

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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WASHINGTON MUTUAL, INC.	:
	:
and	:
	:
WMI INVESTMENT CORP.	: Civil Action No. 1:09-cv-00533 RMC
	:
Plaintiffs,	: ORAL HEARING REQUESTED
	:
v.	:
	:
FEDERAL DEPOSIT INSURANCE	:
CORPORATION,	:
	:
Defendant.	:
-----	x

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
JPMORGAN CHASE BANK, N.A.'S MOTION TO INTERVENE AS DEFENDANT**

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March 30, 2009

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Proposed Intervenor JPMorgan Chase Bank, N.A. (“JPMC”) respectfully submits this Memorandum of Points and Authorities in Support of its Motion to Intervene as Defendant, and its proposed Answer and Counterclaim (“Counterclaim”). By this action, Plaintiffs Washington Mutual, Inc. and WMI Investment Corp. (collectively, “WMI”) are attempting to divest JPMC of billions of dollars worth of assets that JPMC purchased from the Federal Deposit Insurance Corporation (the “FDIC”) in the FDIC’s role as receiver for Washington Mutual Bank, Henderson Nevada (“WMB”).

JPMC acquired these assets pursuant to a Purchase & Assumption Agreement (Whole Bank) between JPMC and the FDIC, dated as of September 25, 2008 (the “P&A”). WMI is and has been well aware of JPMC’s ownership of the assets at issue. Nonetheless, the Complaint names only the FDIC and is drafted as if it asserts claims against only the FDIC. However, it is JPMC’s interests that would be most affected were WMI to succeed on any of the claims because each claim is premised on the allegation that assets sold by the FDIC to JPMC, and paid for by JPMC, belong to WMI.

Indeed, WMI previously submitted these claims as part of the FDIC’s receivership proceedings at the end of last year. On January 23, 2009, the FDIC disallowed WMI’s claims to assets that had been sold to JPMC. If, notwithstanding the FDIC’s disallowance of WMI’s claims, the Court determines that WMI’s claims are cognizable, the primary issue before the Court will be whether these assets sold by the FDIC belong to WMI or JPMC.

Nonetheless, WMI tactically decided not to name JPMC as a defendant in this action. JPMC therefore respectfully seeks permission from this Court to intervene as a defendant. Because JPMC is the owner of the assets that are at the core of this proceeding,

JPMC's intervention as of right pursuant to Federal Rule of Civil Procedure 24(a) is appropriate in order to ensure that JPMC's interests are adequately protected. Alternatively, JPMC requests that the Court exercise its discretion to permit JPMC to intervene, given the common questions of law and fact raised by JPMC and WMI's claims to the same disputed assets, as well as the timeliness of this motion at the early stages of WMI's action.

BACKGROUND

Throughout 2008, the Office of Thrift Supervision ("OTS") developed mounting concerns over the safety and soundness of WMB. (Cntclm. ¶ 19.)¹ On September 18, 2008, the OTS designated WMB as a "problem institution," thus subjecting it to closer control and scrutiny by federal regulators. (*Id.*) Ultimately, because of the need to, among other things, ensure continuity of operations and maximize public confidence while minimizing public costs, the FDIC began an accelerated bidding process for the sale of the assets of WMB. (*Id.*) Proposed Intervenor-Defendant JPMC submitted the winning bid in the FDIC auction. (*Id.*)

On September 25, 2008, the FDIC took possession of WMB in a receivership proceeding under section 1821 of Title 12 of the United States Code, pursuant to a September 25, 2008 order issued by the Director of the OTS. (*Id.* ¶ 14.) Thereafter, JPMC and the FDIC entered into the P&A.² (*Id.* ¶ 15.) Under the P&A, which was prepared by the FDIC, JPMC acquired substantially all of the assets and assumed the deposit liabilities and certain other liabilities of WMB's banking operations. (*Id.*) Following the FDIC's sale of substantially all of WMB's assets to JPMC pursuant to the P&A, WMI filed a voluntary petition for Chapter 11 bankruptcy on September 26, 2008. (*Id.* ¶ 16.) In schedules of assets submitted to the

¹ Parenthetical references to "(Cntclm. ¶ __.)" refer to the specified numbered counterclaim paragraph of the Counterclaim, which accompanies JPMC's Motion to Intervene as Defendant, pursuant to Federal Rule of Civil Procedure 24(c).

