

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

In re

CHAPTER 11

WASHINGTON MUTUAL, INC., *et al.*,¹

Debtors.

Case No. 08-12229 (MFW)

Jointly Administered

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,

Plaintiff,

v.

Adv. Proc. No. 09-50551 (MFW)

WASHINGTON MUTUAL, INC. AND WMI
INVESTMENT CORP.,

Defendants for all claims,

-and-

FEDERAL DEPOSIT INSURANCE
CORPORATION,

*Additional Defendant for
Interpleader Claim.*

**RESPONSE OF PLAINTIFF JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION, TO DEFENDANT FEDERAL DEPOSIT
INSURANCE CORPORATION'S MOTION TO STAY ADVERSARY PROCEEDINGS**

Plaintiff JPMorgan Chase Bank, National Association (“JPMC”), by its undersigned attorneys, files this response (“Response”) to the Motion of Defendant Federal

¹Debtors in these chapter 11 cases and the last four digits of each Debtor’s federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). Debtors continue to share their principal offices with the employees of JPMorgan Chase, located at 1301 Second Avenue, Seattle, Washington 98101.

Deposit Insurance Corporation (“FDIC”) to Stay Adversary Proceedings. In support hereof, JPMC respectfully represents as follows:

PRELIMINARY STATEMENT

1. JPMC agrees with the FDIC that the “first-to-file” rule applies in this case.

This rule requires that Debtors’ first-filed action, *Washington Mutual, Inc. et al. v. FDIC*, Civil Action No. 1:09-cv-00533 (RMC) (D.D.C. Mar. 20, 2009) (the “D.C. Action”), be decided first, and empowers this Court to transfer or stay any later-filed proceeding. Here, transfer would be appropriate because this case is “materially on all fours” with the D.C. Action and, at minimum, all of the Debtors’ counterclaims in this adversary proceeding (“JPMC’s Adversary Proceeding”) are subject to Title 12 of the U.S. Code’s jurisdictional bar. *See* 12 U.S.C. § 1812(d)(13)(D)(i)–(ii) (“Title 12 Jurisdictional Bar”). More specifically, Debtors’ counterclaims challenge the transaction through which the FDIC, as receiver for Washington Mutual Bank, Henderson, Nevada (“WMB”), disposed of assets and/or interests of WMB, and thus (i) concern “a determination of rights with respect to[] the assets of any depository institution for which the Corporation has been appointed receiver” or (ii) “relat[e] to any act or omission of such institution or the Corporation as receiver.” *Id.* Therefore, transfer to the D.C. Action is the best way to effectuate both the first-filed rule and the Title 12 Jurisdictional Bar.

2. Alternatively, JPMC supports a stay of its Adversary Proceeding, at this juncture, on the expectation that the District Court of the District of Columbia will permit its intervention in the D.C. Action and resolve most (if not all) of the parties’ claims. The D.C. Court is also the only court with jurisdiction under Title 12 to determine many of the issues raised by the Debtors’ counterclaims. Accordingly, although JPMC respectfully urges that transfer is the preferred course, the alternative of a stay would be appropriate, at this juncture,

both under the first-filed rule and under the District Court of Delaware's three-factor test for granting a stay.²

BACKGROUND

3. On September 25, 2008, the Office of Thrift Supervision closed WMB and appointed the FDIC to act as receiver for WMB. Thereafter, JPMC and the FDIC entered into a Purchase & Assumption Agreement (the "P&A Agreement"), whereby JPMC acquired from the FDIC substantially all of the assets and assumed certain liabilities that formerly belonged to WMB.

4. On December 30, 2008, Washington Mutual, Inc. ("WMI"), WMB's former parent holding company, and WMI Investment Corp. (together, "Debtors") submitted claims to the receivership, alleging that the FDIC, among other things, improperly took assets belonging to WMI. On January 23, 2009, the FDIC disallowed those claims. On March 20, 2009, Debtors commenced the D.C. Action, in which Debtors challenge the FDIC's disallowance of their claims and assert an ownership interest in certain assets sold under the P&A Agreement to JPMC. JPMC has moved to intervene in the D.C. Action.

