. and WMI Investment Corp. (collectively, "WMI" or "Plaintiffs"), respectfully submit this Opposition to the Bank Bondholders' Motion to Intervene as Defendants ("Motion" or "Motion to Intervene").

PRELIMINARY STATEMENT

This is a straight-forward case made needlessly complex by improper motions for intervention by non-parties. Plaintiffs commenced this action, in one of only two forums permitted by the Federal Deposit Insurance Act ("FDI Act"), seeking judicial review of the perfunctory denial by the Federal Deposit Insurance Corporation ("FDIC") of their claims against Washington Mutual Bank, Henderson, Nevada ("WMB"). The Bank Bondholders[1] are creditors of WMB. They improperly seek to transform this Court into a bankruptcy-like forum – one where any creditor of WMB could be heard on issues relating to the claims of every other depositor or creditor. The FDI Act prohibits such a result. The FDI Act requires that each person with a claim against a failed bank submit its claim to the FDIC as receiver for the bank.[2] The FDIC then decides whether to allow or disallow the claim. *See* 12 U.S.C. § 1821(d)(5). If the claimant disagrees with the FDIC's disallowance of the claim, the FDI Act grants the *claimant* the right to *de novo* judicial review of the FDIC's disallowance. *Id*. § 1821(d)(6). The FDI Act does not grant any other party the right to be heard. Congress designed this claim procedure to maximize the efficiency with which bank failures can be resolved. (*See infra* note 6.) The Bank Bondholders seek to usurp this process, transforming it into a bankruptcy action for WMB, which is not what Congress intended.

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[1] A full list of the Bank Bondholders may be found at note 1 of their moving brief.

[2] WMI refers to the FDIC in its capacity as receiver for WMB as "FDIC-Receiver" and to the FDIC in its corporate capacity as "FDIC-Corporate".

Additionally, as if to highlight their effort to convert this action into a bankruptcy proceeding, the Bank Bondholders seek to "defend" WMI's claims by injecting into this case arguments they have made in support of claims filed against WMI in its bankruptcy and by asserting purported setoff rights based on those claims. This violates the automatic stay and impinges upon the exclusive jurisdiction of the Bankruptcy Court.

Finally, even if the Bank Bondholders could overcome these fundamental jurisdictional hurdles, this action will not impair any significant, legally-protected interest of the Bank Bondholders. Simply put, the Bank Bondholders' claims against WMB are not at issue here. Their only legally-protected interest is receipt of their share of the assets of the receivership, in accordance with the statutory priority scheme for distributions under the FDI Act. The Bank Bondholders have no legally-protected interest in the denial of claims of depositors, *other* creditors, or shareholders of WMB, like WMI. Moreover, any interest that the Bank Bondholders may have will be fully and adequately represented by the FDIC, which, by statute, is the entity that Congress designated to determine the validity of claims against the bank, subject to the *claimant's* right to challenge a disallowance.

STATEMENT OF THE CASE

A. Procedural History

On September 25, 2008 (the "Receivership Date"), the Director of the Office of Thrift Supervision ("OTS") appointed the FDIC as receiver for WMB. The OTS further advised that the FDIC was immediately taking possession of WMB. Shortly after its appointment as receiver, the FDIC, both in its capacity as receiver for WMB and in its corporate capacity, sold substantially all the assets of WMB to JPMorgan Chase Bank, N.A. ("JPMC") pursuant to a Purchase and Assumption Agreement dated September 25, 2008 (the "P&A Agreement").

On September 26, 2008, Plaintiffs commenced voluntary cases pursuant to chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). *See In re Washington Mutual, Inc.*, No. 08-12229 (MFW) (Bankr. D. Del.) (the "Bankruptcy Proceeding"). Plaintiffs are operating as debtors in possession and their chapter 11 cases are being jointly administered under an order of the Bankruptcy Court entered on October 3, 2008.

