UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re WASHINGTON MUTUAL, INC., et al.,[1] Debtors.	CHAPTER 11 Case No. 08-12229 (MFW) (Jointly Administered) Ref. Docket No. 974
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, *Plaintiff,* v. WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP., *Defendants for all claims,* -and- FEDERAL DEPOSIT INSURANCE CORPORATION, *Additional Defendant for Interpleader Claim.*	Adversary Proceeding No. 09-50551

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION'S OBJECTION AND RESPONSE TO DEBTORS' MOTIONS FOR (A) AN ORDER PURSUANT TO BANKRUPTCY RULE 2004 AND LOCAL BANKRUPTCY RULE 2004.1 DIRECTING THE EXAMINATION OF JPMORGAN CHASE, N.A. (DOCKET NO. 974); AND (B) AN ORDER PURSUANT TO 11 U.S.C. § 105(a) AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 7013 AND 9006(b) ENLARGING THE TIME FOR ASSERTING COUNTERCLAIMS AGAINST JPMORGAN CHASE BANK, N.A. (DOCKET NO. 10)

[1] Debtors 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.

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JPMorgan Chase Bank, National Association ("JPMC"), by its undersigned attorneys, files this objection and response (the "Objection") to the Motions of the Debtors for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004.1 Directing the Examination of JPMorgan Chase, N.A. (the "Rule 2004 Motion") and an Order Pursuant to 11 U.S.C. § 105(a) and Federal Rules of Bankruptcy Procedure 7013 and 9006(b) Enlarging the Time for Asserting Counterclaims Against JPMorgan Chase Bank, N.A. (the "Motion for Extension").

PRELIMINARY STATEMENT

On May 1, 2009, Washington Mutual, Inc. ("WMI") and WMI Investment Corp. (collectively, the "Debtors") filed two related motions, both of which should be denied.

The first motion seeks discovery of JPMC under Rule 2004 of the Bankruptcy Rules ("Rule 2004") that Debtors assert is "critical to the Debtors' full understanding of affirmative *claims* and *counterclaims* against JPMC." (Mot. for Ext. at 2 (emphasis added).) However, as a matter of law, Rule 2004 discovery is not available—and cannot be used to circumvent the applicable provisions of the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure (collectively, the "Rules")—when discovery is available through related, pending litigations. *See In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996). Rule 2004 discovery is particularly inappropriate when, as here, discovery is sought from "parties to" or those "affected by" the related proceeding. *Id.* at 29.

Here, there are two pending litigations that relate to the Rule 2004 discovery request: (1) Debtors' own action against the Federal Deposit Insurance Corporation ("FDIC") in the U.S. District Court for the District of Columbia, captioned *Washington Mutual, Inc., et al.* v. *FDIC*, Civil Action No. 1:09-cv-00533 (RMC) (the "D.C. Action"),[2] in which Debtors are already broadly challenging the conduct of the FDIC in connection with the failure of Washington Mutual Bank ("WMB") and the resulting sale of substantially all of the assets of WMB to JPMC, pursuant to a purchase and assumption agreement dated as of September 25, 2008 (the "P&A"); and (2) JPMC's adversary proceeding against Debtors, Adversary Proceeding No. 09-50551 (MFW) (the "Adversary Proceeding"),[3] which is in many ways the flip side of the D.C. Action, and in which JPMC broadly asserts claims that result from Debtors' efforts to assert ownership rights over assets JPMC purchased from the FDIC pursuant to the P&A.

To the extent the Rule 2004 discovery requests are being propounded for the express purpose of exploring "counterclaims" against JPMC, which the second motion discussed below makes clear is the purpose of the proposed Rule 2004 discovery, those counterclaims are by definition related to the pending litigations and therefore may be appropriately pursued in the context of either or both of those litigations but *not* independently through Rule 2004. To the extent the Rule 2004 discovery requests are directed at JPMC to explore other potential "claims" against JPMC, those claims, as described by Debtors in their motion, relate to the sale of WMB's

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[2] A copy of Debtors' Complaint in the D.C. Action is attached as Exhibit A submitted in support of this Objection (hereinafter, the "D.C. Action Complaint").

[3] Complicating the disputes between Debtors and JPMC, on April 27, 2009, Debtors filed in this Court a purported turnover action pursuant to 11 U.S.C. § 542 seeking the turnover of approximately $4 billion in six accounts maintained with WMB at the time of WMB's failure (the "Turnover Action"). Although the Rule 2004 discovery also relates to the Turnover Action—which presents another bar to the Rule 2004 discovery—JPMC has not focused on that proceeding given the substantial likelihood that it will be dismissed and because it overlaps with issues raised in the Adversary Proceeding. Nonetheless, the D.C. Action, Adversary Proceeding and Turnover Action are collectively referred to herein as the "Related Litigations".

assets by the FDIC to JPMC—a subject of both the D.C. Action and the Adversary Proceeding. Debtors are thus seeking to obtain discovery from a party to (and an entity "affected by") the Related Litigations, which likewise makes the Rule 2004 discovery request improper.

