

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WMI LIQUIDATING TRUST,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, et al.,

Defendants.

CASE NO. C13-1706RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on a motion to transfer venue to the Bankruptcy Court for the District of Delaware, or to the United States District Court for Delaware pursuant to 28 U.S.C. § 1404(a) filed by defendants Todd Baker, Sean Beckett, Anthony Joseph Bozzuti, Alfred Brooks, Gregory Camas, Thomas Casey, Debora Horvath, Rajiv Kapoor, Mark Malone, John McMurray, Thomas Morgan, Stephen Rotella, David Schneider, Radha Thompson, Ann Tierney, and Robert Williams. Dkt. # 113. Thirty-one defendants join in this motion. Dkt. ## 125 (Browning), 131

1 (Berens, Zarro), 135 (Allison, Batt, Jones, McCarthy, Melby, Schulte, Shaw, Stearns),
2 140 (Murphy), 143 (Bjorklund, Cannon, David, Reynoldson, Sharma), 147 (Vuoto), 157
3 (Fukui, Sorenson), 166 (Eschenbach), 183 (Stevens), 184 (Duck), 185 (Darakhovskiy),
4 196 (Murphy), 262 (Stein), 264 (Kido), 266 (Bartels), 271 (Schrag), 272 (Mileur), 276
5 (Everett). Plaintiff WMI Liquidating Trust (“WMILT”) opposes transfer.

6 **II. BACKGROUND**

7 WMILT is successor in interest to Washington Mutual, Inc. (“WMI”), a multiple
8 savings and loan holding company that owned Washington Mutual Bank (“WMB”) and
9 WMI Investment Corp (collectively, “Debtors”). Dkt. # 23 at 2-3 (Am. Compl.). In
10 September 2008, the Office of Thrift Supervision (“OTS”) downgraded then seized
11 WMB and appointed the Federal Deposit Insurance Corporation (“FDIC”) as receiver to
12 take control of WMB’s assets. Dkt. # 211 (Logan Decl.) ¶¶ 24-25. The FDIC Receiver
13 sold substantially all of WMB’s assets to JPMorgan Chase Bank, National Association
14 (“JPMC”). *Id.* ¶ 26. As a result, nearly all employees of WMI and WMB were
15 transferred to JPMC and terminated from WMI and WMB. *Id.* ¶ 27.

16 On September 26, 2008, Debtors filed voluntary petitions under Chapter 11 of
17 Title 28, United States Code (the “Bankruptcy Code”). *Id.* ¶ 28; *In re Wash. Mut. Inc.*,
18 Case No 08-12228 & 08-12229 (Bankr. D. Del.) (Walrath, J.), Bankr. Dkt. (“Bankr.”) #
19 1. The individual defendants here are many former employees of WMI and WMB who
20 were terminated and transferred to JPMC and who have filed proofs of claim against
21 Debtors’ chapter 11 estate, seeking payment under various employment agreements and
22 plans (“Claimants”). Dkt. # 211 (Logan Decl.) ¶ 29.

23 On December 12, 2011, the Debtors filed their Seventh Amended Joint Plain of
24 Affiliated Debtors. Dkt. # 23 (Am. Compl.) ¶ 115; Bankr. # 9178; *see also* Dkt. # 145-1
25 (Ex. 1 to Bjorklund et al. Req. for Jud. Not.). On February 23, 2012, the Bankruptcy
26 Court confirmed the Seventh Amended Plan, which became effective in March 2012, and
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1 the administration of the Debtors' chapter 11 cases and the responsibility to reconcile and
2 litigate remaining disputed proofs of claim were transferred to WMILT. Dkt. # 23 (Am.
3 Compl.) ¶ 115; Bankr. ## 9759, 9933. On February 19, 2013, WMILT filed a motion for
4 leave to amend a number of omnibus objections to claims to assert, for the first time, that
5 WMILT is not liable for the defendants' claims because such claims seek payments that
6 constitute impermissible "golden parachute payments" pursuant to the Golden Parachute
7 Regulations and are not enforceable pursuant to the Automatic Termination Regulation.
8 Dkt. # 23 (Am. Compl.) ¶ 153; 12 C.F.R. § 359.2 (Golden Parachute Regulations); 12
9 C.F.R. § 163.39 (Automatic Termination Regulation). Claimants objected arguing that
10 the Golden Parachute Regulations did not provide WMILT with standing to enforce the
11 federal statutory and regulatory law prohibiting such payments and that at the time of the
12 bank seizure, WMI ceased to be covered by the Golden Parachute Regulations, so
13 WMILT was not prohibited from making payments pursuant to the agreements and plans
14 at issue. Dkt. # 23 (Am. Compl.) ¶ 154.