Pursuant to section 11(d) of the FDI Act, 12 U.S.C. § 1821(d), the FDIC set December 30, 2008, as the last day to file claims against the receivership of WMB (the "Receivership"). Plaintiffs asserted claims against the Receivership by filing a proof of claim on December 30, 2008 (the "Proof of Claim"). In a letter dated January 23, 2009, the FDIC provided WMI notice (the "Notice of Disallowance") that Plaintiffs' claims had been disallowed. The Notice of Disallowance provided a two sentence "explanation" for disallowing Plaintiffs' claims. A copy of the Notice of Disallowance is attached as Exhibit 2 to the Complaint in this action. As authorized by the FDI Act, WMI initiated this action on March 20, 2008 in order to challenge the FDIC's perfunctory disallowance of its claims. *See* 12 U.S.C. § 1821(d)(6)(A)(ii).

On March 30, 2009, JPMC moved to intervene in this action, arguing that WMI seeks to divest JPMC of assets that JPMC purchased from the FDIC through the P&A Agreement. (*E.g.*, JPMC Mov. Br. at 1, 5 & 10.) WMI opposed JPMC's motion, *inter alia*, because (1) the Court does not have subject matter over JPMC's claims under the FDI Act and 28 U.S.C. § 1334(e), (2) JPMC's claims violated the automatic stay, (3) WMI's claims for money damages against the FDIC would not divest JPMC of any assets (and, indeed, would limit JPMC's liability), and (4) allowing JPMC to assert its arguments here threatens to transform this action into a parallel bankruptcy proceeding. (*See generally* Pls.' Opp. to JPMC's Mot.)

B. The Bank Bondholders' Motion to Intervene

The Bank Bondholders now seek to intervene as well. They assert that this action will impair their interests essentially on two grounds. First, the Bank Bondholders assert that WMI has no legitimate claim to any Receivership estate assets because WMI "was the shareholder, not a creditor, of WMB" and thus "owed a duty to be a 'source of strength' for WMB and its legitimate creditors."[3] (Mov. Br at 1.) The Bank Bondholders further assert that WMI's so-called "illegitimate" claims will reduce the payment they will receive from the Receivership. Second, the Bank Bondholders assert that factual positions WMI takes in this action are inconsistent with assertions by the Bank Bondholders in their proof of claim in WMI's Bankruptcy Proceeding. (*Id*.) Finally, as part of their motion, the Bank Bondholders submitted a proposed answer in which they assert set-off rights as a defense to WMI's claims against the FDIC.[4]

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE BANK BONDHOLDERS

"[T]he party asserting federal jurisdiction when it is challenged has the burden of establishing it." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). Courts are to "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotes and citations omitted). The Bank Bondholders cannot establish that this Court has subject matter jurisdiction over their

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[3] The Bank Bondholders assert that WMI is not a creditor of WMB, but is only a shareholder. (Mov. Br. at 1.) While WMI was WMB's sole shareholder, that status is not inconsistent with WMI also being a creditor of WMB, as demonstrated by the documentation to its proof of claim.

[4] Answer of Proposed Intervenor-Defs. Bank Bondholders ¶ 14 ("Bank Bondholders generally deny that Plaintiffs have any valid claims against the WMB Receivership Estate and state that, if they do have any such claims, they are more than offset by valid claims of the Receivership Estate *and its creditors* against Plaintiffs.") (emphasis added); *see also id*. ¶¶ 15-20, 22-24, 28-29, 33-35, 39-41, 44-46, 49-61, 87, 90 & the "Eighth Additional Defense."

claims because (1) the Bank Bondholders have no right to be heard in this action under the FDI Act, and (2) the Bank Bondholders improperly seek to pursue their claims filed in WMI's Bankruptcy Proceeding in this action, but those claims are barred by the automatic stay and the Bankruptcy Code gives the Bankruptcy Court exclusive jurisdiction over claims *against* WMI and WMI Investment Corp.

A. The FDI Act Does Not Allow the Bank Bondholders to Intervene

WMI's action is brought primarily under section 11(d)(6) of the FDI Act,[5] which provides that a claimant may seek *de novo* judicial review of the FDIC's disallowance of a proof of claim against a bank receivership:

> Before the end of the 60-day period beginning on . . . the date of any notice of disallowance . . . *the claimant* may request administrative review . . . or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

12 U.S.C. § 1821(d)(6)(A) (emphasis added). Furthermore, the FDI Act generally precludes judicial interference with the claims process except where the FDI Act specifically provides for a right of review. *See* 12 U.S.C. § 1821(d)(13)(D). Section 1821(d)(6)(A) does not grant any party other than the claimant the right to seek review of the FDIC's disallowance.

