

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

AMERICAN NATIONAL INSURANCE  
COMPANY, AMERICAN NATIONAL  
PROPERTY AND CASUALTY  
COMPANY, AMERICAN NATIONAL  
GENERAL INSURANCE COMPANY,  
FARM FAMILY LIFE INSURANCE,  
COMPANY, FARM FAMILY CASUALTY  
INSURANCE COMPANY, PACIFIC  
PROPERTY AND CASUALTY  
COMPANY, AMERICAN NATIONAL  
LLOYDS INSURANCE COMPANY,  
NATIONAL WESTERN LIFE  
INSURANCE COMPANY and GARDEN  
STATE LIFE INSURANCE COMPANY,

**Plaintiffs,**

CIVIL ACTION NO. 3:09-cv-00044

**V.**

**JP MORGAN CHASE & CO.  
and JP MORGAN CHASE BANK,  
NATIONAL ASSOCIATION,**

**Defendants,**

and

**FEDERAL DEPOSIT INSURANCE  
CORPORATION,**

**Intervenor-Defendant.**

**MOTION OF INTERVENOR-DEFENDANT FDIC-RECEIVER  
TO TRANSFER OR DISMISS FOR IMPROPER VENUE**

Intervenor-Defendant, the Federal Deposit Insurance Corporation, as receiver for Washington Mutual Bank, Henderson, Nevada (the “FDIC-Receiver”), respectfully submits this motion pursuant to 28 U.S.C. § 1406(a) and 12 U.S.C. § 1821(d)(6)(A) to transfer this action to

the United States District Court for the District of Columbia or, in the alternative, to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(3) for improper venue.

### **PRELIMINARY STATEMENT**

The institutional investor plaintiffs in this action filed their Original Petition (the “Petition”) in Cause No. 09-CV-0199 in the 122nd State District Court of Galveston County, Texas, asserting claims for tortious interference with contract and other causes of action against JPMorgan Chase Bank, National Association (“JPMC Bank”) and its parent holding company JPMorgan Chase & Co. (“JPMC”). According to plaintiffs’ allegations, they suffered harm when JPMC Bank purchased substantially all of the assets of Washington Mutual Bank (“WMB”) from the FDIC-Receiver, at allegedly too low a price. As a result, plaintiffs allege, they suffered a loss of the value in their holdings of debt issued by WMB and of debt and stock issued by WMB’s parent holding company, Washington Mutual, Inc. (“WMI”). See, e.g., Pet., ¶ 30 (“On September 25, 2008, JPMC, in order to gain money and market share, wrongfully finalized its scheme to strip away valuable assets of Washington Mutual without properly compensating the company or its stakeholders, including the Plaintiffs.”).

To the extent that it involves plaintiffs’ holdings of WMB debt securities, the Petition is a transparent attempt to evade the receivership claims process that is overseen by the FDIC-Receiver, as provided for under federal banking law. Under the Federal Deposit Insurance Act, as amended, inter alia, by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”), actions relating to the FDIC claims process only may be commenced in the United States District Court for the District of Columbia or the district where the failed depository institution had its headquarters, here, the Western District of Washington. See 12 U.S.C. § 1821(d)(6); Hudson United Bank v. Chase Manhattan Bank of Conn., 43 F.3d 843,

847 (3d Cir. 1994) (affirming transfer of venue of action against FDIC and purchaser of failed bank assets); Family Realty & Constr. Co. v. Mfrs. & Traders Tr. Co., 931 F. Supp. 141, 145-46 (N.D.N.Y. 1996) (granting motion of FDIC as intervenor to transfer action pursuant to section 1821(d)(6)(A)).