15 On August 23, 2013, the Bankruptcy Court denied WMILT's motion to amend
16 because (1) there had been undue delay by WMILT in seeking to amend the Omnibus
17 Objections, (2) the claimants, particularly those who have already settled their claims,
18 would be unduly prejudiced by the amendment, and (3) the amendment would be futile
19 because any decision on the legal issue would not be binding on the FDIC and the
20 Federal Reserve Board ("FRB") because they were not parties to the Omnibus
21 Objections. Dkt. # 23-1 at 2 (Ex. A to Am. Compl.). The Bankruptcy Court then ordered
22 WMILT to file a declaratory judgment action naming the FDIC, FRB and all claimants to
23 seek a determination as to whether WMILT is precluded by 12 U.S.C § 1828(k), 12
24 C.F.R. § 163.39, 12 C.F.R. § 359, or any similar provision from paying any of the
25 claimants if their claims are allowed by the Bankruptcy Court. *Id.* The Bankruptcy order
26 was purposefully silent as to venue. *See* Dkt. # 212-3 at 4 (Ex. C to Singh Decl.)
27 (Bankruptcy Judge Walrath indicating that the order did not specify venue "on purpose").

1 WMILT filed the declaratory action in the Western District of Washington. This
2 court previously presided over a case brought by former employees of WMB, including
3 eighteen individuals who filed claim forms in the Bankruptcy action and are named
4 defendants here, against FDIC. *Williams v. FDIC*, Case No. C09-504RAJ.

5 III. ANALYSIS

6 The district court has discretion to adjudicate motions to transfer according to an
7 individualized case-by-case consideration of convenience and fairness under 28 U.S.C. §
8 1404(b). *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). Section
9 1404(a) requires that (1) the district to which defendant seeks to have the action
10 transferred is one in which the action might have been brought, and (2) the transfer be for
11 the convenience of the parties and witnesses and in the interest of justice. 28 U.S.C. §
12 1404(a).

13 With respect to the first 1404(a) requirement, WMILT does not dispute that this
14 action could have been brought in the Bankruptcy Court for the District of Delaware.
15 Accordingly, the court only considers the second requirement.

16 With respect to the second 1404(a) requirement, the court may consider eight
17 private and public interest factors: (1) the location where the relevant agreements were
18 negotiated and executed; (2) the state that is most familiar with the governing law; (3) the
19 plaintiff's choice of forum; (4) the respective parties' contacts with the forum; (5) the
20 contacts relating to the plaintiff's cause of action in the chosen forum; (6) the differences
21 in the costs of litigation in the two forums; (7) the availability of compulsory process to
22 compel attendance of unwilling non-party witnesses; and (8) the ease of access to sources
23 of proof. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). The
24 court may also consider court congestion, pendency of related litigation in the transferee
25 forum and the public's interest in adjudicating the controversy in the chosen forum. *See*
26 *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

1 “Because these factors cannot be mechanically applied to all types of cases, they shall be
2 considered here under the statutory requirements of convenience of witnesses,
3 convenience of parties, and the interests of justice.” *Amazon.com v. Cendant Corp.*, 404
4 F. Supp. 2d 1256, 1259 (W.D. Wash. 2005).

5 **A. Convenience of the Witnesses and Parties**

6 A plaintiff’s choice of forum is entitled to greater deference when a plaintiff
7 chooses its home forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).
8 It is undisputed that WMILT and its predecessor organizations are located in
9 Washington. However, the Debtors initially chose to file their chapter 11 petitions in the
10 Bankruptcy Court for the District of Delaware, the likely more favorable forum, rather
11 than the Western District of Washington, where they were located and the likely more
12 convenient forum. Indeed, WMILT attempted to litigate the exact issues presented to this
13 court in the Bankruptcy Court when it belatedly sought leave to amend its objections to
14 include the golden parachute and automatic termination defenses. For this reason, the
15 court finds that plaintiff’s choice to file this declaratory action (that is related to the
16 bankruptcy case originally filed in Delaware) in this District is not entitled to deference.
17 Accordingly, this factor is neutral, at best.

18 Neither party has identified any non-party witnesses. *See Amazon.com*, 404 F.
19 Supp. at 1260 (convenience of non-party witnesses is more important factor). Of the
20 parties who have not been dismissed, twenty-eight reside in Washington state, eighteen
21 reside in California, seven reside in Texas, three reside in New York, three reside in New
22 Jersey, three reside in Pennsylvania, three reside in Washington D.C., two reside in the
23 United Kingdom, two reside in Virginia, and one defendant resides in each of Florida,
24 Wisconsin, Georgia, Maryland, Illinois, and South Carolina. Dkt. # 23 (Am. Compl.) ¶¶
25 7, 9-101. However, all individual defendants have consented to being a party in the
26 related Bankruptcy case in the District of Delaware, which indicates that the District of
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1 Delaware is at least as convenient, if not, more convenient than Washington for at least
2 the forty-seven non-Washington residents. This factor weighs slightly in favor of
3 transfer.