The text and structure of the FDI Act defies any claim that a bank creditor has the right to challenge the claims of other creditors. This conclusion is supported by both the plain language of section 1821(d)(6)(A) and the structure of the FDI Act's claims process. Section 1821 does not grant any party the ability to challenge the FDIC's *allowance* of any party's claims. If

[5] WMI's claims against FDIC itself, rather than the Receivership estate, are not governed by section 1821(d)(6) because they are not claims for payment from the Receivership. Those claims, however, seek damages from FDIC for WMI's valid claims that will not be paid in full because the FDIC dissipated WMB's assets by selling them to JPMC for far less than liquidation value.

Congress created no mechanism for a creditor of a bank receivership to obtain judicial review of the FDIC's *allowance* of the claim of another depositor, creditor or shareholders, then it cannot be that such a creditor, by way of intervention, could participate in judicial review of the FDIC's *disallowance* of such claims. If Congress had intended any bank creditor to be able to challenge the FDIC's distribution of estate assets to other creditors, it would have established procedures under the FDI Act that were more akin to the Bankruptcy Code, where all creditors have a right to be heard, or at a minimum provided creditors with the ability to challenge claims otherwise allowed by the FDIC. Instead, Congress created a streamlined, largely non-judicial process for administration of bank receiverships, with *de novo* judicial review available only to claimants who contest the FDIC's disallowance of their claims.[6]

The logical implication of the Bank Bondholders' position is that *any* disaffected depositor, creditor or shareholder of a bank in receivership would be able to intervene in a lawsuit challenging the FDIC's disallowance of *someone else's* claim because reversal would increase the total claims against the limited fund of receivership assets. That result is inconsistent with Congress' intent that judicial review of the bank receivership process be limited to specific circumstances. *See Branch v. FDIC*, 825 F. Supp. 384, 391 (D. Mass. 1993) (under the FDI Act the FDIC "is responsible for marshalling the insolvent bank's assets and distributing them to the bank's creditors and shareholders"); *see also infra* note 12. The Bank Bondholders "like all others who have some interest in recovering funds from the closed bank,

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[6] *See* H.R. Rep. No. 101-54(I), 101 Cong., 1st Sess., at 418-19, reprinted in 1989 U.S.C.C.A.N. 86, 214-15 ("[T]he claim resolution process established in this section should allow the FDIC to quickly resolve many of the claims against failed financial institutions without unduly burdening the District Courts."); *Daminano v. FDIC*, 104 F.3d 328, 334 (11th Cir. 1997) (finding "FIRREA's aim [to be] the expeditious and fair resolution of claims against failed financial institutions in federal receivership and its concern for conserving judicial resources") (internal quotation and citation omitted); *cf. Yeomalakis v. FDIC*, 562 F.3d 56, 60 (1st Cir. 2009) ("To send the case back to the FDIC for administrative proceedings that could take additional time . . . makes no sense and would hardly advance Congress' purpose in enacting FIRREA of promptly disposing of claims against failed financial institutions.").

must simply rely upon the FDIC to do its job." *Pareto v. FDIC*, 139 F.3d 696, 701 (9th Cir. 1998). The Bank Bondholders' motion to intervene here would expand this proceeding to necessarily include any WMB creditor who wished to appear, undermining the efficiency underlying the FDI Act's statutory framework. Accordingly, the FDI Act should not be interpreted as allowing the Bank Bondholders' intervention, and the Court lacks subject matter jurisdiction over their claims.

B. The Bank Bondholders Seek to Advance Their Bankruptcy Claims in This Action

The Bank Bondholders assert that they "do not propose to expand the scope of the litigation beyond the four corners of Plaintiffs' own complaint," Mov. Br. at 17, and that admission itself dooms their motion to intervene because the FDIC is perfectly capable of defending its own decisionmaking on all matters pleaded in the complaint. In reality, however, the Bank Bondholders seek to intervene as a way to further their own spurious claims asserted against WMI in the WMI Bankruptcy Proceeding (*see, e.g.*, Mov. Br. at 1, 7, 10-11) and inject alleged setoff defenses to WMI's claims in this action. (*See supra* note 4.) As a threshold matter, the assertion of setoff rights violates the automatic stay.[7] *See* 11 U.S.C. § 362(a)(7) (a bankruptcy petition operates as a stay, applicable to all entities, of "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor"); *In re W & T Enter., Inc.*, 84 B.R. 838, 840 (Bankr. M.D. Fla. 1988) (creditor asserting setoff as a defense without seeking relief from the automatic stay violated the automatic stay); *In re Lessig Const., Inc.*, 67 B.R. 436, 444 (Bankr. E.D. Pa. 1986) (same).