The FDIC-Receiver intervened in the state court action, and thereafter removed this action, in order to protect the jurisdictional scheme established by Congress for the FDIC's oversight of failed bank receiverships. The FDIC-Receiver now respectfully moves this Court for an order pursuant to 28 U.S.C. § 1406(a), transferring this action to the District of Columbia or, in the alternative, for dismissal of the Petition for improper venue, pursuant to Federal Rule of Civil Procedure 12(b)(3).<sup>1</sup>

## **BACKGROUND**<sup>2</sup>

### **A. The Parties**

Plaintiffs American National Insurance Company ("ANICO"), American National Property and Casualty Company, American National General Insurance Company, Farm Family Life Insurance Company, Farm Family Casualty Insurance Company, Pacific Property and Casualty Company, American National Lloyds Insurance Company, National Western Life

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<sup>1</sup> Plaintiffs' claims also violate the jurisdictional bar provided under 12 U.S.C. §§ 1821(d)(13)(D) and 1821(j). In addition, plaintiffs' claims arising from the alleged loss of value of their holdings of debt and equity securities issued by WMI are not actionable for other reasons. However, this motion is limited to the FDIC-Receiver's venue arguments under federal banking law. In accordance with 11 U.S.C. § 1821(d)(6), the FDIC-Receiver intends to address its other defenses in this action in the transferee court.

<sup>2</sup> The factual allegations of the Petition are assumed to be true solely for purposes of the FDIC-Receiver's motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). Braspetro Oil Servs. Co. v. Modco (USA), Inc., 240 F. App'x 612, 615 (5th Cir. 2007). "Once a defendant raises the issue of improper venue, the plaintiffs have the burden to prove that the chosen venue is proper." Banks v. FDIC, No. 3:08-cv-1076, 2009 WL 289604, at \* 1 (N.D. Tex. Feb. 2, 2009) (citing Psarros v. Avior Shipping, Inc., 192 F. Supp. 2d 751, 753 (S.D. Tex. 2002); McCaskey v. Continental Airlines, Inc., 133 F. Supp. 2d 514, 523 (S.D. Tex. 2001)).



Insurance Company and Garden State Life Insurance Company allege that they are insurance companies incorporated under the laws of various states. Pet., ¶¶ 1-9. All of the plaintiffs other than National Western Life Insurance Company are listed on ANICO's corporate website as affiliated companies of ANICO.<sup>3</sup> The plaintiffs allege that they own common stock of WMI and debt securities of WMI and WMB. Pet., ¶ 29. Defendant JPMC Bank is a national bank and a subsidiary of JPMC, which is a bank holding company. Pet., ¶ 11.

**B. The WMB Receivership and the WMI Bankruptcy**

Prior to its bankruptcy, WMI was a thrift holding company. WMI's principal subsidiary, WMB, was a savings and loan association with its principal place of business in Seattle, Washington. Pet., ¶ 33; see Office of Thrift Supervision Press Release, OTS 08-046, "Washington Mutual Acquired by JPMorgan Chase," September 25, 2008.<sup>4</sup>

On September 25, 2008, WMB's principal federal regulator, the Office of Thrift Supervision (the "OTS"), by order number 2008-36, closed WMB and appointed the FDIC-Receiver pursuant to 12 U.S.C. § 1821(c)(6)(B). See Pet., ¶ 64. Immediately after its appointment, the FDIC-Receiver sold substantially all the assets of WMB, including the stock of WMB's thrift subsidiary Washington Mutual Bank fsb ("WMBfsb"), to JPMC Bank pursuant to a Purchase and Assumption Agreement dated as of September 25, 2008. See Pet., ¶ 67.

As a result of the asset sale, all deposits of WMB and WMBfsb – including uninsured deposits – were protected, and no payment was required from the FDIC's Deposit Insurance Fund. In addition, JPMC Bank paid the FDIC-Receiver approximately \$1.9 billion, Pet., ¶ 21, and those funds are available to pay administrative expenses of the receivership as well as claims

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<sup>3</sup> See [http://www.anico.com/aff\\_companies.dhtml](http://www.anico.com/aff_companies.dhtml) (last checked March 31, 2009).