In an apparent effort to escape this result, Debtors assert that the Rule 2004 discovery is needed to explore the allegations made in a complaint captioned *Am. Nat'l Ins. Co.* v. *JPMorgan Chase & Co.*, 09 CV 0199 (Tex. Dist. Ct. 122d Dist.) (the "Texas Action"), an action that both JPMC and the FDIC have moved to have transferred to the District of Columbia given the pendency there of the D.C. Action commenced by Debtors. However, the existence of the Texas Action—and its flamboyant story of collusion by the U.S. Government and JPMC (which is factually inaccurate and asserts claims barred by relevant provisions of Title 12 of the United States Code)—does not justify the request for Rule 2004 discovery. To the extent the allegations made in the Texas Action are the proper subject of discovery by Debtors, that discovery can be pursued in the Related Litigations under, and subject to the protections of, the Rules. In short, to the extent Debtors would have any proper discovery related to the conduct of JPMC or the government in connection with the receivership of WMB and sale of assets to JPMC,[4] they have sufficient and appropriate avenues in the Related Litigations to pursue that discovery and to do so in the efficient and coordinated manner that the Rules contemplate.

In addition to being improper under well-settled legal principles, the Rule 2004 discovery request would be an inefficient and prejudicial manner in which to proceed. JPMC has conferred with Debtors regarding a discovery schedule for the Adversary Proceeding. Debtors have agreed that, if the Court denies their Rule 2004 Motion, the discovery deadlines and dates set forth in JPMC's proposed discovery plan are acceptable. Debtors' only objection to the

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[4] The claims in the Texas Action, and thus the claims Debtors seek to investigate, are in fact barred by federal law. *See* 12 U.S.C. §§ 1821(d)(6)(A) and 1821(d)(13)(D).

schedule is they would like to deviate from the ordinary course of litigation discovery in order to go forward with a subset of discovery (their Rule 2004 discovery) first. This approach not only would lead to needless complication, inefficiency and overall delay, but the taking of unilateral discovery also could prejudice JPMC in both the Related Litigations and the Texas Action. The Rule 2004 discovery clearly will require the review of documents from some of the same custodians and sources from whom JPMC will collect documents for the Adversary Proceeding and other Related Litigations, resulting in needless duplication and expense. Likewise, certain of the deponents will undoubtedly overlap, creating the risk of a repetitive and inefficient process that will unduly burden witnesses. JPMC respectfully submits that the proper way forward is pursuant to a coordinated discovery plan through which Debtors can take any discovery they legitimately seek as part of an overall discovery schedule designed to move the Related Litigations forward in an efficient, expeditious and even-handed manner.

The second motion is made contingent on the Court's granting of the Rule 2004 Motion. Debtors request up to "60 days following the completion of the Requested [2004] Examination" to assert counterclaims against JPMC in the Adversary Proceeding. (Mot. for Ext. at 6.) This Motion should be denied as without basis in the Rules or otherwise. If, through discovery, Debtors ultimately conclude there is a need to add counterclaims or otherwise amend their answer, they should follow the usual procedure and seek leave of the Court to make such amendments and meet the standards applicable to such requests at that time. They should not be granted an extraordinary free pass in the meantime. Without a motion for leave to amend and attendant showing of good cause, Debtors are inappropriately asking the Court to pre-approve a hypothetical complaint that may or may not be proper. Likewise, JPMC is unfairly being asked

to anticipate objections it may have to that hypothetical complaint without any substantive understanding of what would be proposed.

Accordingly, for the reasons set forth more fully below, both the Rule 2004 Motion and the Motion for Extension should be denied.[5]

BACKGROUND

On September 25, 2008, the FDIC took possession of WMB in a receivership proceeding under 12 U.S.C. § 1821 pursuant to a September 25, 2008 order issued by the Director of the Office of Thrift Supervision ("OTS"). Thereafter, JPMC and the FDIC entered into the P&A. Pursuant to the P&A, JPMC acquired substantially all of the assets and assumed certain liabilities of WMB. On September 26, 2008, Debtors commenced in this Court their voluntary cases under chapter 11 of Title 11.