[7] Furthermore, courts have construed the automatic stay to apply to all actions brought against a debtor, even if the action does not constitute a claim against the debtor and even if the actions are not brought to obtain property of the estate, so long as "the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1036 (3d Cir. 1991) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

Likewise, the result of the Bank Bondholders' "defense" would be the diversion of property of WMI to the Bank Bondholders, rather than to WMI's bankruptcy estate for distribution in accordance with an eventual plan of reorganization. The Bankruptcy Court has exclusive jurisdiction over WMI's property. *See* 28 U.S.C. § 1334(e)(1) ("[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction – (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate . . . "); *In re Williams*, 244 B.R. 858, 866 (S.D. Ga. 2000) ("The function of § 1334(e) is clear-to insure that only one court administers the bankruptcy estate of a debtor. Otherwise, the orderly distribution of the assets of the debtor to holders of claims against the estate-one of the main functions of bankruptcy-could not be accomplished."); *In re Gurley*, 357 B.R. 868, 876 (Bankr. M.D. Fla. 2006) ("A bankruptcy court has exclusive jurisdiction to determine which creditors are entitled to share in a distribution of the property of the estate.") (internal citation omitted). WMI's Bankruptcy Proceeding is the appropriate forum in which to litigate the Bank Bondholders' claims – not this action.

C. Defects in the Court's Subject Matter Jurisdiction Should Be Considered When Evaluating a Motion to Intervene

Subject matter jurisdiction goes to the inherent power of this Court, *see Renne*, 501 U.S. at 316, and intervention should not be granted where the Court would have no subject matter jurisdiction over claims by or against the putative intervenor. The D.C. Circuit has recognized the need for an intervenor to establish standing. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003) ("Because a would-be intervenor's Article III standing presents a question going to this court's jurisdiction . . . we address it first.") (internal citation omitted). There is no reason why a lack of standing would prevent intervention, but defects in other components of subject matter jurisdiction would not. Likewise, the Federal Rules of Civil

Procedure "do not extend or limit the jurisdiction of the district courts . . . ." Fed. R. Civ. P. 82. Therefore, Rule 24 does not grant the Court jurisdiction where Congress has limited that jurisdiction by statute.

II. THE BANK BONDHOLDERS DO NOT SATISFY THE REQUIREMENTS TO INTERVENE AS OF RIGHT UNDER FED. R. CIV. P. 24(A)

The Federal Rules of Civil Procedure provide for intervention as a matter of right where the party seeking intervention "claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). In this Circuit,

> an applicant's right to intervene depends on "(1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties."

Nat'l Ass'n of Home Builders v. U.S. Army Corp. of Eng'rs, 519 F. Supp. 2d 89, 91 (D.D.C. 2007) (quoting *Fund for Animals*, 322 F.3d at 731). In the absence of even one of these four prerequisites, the motion to intervene must be denied. *See Linton by Arnold v. Comm'r of Health and Envt., State of Tenn.*, 973 F.2d 1311, 1317 (6th Cir. 1992) ("[a] proposed intervenor must prove each of the four factors" and "failure to meet one of the criteria will require that the motion to intervene be denied"). Here, the Bank Bondholders cannot meet these requirements because (i) their interests will not be impaired by WMI's actions, and (ii), in any event, the FDIC adequately represents their interests in this action.

A. Disposition of this Case Will Not Impair or Impede the Bank Bondholders' Ability to Protect Their Legitimate Interests

The Bank Bondholders assert that intervention is required because, absent intervention, their interest in the assets of the Receivership estate may be impaired. However, the rights to payment from the Receivership estate are set by statute and the FDIC is the agency that has been statutorily appointed to oversee the Receivership. Because the disposition of this case will not impair the Bank Bondholders' ability to assert their interests, the Bank Bondholders have no legally protected interest in the denial of competing claims. Their only interest is in receipt of their pro rata share of receivership assets after the FDIC pays depositors, administrative creditors, and any other claimants of higher priority. If the Bank Bondholders are allowed to intervene in order to protect this interest, every other WMB creditor would be able to intervene in every challenge brought against the FDIC for its disallowance of a claim – a result certainly not intended by Congress in passing the FDI Act. *See, e.g., United States v. Alisal Water Corp.*, 370 F.3d 915, 920 (9th Cir. 2004) ("A mere interest in property that may be impacted by litigation is not a passport to participate in the litigation itself. To hold otherwise would create a slippery slop where anyone with an interest in the property of a party to a lawsuit could boostrap that stake into an interest in the litigation itself.").