5. On March 24, 2009, JPMC filed the above-captioned adversary proceeding, asserting ownership of, or interests in, certain of the disputed assets at issue in the D.C. Action. For many of these assets, JPMC requested that, as a threshold matter, this Court declare Debtors' D.C. Action the proper forum in which to resolve the parties' competing claims. (*See, e.g.*, Complaint, ¶¶ 183, 195, 204, JPMC Adversary Proceeding (Bankr. D. Del. Mar. 24,

² JPMC reserves all of its additional rights, remedies, and arguments with respect to this Court's jurisdiction over the counterclaims and disputes raised thereby, including, without limitation, arguments that the reference to this Court must be or should be withdrawn.

2009) (“JPMC Compl.”) (seeking declaratory judgment that these claims should be resolved in the D.C. Action).)

6. Debtors have answered in JPMC’s Adversary Proceeding and alleged eighteen counterclaims. (Debtors’ Answer & Counterclaims in Response to the Complaint of JPMorgan Chase Bank, N.A., ¶¶93-212, JPMC Adversary Proceeding (Bankr. D. Del. May 29, 2009) (“Debtors’ Ans. & Cntrelms”). The counterclaims are entirely duplicative of Debtors’ claims in the D.C. Action. (*Compare, e.g.,* Debtors’ Ans. & Cntrelms ¶¶ 93-103 *with* Complaint, ¶¶ 25-28, D.C. Action (D.D.C. Mar. 20, 2009) (“D.C. Compl.”) (seeking recovery of capital contributions from WMI to WMB); *compare* Debtors’ Ans. & Cntrelms ¶¶ 104-38 *with* D.C. Compl. ¶¶ 29-35 (seeking to avoid the transfer of the Trust-Preferred Securities); *compare* Debtors’ Ans. & Cntrelms ¶¶ 139-52 *with* D.C. Compl. ¶¶ 36-40 (seeking to avoid allegedly preferential tranfers to WMB by WMI).) Moreover, each counterclaim attacks the FDIC receivership and the subsequent P&A Agreement between the FDIC and JPMC and, therefore, is subject to the Title 12 Jurisdictional Bar.

7. Notwithstanding the pendency of the D.C. Action and this adversary proceeding, on April 27, 2009, Debtors filed a complaint for turnover of estate property, Adversary Proceeding No. 09-50934 (“Turnover Action”). The Turnover Action relates to deposit accounts that are the basis of Debtors’ “Deposit Claims” in the D.C. Action and the FDIC’s counterclaims in the D.C. Action, as well as three counts in this adversary proceeding.

8. On June 1, 2009, the FDIC moved to stay JPMC’s Adversary Proceeding and to intervene in the Turnover Action, in order to bring an equivalent motion to stay.³ The

³ For the same reasons asserted in the FDIC’s motions to stay and supporting memorandum, JPMC moved to stay the Turnover Action, in the event it is not dismissed. The alternative of a transfer of that action would also be acceptable, but is unnecessary because the Turnover Action is entirely duplicative of claims Debtors have raised in the D.C. Action and JPMC’s Adversary Proceeding. The proposed stay of Debtors’ Turnover Action is more fully addressed in separate briefing.

FDIC asserts that the stays are appropriate because the claims in these two proceedings seek “a determination of rights with respect to[] the assets” of WMB or relate to an “act or omission of such institution or the Corporation as receiver,” *see* 12 U.S.C. § 1812(d)(13)(D)(i)–(ii), and are therefore within the scope of the Title 12 Jurisdictional Bar of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (“FIRREA”). The FDIC further asserts that a stay is appropriate so that the claims may be heard in the D.C. Action, the first-filed action brought by Debtors.

ARGUMENT

9. JPMC agrees that the “first-to-file” rule applies in this case. Debtors’ D.C. Action was the first-filed action of the three, materially related cases. JPMC’s Adversary Proceeding (the second-filed action) raises claims to the same disputed assets at issue in the D.C. Action. The Debtors’ Turnover Action (the third-filed action) raises claims to the same “Deposits” that are at issue in the D.C. Action and JPMC’s Adversary Proceeding.

10. “The first-to-file rule gives courts the power to stay, enjoin, or transfer a later-filed case.” *Allianz Life Ins. Co. of N. America v. Estate of Bleich*, Civ. Action No. 08-cv-668 (SDW-MCA), 2008 WL 4852683, at *3 (D.N.J. Nov. 7, 2008); *accord G & G LLC v. White*, 535 F. Supp. 2d 452, 466 (D. Del. 2008) (*citing Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (3d Cir. 1941)) (the Third Circuit’s first-to-file rule grants the court discretion to stay or transfer the second-filed case). In order to “encourage sound judicial administration,” the rule requires that, where federal courts have concurrent jurisdiction over “similar cases,” “the court which first had possession of the subject must decide it.” *Allianz*, 2008 WL 4852683, at *3.