4 **B. Interests of Justice**

5 The interest of justice factor is perhaps the most important. *Amazon.com*, 404 F.
6 Supp. 2d at 1261. In considering the interest of justice, the court weighs such factors as
7 ensuring speedy trials, trying related litigation together, and having a judge who is
8 familiar with the applicable law try the case. *Id.*

9 The underlying agreements were negotiated and at least partially executed in
10 Washington State. Accordingly, Washington State has an interest in adjudicating the
11 rights under these contracts, and this factor weighs against transfer.

12 While this court previously analyzed whether the underlying agreements are
13 “employment contracts” under 12 C.F.R. § 563.39 in the *Williams* case, both courts are
14 equally equipped to analyze and interpret the Golden Parachute and Automatic
15 Termination regulations under 12 U.S.C. §1828(k) and 28 U.S.C. §§ 163.39 & 359 and
16 the principles of res judicata or collateral estoppel. Additionally, the fact that the related
17 Bankruptcy proceeding is ongoing in the District of Delaware weighs slightly in favor of
18 transfer. On the other hand, to the extent that the Bankruptcy court could interpret the
19 “employment contracts” provision in 12 C.F.R. § 163.39 differently from this court’s
20 analysis of section 563.39, transferring this case runs the risk of inconsistent rulings,
21 which weighs against transfer.

22 The moving parties have not presented any evidence of increased or decreased
23 costs if the court kept the case or transferred it, and courts have declined to consider
24 increased costs to counsel. *See In re Horseshoe Entm’t*, 337 F.3d 429, 434 (5th Cir.
25 2003) (location of counsel is irrelevant to transfer analysis); *Solomon v. Cont’l Am. Life*
26 *Ins. Co.*, 472 F.2d 1043, 1047 (3rd Cir. 1973) (“convenience of counsel is not a factor to
27 be considered”); *Wang v. LB Intern. Inc.*, Case No. C04-2475 JLR, 2005 WL 2090672,

1 *3 (W.D. Wash. Aug. 29, 2005) (declining to consider increased costs to counsel).

2 Accordingly, this factor is neutral.

3 Finally, district courts in the Ninth Circuit, as well as other circuits, have
4 consistently held that transfer from a forum in which there are difficult questions of
5 personal jurisdiction or venue to a district in which there are no such uncertainties
6 conserve judicial resources and serve the interests of the parties and justice. *See e.g.*,
7 *Berman v. Modell*, Case No. C13-565-TLN AC PS, 2013 WL 5703352, *5 n.3 (E.D. Cal.
8 Oct. 16, 2013); *Multistate Legal Studies, Inc. v. Marino*, Case No. C96-5118 ABC
9 RNBx, 1996 WL 786124, *10 (C.D. Cal. Nov. 4, 1996); *Cherry Commc'n, Inc. v.*
10 *Coastal Tel. Co.*, 906 F. Supp. 452, 455 n.4 (N.D. Ill. 1995). This court agrees.

11 Here, defendants Murphy, Bjorklund, Cannon, David, Reynoldson, Sharma,
12 Vuoto, and Stevens have moved the court to dismiss the complaint for lack of personal
13 jurisdiction. Dkt. ## 140, 143, 147, 167. However, all individual defendants have
14 consented to jurisdiction in the Bankruptcy Court for the District of Delaware. The court
15 finds that given the difficult questions of personal jurisdiction, transfer of this case to the
16 Bankruptcy Court for the District of Delaware, where there are not such uncertainties,
17 will conserve judicial resources and serve the interests of justice and the parties. This
18 factor weighs heavily in favor of transfer.

19 **IV. CONCLUSION**

20 For all the foregoing reasons, the court finds that, on balance, the moving
21 defendants have met their burden of showing that the convenience of the parties, the
22 convenience of the witnesses, and the interests of justice favor transfer to the Bankruptcy
23 Court for the District of Delaware. 28 U.S.C. § 1404. The Clerk is DIRECTED to
24 TERMINATE all pending motions and to TRANSFER this case to the Bankruptcy Court
25 for the District of Delaware as related to *In re Wash. Mut. Inc.*, Case No 08-12228 & 08-
26 12229 (Bankr. D. Del.) (Walrath, J.).

Dated this 3rd day of July, 2014.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Judge

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