The Bank Bondholders also assert that they have an interest because they are taking factual positions in WMI's Bankruptcy Proceeding that are factually inconsistent with factual positions that WMI is taking in this action. This argument effectively admits that the Bank Bondholders seek to prosecute their bankruptcy claims in this action, notwithstanding this Court's lack of jurisdiction over those claims. Moreover, their claims, which are based on allegations that WMI should have served as a "source of strength" for WMB and that it looted "WMB," are both spurious and not claims that the Bank Bondholders have standing to assert.

Rather, it is for the FDIC to decide whether the WMB Receivership has claims that should be asserted against WMI. *See* 12 U.S.C. § 1821(d)(2); *Smith v. United States*, 58. Fed. Cl. 374, 387 (2003) ("Any claim asserted on behalf of [the failed bank] belongs to the FDIC as its receiver.").

1. WMI's Claims Seeking Damages from the FDIC's Funds Do Not Impair the Bank Bondholders' Interests

WMI seeks to compel the FDIC to pay WMI's claims from two sources: (1) the Receivership estate, insofar as the Receivership estate actually has assets and the value of those assets is due to WMI pursuant to 12 U.S.C. § 1821(d)(11); and (2) from the FDIC's own funds, insofar as the FDIC is incapable of paying valid claims pursuant to 12 U.S.C. § 1821(d)(11), because the FDIC transferred the majority of WMB's assets to JPMC for less than their liquidation value. The former claim does not impair the Bank Bondholders' interests because the Bank Bondholders are protected by their ability to litigate whatever claims they may have against the Receivership in their own claims proceeding. This latter claim does not impair the Bank Bondholders' interests because it is a claim against the FDIC's assets, not the Receivership's assets.

2. The Bank Bondholders Have No Right to Receivership Payments Beyond the FDI Act's Payment Priority Scheme

The Bank Bondholders assert that any successful claim by WMI necessarily reduces the recovery by the Bank Bondholders because the Receivership estate has limited assets. (Mov. Br. at 7.) The Bank Bondholders' supposed interest in maximizing their recovery from the Receivership estate is not a legally protected interest that can be impaired. *See Alisal Water Corp.*, 370 F.3d at 921 (finding that a creditor would not have an interest impaired where there was a summary claims process used by the receiver). The FDIC, as receiver, has a legal duty to pay all valid claims in accordance with the FDI Act. *See* 12 U.S.C. § 1821(d)(2)(H) ("The Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository

institution in accordance with the prescriptions and limitations of this chapter."); *id*. § 1821(d)(11). The Bank Bondholders have no right to assert that WMI's valid claims should not be paid to WMI or to otherwise agitate for payment in excess of their rights under section 1821(d)(11). Nor do they have a right to effectively divert payments to themselves that otherwise would flow into WMI's bankruptcy estate for distribution among WMI's creditors in accordance with the Bankruptcy Code.

The Bank Bondholders prove WMI's argument by analogizing their intervention to creditors objecting to claims in a bankruptcy. (*See* Mov. Br. at 7 n.4.) While the Bankruptcy Code provides a forum and procedures for all creditors of the bankruptcy estate to object to payments to other creditors, the FDI Act provides no such mechanisms. Rather, it relies on the FDIC to lead the resolution of a failed bank. The FDI Act grants the FDIC relatively broad authority to liquidate a failed bank without interference, subject to the FDI Act's limited judicial review provisions.[8] The Bank Bondholders seek to have the Court appoint them to oversee the FDIC, notwithstanding Congress' decision to limit such oversight in an effort to streamline the bank resolution process. Accordingly, the Bank Bondholders' attempts to usurp the FDIC's role and effectively transform this proceeding into a WMB bankruptcy proceeding should be rejected. *Cf. Alisal Water Corp.*, 370 F.3d at 918 (affirming the denial of a motion to intervene where intervention "raise[d] the specter of a complicated 'battle royal' among rival creditors" of a company over which a receiver had been appointed).