<sup>4</sup> Available at <http://ots.gov/?p=PressReleases> (last checked March 31, 2009).

asserted by creditors of the receivership, subject to the scheme of priorities established under FIRREA. See 12 U.S.C. § 1821(d)(11).

On September 26, 2008, WMI filed a petition for reorganization under chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. Pet., ¶ 70. The WMI bankruptcy case is still pending.

**C. Plaintiffs' Claims in this Lawsuit**

Plaintiffs allege in their Petition that because of the WMB receivership and the subsequent WMI bankruptcy, their WMI stock is “worthless,” the WMI bonds they hold are “substantially impaired” and they do not expect to receive “any recovery on their claims” against the FDIC-Receiver with respect to their WMB bonds. See Pet., ¶¶ 70, 71.

Although they acknowledge that their WMB bonds “are subject to liquidation as part of the FDIC receivership,” Pet., ¶ 71, their claims in this action seek recovery from JPMC Bank and JPMC for the loss of value they allegedly sustained as a result of the WMB receivership and the subsequent sale of substantially all of WMB’s assets to JPMC Bank. See Pet., ¶ 91 (“... WMB, through the FDIC as receiver for WMB, has failed and refused to meet its obligations under the bond contracts.”); ¶ 99 (As a result of JPMC’s alleged breach of confidentiality agreement, “the value of Plaintiff’s common stock was rendered worthless and the contractual rights underlying the Bonds are of no value”); ¶ 102 (“Defendants unjustly failed to pay the Plaintiffs for the benefits they received, and the Plaintiffs received overwhelmingly less than the value of what Defendants extracted from the Plaintiffs”).

Plaintiffs assert three causes of action against JPMC Bank and JPMC: for tortious interference with contract, for breach of a confidentiality agreement, and for unjust enrichment.

See Pet., at 26-30. Their theory of harm as to each of these counts arises entirely from the alleged loss of value of plaintiffs' holdings of securities that were issued by WMB and WMI.

#### **D. Procedural History**

Plaintiffs filed their Original Petition on or about February 16, 2009. On March 20, JPMC Bank filed its original answer, pleas to the jurisdiction, verified plea and other defenses, and JPMC filed its special appearance and, subject thereto, its original answer, pleas to the jurisdiction, and other defenses.

On March 25, 2009, the FDIC-Receiver filed its plea in intervention as a defendant in the state court proceedings. Under Texas law, the FDIC-Receiver's intervention occurred upon the filing of its plea in intervention. See Tex. R. Civ. P. 60; Brook v. Brook, 865 S.W.2d 166, 172 (Tex. App.—Corpus Christi 1993) aff'd 881 S.W.2d 297 (Tex. 1994) ("Once a plea in intervention is filed, the intervenor becomes a party for all purposes unless the trial court strikes the intervention."). The FDIC-Receiver filed its notice of removal later on the same day.

### **ARGUMENT**

#### **THIS ACTION SHOULD BE TRANSFERRED, OR IN THE ALTERNATIVE, DISMISSED FOR IMPROPER VENUE**

##### **I. This Action Should Be Transferred to the U.S. District Court for the District of Columbia**

In the interest of justice, this action should be transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1406(a).<sup>5</sup> To the extent that plaintiffs' claims in this action are for the loss of value of their WMB bonds, those claims are

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<sup>5</sup> Section 1406(a) provides:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 1406(a).



subject to the receivership claims process overseen by the FDIC-Receiver under FIRREA. Any action relating to that claims process must be filed in federal district court in the District of Columbia or in the district of WMB's principal place of business, in Seattle. See 12 U.S.C. § 1821(d)(6)(A). In this case, the District of Columbia is the more appropriate transferee court because, among other reasons, this action is related to an action brought by WMI against the FDIC-Receiver that already is pending in that district, styled Washington Mutual, Inc. v. FDIC, No. 1:09-cv-00533-RMC (D.D.C. filed Mar. 20, 2009).<sup>6</sup>