² A copy of the P&A is attached as Ex. A to the Counterclaim.

bankruptcy court after the filing of its bankruptcy petition, WMI claimed it owned or otherwise held interests in certain WMB assets acquired by JPMC from the FDIC as receiver for WMB under the P&A. (*Id.* ¶ 4.) In order to block this attempt by Plaintiffs to use the bankruptcy proceedings to divest JPMC of its assets acquired under the P&A, on March 24, 2009 JPMC also commenced an adversary action against WMI in its Chapter 11 proceedings, requesting that the bankruptcy court reject Plaintiffs' claims of any interest in the assets sold to JPMC by the FDIC.

Likewise, in the receivership process, WMI submitted claims pursuant to the resolution procedures under Title 12, asserting that it owned or otherwise held interest in certain assets acquired by JPMC pursuant to the P&A. (*Id.* ¶ 3.) On January 23, 2009, the FDIC, as receiver, disallowed WMI's claims to such assets. (*Id.*) WMI elected not to administratively appeal the FDIC's decision, but instead filed this action, challenging the FDIC's disallowance of the claims filed and also asserting an ownership interest in the assets sold by the FDIC to JPMC. (*Id.*)

The assets acquired by JPMC for which WMI has asserted claims in this action include (i) approximately \$4 billion in the aggregate liquidation preference of certain trust securities contributed by WMI to WMB, the amount of which constituted regulatory core capital of WMB; (ii) the right to tax refunds arising from overpayments attributable to operations of WMB and its subsidiaries for the 2008 tax year and prior tax years and the net operating loss carryback from 2008 to prior tax years; (iii) approximately \$3.7 billion credited by book entry shortly prior to the receivership of WMB so as to create a purported deposit account at WMB fsb in the name of WMI without any apparent deposit of funds; (iv) at least \$234 million in tax refunds that belonged to WMB and/or WMB subsidiaries and were acquired by JPMC under the P&A but were deposited to the credit of WMI in the days immediately following the

receivership; (v) assets of certain trusts supporting deferred compensation arrangements covering the former and current employees of WMB and its subsidiaries; and (vi) other assets, including intellectual property and certain contractual rights. (*Id.* ¶ 6; Compl. ¶¶ 14-61.) WMI is also claiming ownership of certain tax qualified pension and 401(k) plans pursuant to which the trust assets are held for the exclusive benefit of participants, most of whom were WMB's and then JPMC's employees. (Cntrclm. ¶ 6; Compl. ¶ 55.)

JPMC's acquisition was a transaction that involved no financial assistance from, or cost to, the FDIC's Deposit Insurance Fund and avoided an interruption in banking services to the 13 million depositors of WMB. (Cntrclm. ¶ 25.) It assured that the more than 2,200 bank branches operated by WMB or its subsidiary opened for business on September 26, 2008, protecting the interests of employees, customers, vendors, and communities who were dependent on WMB's banking operations. (*Id.*) JPMC assumed billions of dollars in liabilities of WMB, including more than \$140 billion in insured deposit liabilities, at no cost to the FDIC. (*Id.* ¶ 20.) In addition, JPMC paid the FDIC \$1.88 billion in cash for the benefit of the receivership. (*Id.* ¶ 25.) This transaction stands in contrast to other recent bank failures such as the FDIC's sale of IndyMac Federal Bank FSB, which cost the FDIC approximately \$10.7 billion, despite IndyMac being a much smaller bank than WMB.