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[8] *See* FDIC Resolution Handbooks, at 70 (April 2, 2003) ("The U.S. Congress has entrusted the FDIC with virtually complete responsibility for resolving failed federally insured depository institutions . . . . The FDIC as receiver is not subject to the direction or supervision of any other agency or department of the United States or of any state, in the operation of the receivership. These provisions allow the receiver to operate without interference from other executive agencies and to exercise its discretion in determining the most effective resolution of the institution's assets and liabilities."), *available at* http://www.fdic.gov/bank/historical/reshandbook/ch7recvr.pdf.

3. The Bank Bondholders Have No Rights Based on WMI's Purported Duty to Serve as a "Source of Strength"

The Bank Bondholders insinuate that WMI's claims are fundamentally illegitimate, and thus adverse to the Bank Bondholders, because WMI is obligated to serve as a so-called "source of strength" to WMB. This assertion is flawed on several levels. First, while the Board of Governors of the Federal Reserve Systems (the "Board") has characterized this "source of strength" doctrine as flowing from the Bank Holding Company Act ("BHC Act") in a policy statement,[9] the Board did not regulate WMI or WMB, and the BHC Act is not applicable to a savings bank such as WMB. *See* 12 U.S.C. §§ 1841(c)(2)(B), 1841(j) (exempting savings banks, such as WMB from the BHC Act's scope). Nor has the OTS (WMI's and WMB's former regulator) issued a comparable policy statement. Second, the Board's "source of strength" doctrine has absolutely no statutory basis, and the highest court to ever consider the question found that the Board did not have statutory authority to impose the doctrine. *See MCorp Fin., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 900 F.2d 852, 862 (5th Cir. 1990) ("[W]e conclude that the Board is without authority under the BHCA to require MBank to transfer its funds to its troubled subsidiary bank."), *rev'd on other grounds*, 502 U.S. 32 (1991).[10] Third, even if the "source of strength" doctrine actually applied to WMI, the Bank Bondholders have no right to invoke it. As articulated by the Board, the doctrine allows the *Board* to compel a holding company to support its subsidiary bank using its regulatory cease and desist authority. *See* 52 Fed. Reg. at 15707. It has no application here.

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[9] *See* 52 Fed. Reg. 15707 (Apr. 30, 1987).

[10] The U.S. Supreme Court overturned the Fifth Circuit's decisions because it found that courts could not exercise jurisdiction over a Board cease-and-desist proceeding under 12 U.S.C. § 1818(i) until the Board's administrative process had been exhausted. *MCorp Fin., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 502 U.S. 32, 42 (1991).

4. The Bank Bondholders' Advancement of Their Bankruptcy Claims Does Not Warrant Intervention

Finally, the Bank Bondholders assert that they have an interest in this action because WMI takes factual positions that are inconsistent with the allegations of the Bank Bondholders in their own proofs of claims filed in WMI's Bankruptcy Proceeding. The Bank Bondholders' contention that "WMI looted WMB for its own benefit while at the same time directing WMB to issue the Senior Bonds now held by the Bank Bondholders", Mov. Br. at 11, is baseless. In fact, WMI invested billions in WMB, including $6.5 billion between the end of 2007 and September 2008 when the government took it over and FDIC sold its assets to JPMC. But regardless of the lack of merit, the Bank Bondholders lack standing to assert those claims because the FDI Act grants the FDIC authority to pursue such claims on behalf of the Receivership, not the Bank Bondholders. *See* 12 U.S.C. § 1821(d)(2).[11] The FDIC – in its capacity as receiver – has filed a proof of claim in WMI's bankruptcy, apparently asserting what the FDIC believes to be WMB's valid claims against WMI. The Bank Bondholders seek to use this Court as a forum to circumvent the receivership and adjudicate claims against WMI that they have no right to pursue in any forum. Furthermore, the mere fact that the Bank Bondholders' bankruptcy claims against WMI may share common issues of fact with the claims in this action does not establish a right to intervene. *See Tripp v. Executive Office of the President*, 194 F.R.D. 344, (D.D.C. 2000) ("[E]ven though the two cases share common issues of fact . . . that fact alone is not sufficient to warrant intervention here.") (internal citation omitted).