Following the receivership and sale of the failed bank, the FDIC followed its customary claims process for the administrative review of "any claim against a depository institution for which the Corporation is receiver." 12 U.S.C. § 1821(d)(6)(A)(i). Debtors availed themselves of that process by submitting claims to the receivership, certain of which alleged that the FDIC, among other things, improperly sold assets belonging to WMI. On January 23, 2009, the FDIC disallowed those claims.

Debtors then elected to forgo administrative review of the FDIC's disallowance and to proceed directly with a lawsuit in the U.S. District Court for the District of Columbia. In the D.C. Action, Debtors not only directly challenge the FDIC's disallowance of their claims, but also concurrently assert an ownership interest in certain assets sold by the FDIC to JPMC and

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[5] JPMC does not here address, and does not waive, the substantial objections it would have to the substance of the overbroad and harassing discovery Debtors seek through Rule 2004 if any such discovery were appropriate.

directly challenge the actions and conduct of their regulators—the FDIC and the OTS—in connection with the circumstances leading up to the failure of WMB. (D.C. Action Complaint ¶ 27.) The D.C. Action also challenges the propriety of the FDIC's sale of WMB assets to JPMC, the price paid by JPMC under the P&A, and the actions of the OTS and the FDIC with respect to WMI and WMB during 2008. (*See, e.g.*, D.C. Action Complaint ¶¶ 27-28, 86-89.) To protect its interests and prevent divestiture of assets and interests acquired from the FDIC, JPMC moved to intervene in the D.C. Action on March 30, 2009. The FDIC has supported JPMC's intervention; WMI has opposed it.

In their schedules of assets and liabilities, amended as recently as February 24, 2009 and filed with this Court, Debtors also laid claim to assets acquired by JPMC from the FDIC as receiver in this bankruptcy proceeding. In order to protect its ownership of and other rights to those assets in this bankruptcy case, JPMC commenced the Adversary Proceeding on March 24, 2009. The Adversary Proceeding likewise is predicated upon the validity of the receivership and sale by the FDIC to JPMC. (*See, e.g.*, Adversary Proceeding ¶¶ 16-17.) The Adversary Proceeding asks this Court to, among other things, declare that Debtors have no right to or interest in certain assets JPMC acquired from the FDIC pursuant to the P&A. (*Id.* ¶¶ 183, 195, 204, 216, 220, 229, 237, 243, 247, 251.) As a courtesy, and to further an efficient litigation, JPMC agreed to Debtors' request to delay filing their answer or otherwise responding to the Adversary Proceeding until May 22, 2009.

In that additional time, rather than proceed in the litigation that was pending and as to which they had requested and obtained an extension, Debtors instead filed the recent Turnover Action, opposed JPMC's motion to intervene in the D.C. Action, and filed these

motions for unilateral discovery under Bankruptcy Rule 2004 and for a significant extension of time to formulate or reformulate counterclaims in the Adversary Proceeding.

JPMC and its counsel have stood ready, willing and able to proceed with discovery. On April 29, 2009, JPMC proposed that the parties develop a coordinated discovery schedule and requested a further conference to discuss how to address the Rule 2004 requests efficiently, as part of the discovery to be taken in the Adversary Proceeding. On May 1, 2009, Debtors said they would not agree to a comprehensive discovery schedule as a way to address their Rule 2004 request. To be clear, JPMC did *not* object to Debtors proceeding with appropriate discovery and does not do so now. Rather, JPMC believed and still believes that it is entitled to the protections afforded to parties in litigation through the discovery process and to a coordinated discovery schedule, pursuant to the Rules and an agreed-upon schedule, that avoids duplication, inefficiency and multiple or repetitive productions of documents or witnesses. Debtors' response to these concerns was to file both the Rule 2004 Motion and the Motion for Extension later the same day as the discovery conference.

ARGUMENT

I. DEBTORS' REQUEST FOR RULE 2004 DISCOVERY SHOULD BE DENIED.

Rule 2004 discovery cannot be used in lieu of the "compulsory process procedures" of discovery available under the Federal Rules for use in related litigations.[6] *In re Continental Airlines, Inc.*, 125 B.R. 415, 417 (Bankr. Del. 1991); *see also In re Enron Corp.*, 281

[6] Although JPMC is not yet a party to the D.C. Action, there is a substantial likelihood that its motion seeking to intervene in that litigation will be granted. In the meantime, discovery from JPMC is available to Debtors in connection with the D.C. Action pursuant to Rule 45 of the Federal Rules of Civil Procedure. The availability of discovery in Related Litigations is fatal to Debtors' Rule 2004 Motion particularly when, as here, JPMC has such a clear interest in the D.C. Action. *In re 2435 Plainfield Ave., Inc.*, 223 B.R. 440, 455 (Bankr. D.N.J. 1998) (noting that "courts . . . prohibit[] a Rule 2004 exam of parties involved in or *affected by*" a pending proceeding) (emphasis added); *In re Blinder, Robinson & Co., Inc.*, 127 B.R. 267, 274-75 (D. Colo. 1991) (same).