Because WMI's claims in this action seek to establish ownership of assets that WMI concedes were the subject of the P&A between the FDIC and JPMC,³ JPMC seeks to intervene in this action as a defendant to protect its significant property interests in those disputed assets. Consistent with this defensive posture, JPMC in its proposed Answer and

³ WMI's complaint refers repeatedly to the fact that the FDIC as receiver "sold substantially all the assets of WMB, including the stock of WMBfsb, to JPMorgan Chase Bank, National Association . . . pursuant to that certain Purchase and Assumption Agreement, Whole Bank, dated as of September 25, 2008." (Compl. ¶¶ 8, 13, 45, 48, 50, 51, 85 & Exhibit 3.)

Counterclaim denies WMI's claims regarding its interests in JPMC's property, and asserts a corresponding compulsory counterclaim seeking only a declaration that, as the successor of the FDIC as receiver for WMB, JPMC has or is entitled to full legal title to and the beneficial and equitable ownership interest in the assets at issue.⁴ (*Id.* ¶ 32.)

ARGUMENT

I. JPMC IS ENTITLED TO INTERVENE AS OF RIGHT UNDER RULE 24(A) TO PROTECT ITS SIGNIFICANT PROPERTY INTERESTS THAT ARE THE SUBJECT OF WMI'S CLAIMS.

The D.C. Circuit has “held that qualification for intervention as of right [under Rule 24(a)] depends on the following four factors:

(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.”

The Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998)). A party seeking to intervene as of right must also demonstrate that it has standing under Article III of the Constitution. *The Fund for Animals*, 322 F.3d at 732-33. Given that WMI seeks nothing less than complete divestment of specific significant assets it concedes were the subject of the P&A under which the assets were paid for by and sold to JPMC by the FDIC, *see supra* note 3, JPMC clearly satisfies each of the requirements for intervention as of right.

⁴ As set forth in JPMC's compulsory counterclaim for declaratory relief, those causes of action are all premised on the actual controversies created by WMI's *post-bankruptcy* assertions of claims to the assets acquired by JPMC under the P&A. (*See* Cntrclm. ¶ 26.) Indeed, JPMC's defenses and compulsory counterclaims all seek nothing more than a confirmation that the FDIC's disallowance of WMI's claims to WMB's assets—which occurred nearly four months after WMI's declaration of bankruptcy—was proper, in part because the FDIC took possession of WMB as receiver and sold substantially all of WMB's assets to JPMC under the P&A.

A. JPMC Has Standing.

To establish Article III standing, a prospective intervenor must show “(1) injury-in-fact, (2) causation, and (3) redressability.” *Id.* at 733; *see Bennett v. Spear*, 520 U.S. 154, 162 (1997). Where, as here, a party seeks to intervene as a defendant, the focus of the standing inquiry is on the potential of the plaintiff’s lawsuit to injure the prospective intervenor. *See Glamis Imperial Corp. v. U.S. Dep’t of the Interior*, No. Civ.A. 01-530 (RMU), 2001 WL 1704305, at *3 (D.D.C. Nov. 13, 2001). Here, JPMC’s standing is beyond dispute. If WMI somehow prevailed on the claims asserted in the Complaint, JPMC could potentially be divested of billions in assets JPMC paid for and purchased from the FDIC. As set forth in JPMC’s proposed answer and compulsory counterclaim, WMI’s baseless claims to these assets have already harmed JPMC, which has been denied the use and benefit of assets acquired under the P&A. (Cntrelm. ¶¶ 3, 26-27.) It is precisely these harms that JPMC’s proposed defense of this action, as well as the corresponding declaratory relief sought by JPMC in its compulsory counterclaim, seeks to remedy.⁵

B. JPMC’s Motion Is Timely.

The timeliness of a motion to intervene “is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant’s rights, and the probability of prejudice to those already parties in the case.” *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (citing *Moten v. Bricklayers Int’l Union*, 543 F.2d 224, 228 (D.C. Cir. 1976)). “The critical factor is whether any ‘delay in

⁵ JPMC’s cause of action for declaratory relief with respect to the disputed assets is in the nature of a compulsory counterclaim, given that it “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” Fed. R. Civ. P. 13(a).

moving for intervention will prejudice the existing parties to the case.” *Akiachak Native Comty. v. Dep’t of the Interior*, 584 F. Supp. 2d 1, 5 (D.D.C. 2008) (quoting 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1916 (3d ed. 2007)).