[11] *See also E.I. du Pont de Nemours and Co. v. FDIC*, 32 F.3d 592, 595 (D.C. Cir. 1994) ("As receiver the FDIC has a responsibility to marshal the assets of the bank and to distribute them to the bank's creditors and shareholders.") (internal citation omitted); *Golden Pacific Bancorp. v. FDIC*, 375 F.3d 196, 201 (2d Cir. 2004) ("In its capacity as receiver, the FDIC steps into the shoes of the failed bank and has a responsibility to marshal the assets of the bank and to distribute them to the bank's creditors and shareholders. Generally speaking, a receiver owes a duty of strict impartiality to all persons interested in the receivership estate, and also must endeavor to realize the largest possible amount for assets of the estate.") (internal citation and quotation omitted).

B. Any Interest that the Bank Bondholders Might Have in This Action is Adequately Represented by the FDIC

Even if the Bank Bondholders have protectable interests that might be impaired here, intervention is not necessarily because the FDIC will adequately represent their interests. The FDIC and the Bank Bondholders seek exactly the same thing – a judgment of this Court disallowing Plaintiffs' claims. Under the FDI Act, Congress has statutorily appointed the FDIC to operate and liquidate failed banks for the benefit of their creditors.[12] (*See supra* note 4.) Hence, Congress already has determined that the FDIC is the sole and adequate representative of the interests of the receivership creditors at large.

The Bank Bondholders cite several decisions in this Circuit where courts have concluded that governmental entities do not adequately represent the interests of other parties. The cases cited by the Bank Bondholders, however, are distinguishable because they involve situations where the government and the prospective intervenor had differing policy goals – generally in the context of challenges to agency action or statutes.[13] Where the government and prospective private intervenors have similar interests, this Court and the D.C. Circuit have found that the government adequately represents the prospective intervenors' interests. *See, e.g., Mass. School of Law v. United States*, 118 F.3d 776, 781 (D.C. Cir. 1997); *United States v. Microsoft Corp.*, No. Civ. A. 98-1232 (CKK), 2003 WL 1191753, at *3 (D.D.C. Feb. 7, 2003); *see also FDIC v.*

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[12] *See supra* note 11. There is no evidence that the FDIC is disfavoring the Bank Bondholders relative to WMI or other WMB creditors. In contrast, the FDIC has disfavored WMI, going so far as to disallow its clearly documented and straightforward claims for intercompany loans and receivables without explanation. (*See* Compl. ¶¶ 14-19.)

[13] *See* Mov. Br. at 13 (citing *Fund for Animals*, 322 F.3d at 736 (reversing a decision not to allow the Mongolian government to intervene in a challenge to an Endangered Species Act determination); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (reversing denial of a insurer's motion to intervene in a constitutional challenge to the District of Columbia's no fault insurance law); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (allowing a group of parents to intervene in a challenge against the D.C. Board of Education regarding the administration D.C. schools); *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 70 (D.D.C. 2006) (granting motion of hunting groups to intervene in an Endangered Species Act determination)).

Jennings, 107 F.R.D. 50, 53 (W.D. Okla. 1985) (denying a motion to intervene by a bank holding company because the FDIC adequately represented the interests of the failed bank's holding company in the FDIC's actions against the failed bank's auditors and directors).

The Bank Bondholders next argue that the FDIC has an inherent conflict of interest because the FDIC has an incentive to settle WMI's claims against FDIC-Corporate with funds from the Receivership estate. (Mov. Br. at 14.) That argument lacks merit. First, the FDIC is obligated to pay all valid claims in accordance with the FDI Act's priority scheme, and thus cannot discriminate among claimants. *See* 12 U.S.C. § 1821(d)(11). The FDIC lacks the statutory power to engage in the movants' hypothetical conflict of interest. Second, the Bank Bondholders misconstrue the practicalities of this case. Because the FDIC sold WMB to JPMC for substantially less than WMB's liquidation value, the FDIC does not have sufficient assets in the Receivership estate to settle WMI's claims, even if the FDIC could ignore the FDI Act. Accordingly, the Bank Bondholders may not intervene as of right in this action because the FDIC adequately represents their interests.