11. An immediate transfer of JPMC’s Adversary Proceeding to the D.C. Action would best “encourage sound judicial administration.” *See also* Fed. R. Bankr. P. 1014(a)(1) (bankruptcy court may *sua sponte* transfer venue “in the interests of justice”); *In re*

Donald, 328 B.R. 192, 198 (9th Cir. B.A.P. 2005) (bankruptcy court may *sua sponte* transfer venue under its 11 U.S.C. § 105(a) equitable powers). Not only do the two proceedings materially overlap, but because Debtors counterclaims relate to assets of the WMB receivership, acts or omissions of the FDIC, or both, the Congressional scheme for judicial review of receivership claims, set out in FIRREA and Title 12 of the U.S. Code, further commands which courts may hear Debtors' counterclaims.⁴ See 12 U.S.C. § 1821(d)(13)(D)(i)-(ii). Here, because of how the Debtors elected to pursue their claims, Title 12 of the U.S. Code restricts judicial review of these counterclaims to the action the Debtors initiated in the U.S. District Court for the District of Columbia. See, e.g., 12 U.S.C. §§ 1821(d)(5), (6)(A), (13)(D); *Nat'l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 383 (3d Cir. 1994); see also *Village of Oakwood v. State Bank & Tr. Co.*, 539 F.3d 373, 386 (6th Cir. 2008) (holding that the Title 12 Jurisdictional Bar encompasses a suit against a bank that purchased assets from the receivership).

12. In the alternative, JPMC supports a stay of its Adversary Proceeding, at this juncture, on the expectation that the D.C. Court will permit its intervention in the D.C. Action and resolve most, if not all, of the parties' claims. A stay would be appropriate under the first-filed rule, as explained above, and additionally, under the Delaware District Court's three-factor test for granting a stay, articulated in *Pegasus Development Corp. v. DirecTV, Inc.*, No. Civ.A. 00-1020-GMS, 2003 WL 21105073, at *1 (D. Del. May 14, 2003).

⁴ The Court need not decide whether Title 12 Jurisdictional Bar does, as the FDIC asserts, encompass all of JPMC's adversary claims because the first-filed rule provides a sufficient basis for stay and/or transfer of all parties' claims. The first-filed rule applies to all of JPMC's claims in the Adversary Proceeding, Debtors' counterclaims, and the parties' defenses because they are "materially on all fours" in that they arise from the same facts and involve the same core factual and legal disputes already at issue in the D.C. Action. *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 334 n.6 (3d Cir. 2007) (first-filed rule applies where the cases are "materially on all fours" with each other and where "the issues have such an identity that a determination in one action leaves little or nothing to be determined in the other").

13. Under *Pegasus*, courts deciding a stay should consider:

(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set.

Id. at *1; accord *Zoetics, Inc. v. Yahoo!, Inc.*, No. Civ.A. 06-108-JJF, 2006 WL 1876912, at *1 (D. Del. July 6, 2006). Here, if the Court does not transfer the JPMC Adversary Proceeding, a stay of this case and the Turnover Action (if it is not dismissed) would be appropriate, at this juncture. The stay would in no way prejudice the Debtors, as the FDIC seeks only to prioritize the action that the Debtors chose to file first. The stay would also greatly simplify the issues before this Court by resolving non-bankruptcy questions of federal regulatory law in a court of undoubted jurisdiction. Lastly, no trial date has been set, and no discovery has begun in this Court.


CONCLUSION

14. For the foregoing reasons, Plaintiff JPMC respectfully submits that JPMC's Adversary Proceeding should be transferred to the U.S. District Court for the District of Columbia or, in the alternative, stayed.⁵

⁵In the event the Court grants a stay, JPMC further requests that any action by the Debtors, the Committee, or any party in interest with respect to the assets that are the subject of the D.C. Action and/or the JPMC Adversary Proceeding, including JPMC's proofs of claim with respect to those assets, also be stayed, except for the consensual resolution of issues between JPMC and the Debtors that are jointly submitted to the Court for approval after appropriate notice to parties in interest.

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