JPMC’s motion to intervene is manifestly timely. JPMC has brought this motion less than one week after WMI’s commencement of this action, well before the sole defendant, the FDIC, has answered and, to JPMC’s knowledge, before the FDIC has even been served. JPMC’s counterclaims for declaratory relief all relate to its rights in the same property that is the subject of WMI’s action, and raise no new issues for the Court to adjudicate. Furthermore, JPMC is prepared to comply with any schedule set by this Court. Thus, JPMC’s intervention in this matter at this early stage will cause no undue delay in the ultimate resolution of this matter, and will not result in any prejudice to WMI or the FDIC. *See Akiachak Nation*, 584 F. Supp. 2d at 5 (summarily finding motion to intervene to be timely where it was filed “only eighteen days after the plaintiffs filed their consolidated complaint, on the same day as the defendants filed their answer to the consolidated complaint and before any dispositive motions were filed”).

C. JPMC Has Interests Relating to the Property and Transactions that Are the Subject of this Litigation.

“An intervenor’s interest is obvious when he asserts a claim to property that is the subject matter of the suit” *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (citing *Atlantis Dev. v. United States*, 379 F.2d 818 (5th Cir. 1967)); *see also* 6 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE, § 24.03[2][a], at 24-26 (3d ed. 2008) (“Motions to intervene in which the proposed intervenor advances a clear property interest present the easiest cases for intervention.”). “If an action involves a dispute about a particular property or fund, and a movant claims a direct substantial, and legally protectable right to this property or fund, the existence of a sufficient interest is apparent.” *Id.* (collecting cases).

Here, the heart of WMI's action is its contention that it has rights with respect to billions of dollars in specific assets that WMI acknowledges were the subject of the P&A pursuant to which these assets were sold by the FDIC to JPMC, *see supra* note 3. WMI is effectively asking this Court to divest JPMC as the purchaser from the FDIC as receiver in favor of WMI. Thus, there can be no reasonable dispute concerning JPMC's substantial and legally protectable interests in this action. *Foster*, 655 F.2d at 1324. Moreover, as demonstrated *supra* page 6, JPMC has Article III standing with respect to WMI's action, which the D.C. Circuit has held "is alone sufficient to establish that [JPMC] has 'an interest relating to the property or transaction which is the subject of the action.'" *The Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)).

D. Adverse Disposition of this Action Will Impair JPMC's Ability to Protect Its Interests.

To intervene as a matter of right, JPMC must also show that an unfavorable disposition of the action may practically impair or impede its ability to protect its interest in the litigation. *Alternative Research and Dev. Found. v. Veneman*, 262 F.3d 406, 411 (D.C. Cir. 2001). Here, JPMC's ability to protect its interests in the assets purchased from the FDIC will be severely prejudiced if WMI prevails in its action and JPMC loses its right, title, and interest in the disputed assets. While styled as an action against the FDIC, because WMI's claims involve assets that are no longer the FDIC's property but are now JPMC's property, it is JPMC that has the direct interest and economic stake in litigating the issues in the Complaint so as to protect its own property and its ownership interest therein. Further, a decision from this Court in favor of WMI would likely be cited by WMI itself as precluding litigation of a future claim, or of issues in connection with a claim, by JPMC with respect to the assets claimed here by WMI. *See Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 452 (D.D.C. 1978) (a third party may be bound

by a judgment in a case it could have entered as a matter of right). Thus, if JPMC's interests are not represented in this action, JPMC could suffer severe prejudice to its interests, for which it may have no recourse.