III. THE COURT SHOULD NOT GRANT THE BANK BONDHOLDERS' REQUEST FOR PERMISSIVE INTERVENTION

Federal Rule of Civil Procedure 24(b)(1) allows the court to permit a party to intervene who "(A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Federal Rule of Civil Procedure 24(b)(3) specifies that "in exercising its discretion [to allow permissive intervention], the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see also Fund for Animals*, 322 F.3d at 731-32. "District courts have the discretion . . . to deny a motion for permissive intervention even if the movant established an independent jurisdictional

basis, submitted a timely motion, and advanced a claim or defense that shares a common question with the main action." *Equal Employment Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998).

The Court should reject the Bank Bondholders' request for permissive intervention because it will delay this action and prejudice WMI for all of the reasons stated above. The D.C. Circuit has interpreted Rule 24(b)(2)'s "delay or prejudice" standard as follows:

> The "delay or prejudice" standard presumably captures all the possible drawbacks of piling on parties; the concomitant issue proliferation and confusion will result in delay as parties and courts expend resources trying to overcome the centrifugal forces springing from intervention, and prejudice will take the form not only of the extra cost but also of an increased risk of error.

Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1235 (D.C. Cir. 2004) (quoting *Mass. School of Law*, 118 F.3d at 782). The Bank Bondholders' intervention would unnecessarily and improperly expand this litigation to include the Bank Bondholders' bankruptcy claims and transform this action into a free-for-all where any and every creditor of WMB could interfere with the orderly administration of the receivership and put its own spin on the defense of the FDIC's decisionmaking. Likewise, the Bank Bondholders' presence will make this action less efficient because they have little to add beyond piling on to the FDIC's defense. Not only will this delay resolution of this action, it also will unnecessarily dissipate the limited resources of WMI's bankruptcy estate because WMI will be required to respond to the Bank Bondholders' extraneous and duplicative litigation efforts. Finally, only the Bankruptcy Court can resolve claims by JPMC, the Bank Bondholders, and others against WMI. This Court has no jurisdiction to hear the Bank Bondholders' claims against WMI, which can be adjudicated only in the Bankruptcy Court.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Bank Bondholders' Motion to Intervene as Defendants in this action.

Dated: Washington, D.C.
June 15, 2009

	/s/ Adam P. Strochak David R. Berz, Esq. (D.C. Bar No. 182105) Adam P. Strochak, Esq. (D.C. Bar No. 439308) Weil, Gotshal & Manges LLP 1300 Eye Street, NW, Suite 900 Washington, DC 20005 Telephone: (202) 682-7001 Facsímile: (202) 857-0939 – and – Marcia L. Goldstein, Esq. Brian S. Rosen, Esq. Michael F. Walsh, Esq. Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, New York 10153 Telephone: (212) 310-8000 Facsímile: (212) 310-8007 *Attorneys for Plaintiffs Washington Mutual, Inc. and WMI Investment Corp.*
Daniel H. Bromberg (D.C. Bar No. 442716) Quinn Emanuel Urquhart Oliver & Hedges, LLP 555 Twin Dolphin Drive, Suite 520 Redwood Shores, CA 94306 Telephone: (650) 801-5008 Fax: (650) 801-5100 – and – Peter E. Calamari David L. Elsberg Deborah K. Brown Quinn Emanuel Urquhart Oliver & Hedges, LLP 51 Madison Avenue New York, New York 10010 Telephone: (212) 849-7000 Facsimile: (212) 849-7100	

CERTIFICATE OF SERVICE

I certify that on this 15th day of June 2009, I caused a copy of the foregoing document to be filed via the Court's CM/ECF system which will cause electronic notification of its filing to be served on all parties who have appeared in this action. In addition, I have caused a copy of the foregoing documents to be served via First Class U.S. Mail upon the following:

Philip David Anker
WILMER, CUTLER PICKERING HALE & DORR, LLP
399 Park Avenue
New York , NY 10022

Russell J. Bruemmer
Gianna Ravenscroft
WILMER, CUTLER PICKERING HALE & DORR, LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

/s/ Adam P. Strochak
Adam P. Strochak, Esq.
WEIL, GOTSHAL & MANGES LLP
1300 Eye St., NW, Suite 900
Washington, DC 20005