Section 1406(a) provides that if the interest of justice would be served, transfer to a court of proper venue rather than dismissal is the preferred remedy when a case is brought in the incorrect forum. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (1962); see Burr v. Transohio Savings Bank, 77 F.3d 477 (5th Cir. 1995) (per curiam) (remanding case with instruction to transfer under § 1406); ACF Indus., Inc. v. Guinn, 384 F.2d 15, 20 (5th Cir. 1967). Transfer, rather than dismissal, serves the interest of justice when transfer would "remove an 'obstacle [to] . . . an expeditious and orderly adjudication on the merits.'" Phillips v. Ill. Central Gulf R., 874 F.2d 984, 987–88 (5th Cir. 1989) (quoting Aquacate Consol. Mines, Inc. v. Deeprock, Inc., 566 F.2d 523 (5th Cir. 1978)).

Here, transfer to the District for the District of Columbia is required under the FIRREA venue provision, 12 U.S.C. § 1821(d)(6)(A).<sup>7</sup> This venue provision protects the FDIC, as

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<sup>6</sup> For the Court's convenience, a copy of the complaint against the FDIC-Receiver in the WMI action is attached to this motion as Exhibit A.

<sup>7</sup> Section 1821(d)(6)(A) provides, in pertinent part:

Before the end of the 60-day period beginning on the earlier of –

- (i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver;
- or

receiver of failed depository institutions, from “defend[ing] actions at various locations throughout the country.” Hudson United Bank v. Chase Manhattan Bank of Conn., 43 F.3d 843, 849 (3d Cir. 1994). It is a significant “part of a broader scheme enacted to allow the FDIC expeditiously to wind up the affairs of defunct savings and loan institutions without judicial interference.” Volges v. Resolution Trust Corp., 32 F.3d 50, 52 (2d Cir. 1994); see also 12 U.S.C. §1821(d)(13)(D) (limiting judicial review over claims with respect to the assets of a failed institution for which the FDIC has been appointed receiver or for claims based on the acts or omissions of the institution or of the FDIC as receiver), 12 U.S.C. §1821(j) (“no court may take any action . . . to restrain or affect the powers or functions of the Corporation as conservator or receiver”).

This important jurisdictional scheme is implicated by the Petition here, which reflects an impermissible attempt to end-run the receivership claims process in the guise of an action for recovery against JPMC Bank for amounts that plaintiffs themselves allege they will not be able to recover by asserting claims against the FDIC-Receiver. See 12 U.S.C. § 1821(d)(5) (setting forth FDIC receivership claims process).

Plaintiffs’ first cause of action, for tortious interference with contract, is predicated on the alleged loss in value of their WMB bonds, which even plaintiffs acknowledge are “subject to liquidation as part of the FDIC receivership.” Pet., ¶ 71. Plaintiffs allege that the JPMC

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(ii) the date of any notice of disallowance of such claim pursuant to paragraph 5(A)(i),

the claimant may request administrative review of the claim . . . or file suit on such claim . . . 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).



defendants “willfully and intentionally interfered with Plaintiffs’ bond contracts by inducing WMI and WMB to breach the contracts,” that “WMB, through the FDIC as receiver for WMB, has failed and refused to meet its obligations under the bond contracts,” and that the defendants’ actions “proximately caused the Plaintiffs to suffer actual damage and loss.” Pet., ¶¶ 88-93.

Similarly, plaintiffs’ third cause of action, for unjust enrichment, alleges that “JPMC received a benefit from its transaction with the FDIC whereby it obtained the valuable assets of WMB at a price less than its fair market value,” that the defendants “unjustly failed to pay the Plaintiffs for the benefits they received,” and that the defendants engaged in various forms of alleged misconduct “in order to obtain the WMB assets at below market prices out of the FDIC receivership, unencumbered of Plaintiffs’ contractual rights to payment.” Pet., ¶¶ 100-03.