E. JPMC's Interests Will Not Be Adequately Protected by the FDIC.

An applicant for intervention as of right "need only show that representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate." *See Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). The burden of this showing is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Dimond*, 792 F.2d at 192 (inadequacy requirement is "not onerous").

Here, JPMC amply meets its minimal burden of showing that the FDIC, as a regulatory agency of the federal government, "may not" adequately protect JPMC's interests in this litigation. Courts in this circuit have consistently concluded that "governmental entities do not adequately represent the interests of aspiring intervenors." *The Fund for Animals*, 322 F.3d at 736 & n.9 (collecting cases). The interests of governmental or regulatory entities such as the FDIC necessarily go far beyond the "more narrow and parochial financial interest" of private intervenors, with the result being that the FDIC effectively "would be shirking its duty were it to advance [JPMC]'s narrower interest at the expense of its representation of the general public interest." *Dimond*, 792 F.2d at 192-93 (noting "the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances"). Here, the FDIC's "duty" as receiver is nothing short of helping "promote stability, economic recovery, and increased public confidence," *FDIC v. McFarland*, 243 F.3d 876, 885 (5th Cir. 2001), not zealously advocating for JPMC's specific interests as a counter-party to an arms-length purchase agreement. As a regulatory agency with unique public

commitments, the FDIC cannot adequately represent JPMC's particular economic interest and should not be asked to do so. *Dimond*, 792 F.2d at 192-93.

Beyond that, the assets claimed by WMI have already been sold by the FDIC to JPMC. Thus, unlike JPMC, the FDIC no longer has any direct interest in those assets and, therefore, has little or no incentive to protect those assets from claims by WMI.

II. ALTERNATIVELY, JPMC SHOULD BE ALLOWED TO INTERVENE PERMISSIVELY

JPMC respectfully submits that this case presents a clear instance in which intervention as of right is appropriate. If, however, this Court determines otherwise, JPMC should be allowed to permissively intervene pursuant to Federal Rule of Civil Procedure 24(b)(1), which provides in pertinent part:

On timely motion, the court may permit anyone to intervene who: . . . (B) has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

The Court has wide discretion in deciding a motion for permissive intervention. *See EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045-46 (D.C. Cir. 1998). The principal factor to be considered is whether JPMC's intervention will unduly delay or prejudice the adjudication of the rights of WMI or the FDIC. *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967).

As shown above, JPMC's motion is timely, coming just days after the filing of WMI's complaint and prior to any substantive proceedings on the merits. *See supra* pages 6-7. Thus, intervention by JPMC at this early stage will not unduly prejudice either WMI or the FDIC. *See Glamis Imperial Corp.*, 2001 WL 1704305, at *4. Indeed, from the standpoint of speed, JPMC has the greatest incentive of anyone to seek an expeditious adjudication of WMI's claims to JPMC's own property. And, from the standpoint of positioning the dispute, permitting

intervention will be helpful as well: Because the assets at issue were paid for by and sold to JPMC by the FDIC under the P&A, intervention by JPMC places the party that actually and currently owns the assets being claimed by WMI—*i.e.*, the party with the most direct economic interest in the dispute—in a position to defend the claims. Further, because WMI's claims and JPMC's claim for declaratory judgment are in essence flip sides of the same coin, they share common questions of both law and fact that makes intervention particularly efficient here.

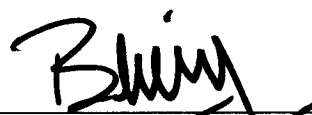
Therefore, if intervention as of right is not granted, the Court should exercise its discretion and grant JPMC leave to intervene in this action.

CONCLUSION

For the foregoing reasons, JPMC's motion to intervene as of right as a defendant in this action should be granted. In the event that motion is denied, the Court should exercise its discretion and grant JPMC's motion for permissive intervention.

Dated: March 30, 2009
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Respectfully submitted,



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