Finally, plaintiffs’ cause of action for breach of a confidentiality agreement alleges that the defendants, *inter alia*, “misus[ed] confidential financial information of Washington Mutual to negotiate with and develop a bid to submit to the FDIC . . .” and “disclos[ed] confidential information to third parties in order to cause depositors to withdraw deposits.” Pet., ¶ 98. Plaintiffs allege that they were harmed as a result because the value of their WMI common stock “was rendered worthless and the contractual rights underlying the Bonds are of no value.” Pet., ¶ 99.

The venue provision of section 1821(d)(6)(A) extends to actions such as this one that are nominally brought against purchasers of a failed bank’s assets but that implicate the acts or omissions of the FDIC as receiver or are otherwise claims that should be asserted against the receivership. *See, e.g., Hudson United Bank v. Chase Manhattan Bank of Conn., N.A.*, 43 F.3d 843, 847 (3d Cir. 1994) (affirming transfer of action against purchaser of receivership assets under 28 U.S.C. § 1406(a)); *Family Realty & Constr. Co. v. Mfrs. & Traders Tr. Co.*, 931 F.

Supp. 141, 145-46 (N.D.N.Y. 1996) (transferring action brought by noteholder of failed bank under section 1821(d)(6)(A) on motion of FDIC as intervenor); see also Village of Oakwood v. State Bank & Trust Co., 539 F.3d 373, 386 (6th Cir. 2008) (affirming dismissal of state law action against purchaser of failed bank assets where all of plaintiffs' claims directly related to acts or omissions of the FDIC as receiver).

The decision in Family Realty is instructive. In that case, as here, the plaintiff was a holder of notes that had been issued by a failed bank. After the bank failed, the plaintiff filed a state court action against a purchaser of the failed bank's assets, seeking recovery of amounts owed under the notes. The FDIC intervened and removed the action. It then moved to transfer venue, inter alia, pursuant to 12 U.S.C. § 1821(d)(6)(A) and 28 U.S.C. § 1406(a). Over the plaintiff's objections, the court granted the transfer motion, concluding that section 1821(d)(6)(A) applied and that venue therefore was proper in the district where the failed institution had its principal place of business, as the FDIC had urged, rather than in the district to which the state court proceedings had been removed. See 931 F. Supp. at 144-46.

Section 1821(d)(6)(A) applies with equal force to require transfer here. In this case, however, the FDIC-Receiver respectfully submits that the action should be transferred to the U.S. District Court for the District of Columbia instead of the district where WMB had its principal place of business (the Western District of Washington). As mentioned above, a related action brought by WMI against the FDIC-Receiver currently is pending before U.S. District Judge Rosemary Collyer of that court. Judicial efficiency will be better served by transferring this action to the District of Columbia, where it might be assigned as a related case to Judge Collyer, than to the Western District of Washington, where there is no related litigation pending.

**II. In the Alternative, this Action Should Be Dismissed  
For Improper Venue.**

To the extent that the Court determines that transfer to the District for the District of Columbia would not serve the interest of justice, the FDIC-Receiver respectfully submits that this action should be dismissed for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), without prejudice to its being refiled by plaintiffs in the proper federal district.<sup>8</sup>

**CONCLUSION**

For the foregoing reasons, Intervenor-Defendant the FDIC-Receiver respectfully requests that this Court transfer this action to the United States District Court for the District of Columbia or, in the alternative, dismiss this action for improper venue and grant the FDIC-Receiver such other and further relief as it may deem just and proper.

Dated: Houston, Texas  
April 1, 2009

Respectfully submitted,

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<sup>8</sup> The FDIC-Receiver reserves all of its defenses to any such refiled action, including without limitation the jurisdictional bar under 12 U.S.C. § 1821(d)(13)(D).



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 1st day of April, 2009, the foregoing motion and exhibit thereto were filed with the Court's ECF filing system, which will provide electronic notification of its filing to all counsel who have appeared in this action, and that courtesy copies of same were sent by certified mail, return receipt requested, upon the following counsel of record:

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