B.R. 836, 840, 844 (Bankr. S.D.N.Y. 2002) (refusing effort to use Rule 2004 to overcome stay imposed by the Private Securities Litigation Reform Act). More specifically, Rule 2004 discovery is inappropriate when discovery is sought from "parties to" or those "affected by" the pending proceeding. *In re Bennett Funding Group, Inc.*, 203 B.R. at 24, 28-29; *see also In re Blinder, Robinson & Co., Inc.*, 127 B.R. at 274-75. Consequently, it is well settled that once an adversary proceeding has been commenced, "discovery is made pursuant to [the Federal Rules [] rather than by a [Rule 2004] examination."[7] *In re 2435 Plainfield Ave., Inc*, 223 B.R. at 455 (collecting cases) (citing *In re Bennett Funding Group, Inc.*, 203 B.R. at 28 (Bankr. N.D.N.Y. 1996)); *see also In re Barnes*, 365 B.R. 1, 11 (Bankr. D.D.C. 2007) (noting that Rule 2004 is a "pre-litigation tool"). Indeed, courts have uniformly found that the use of Rule 2004 to seek discovery is inappropriate and an "abuse" when—as here—the Rule 2004 discovery sought clearly relates to and is available in the pending proceeding.[8] *Snyder* v. *Soc'y Bank*, 181 B.R. 40,

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[7] The limitations placed on Rule 2004 discovery are imposed, in part, because a party subject to a Rule 2004 examination—which is a "free and easy practice"—does not enjoy the same rights and privileges as a party subject to discovery under the Federal Rules. *See, e.g., In re Enron Corp.*, 281 B.R. at 841 (citations omitted) (noting the restricted ability to object to relevance and the broad scope of inquiry under a Rule 2004 examination); *In re Dinublio*, 177 B.R. 932, 939-40 & n.12 (E.D. Cal. 1993) (explaining that, in certain circumstances, a Rule 2004 "witness has no right to be represented by counsel except at the [court's discretion] . . . . ; there is only a limited right to object to immaterial or improper questions; there is no general right to cross-examine witnesses; and no right to have issues defined beforehand.")

[8] To support their request for Rule 2004 discovery, Debtors are forced to rely on entirely inapposite precedent. For example, *In re M4 Enterprises Inc.*, 190 B.R. 471, 475 (Bankr. N.D. Ga. 1995) states that a party "may not employ Rule 2004 as a discovery device by which to uncover evidence related to an adversary proceeding." *Id.* at 475. Although the court there allowed narrow Rule 2004 discovery against the Trustee, discovery was allowed because *no* related adversary proceeding was pending and, thus, there was no need to "mandatorily engag[e] the Federal Rules of Civil Procedure"—as required here. *Id.* (allowing narrow Rule 2004 discovery in a "contested matter" under Bankruptcy Rule 9014). The other cases cited by Debtors either simply allow a Rule 2004 examination without any analysis of the relation between the discovery sought and the claims asserted in the complaint (*see In re Sun Med. Mgmt.*, 104 B.R. 522, 523-24 (Bankr. M.D. Ga. 1989)) or stand for the unremarkable notion that Rule 2004 discovery is permissible against "parties [un]affected by the adversary proceeding . . . [because they] do not require the greater protections afforded under the Federal Rules" (*see In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994)).

41 (S.D. Tex. 1994) (denying use of Rule 2004 when a litigation was pending in state court); *In re Petition of the Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 258 B.R. 580, 586-87 (Bankr. S.D.N.Y. 2001) (denying Rule 2004 request because the discovery could be sought in "separate proceeding [that was] an arbitration pending in a foreign country").

Debtors' argument that "Rule 2004 discovery is appropriate here notwithstanding the pending adversary proceedings between the parties" (Rule 2004 Mot. at 12), is not just unfounded, but it is directly contrary to the governing law. The question before the Court is whether Debtors' Rule 2004 discovery request "relates" to the D.C. Action and the Adversary Proceeding, including whether the discovery is sought from "parties to" or those "affected by" the pending proceeding, *In re Bennett Funding Group, Inc.*, 203 B.R. at 28-29; *Snyder*, 181 B.R. at 41, or if the Rule 2004 discovery creates an "unavoidable and unintentional back door" through which discovery relevant to the Related Litigations would be discovered, *In re Enron*, 281 B.R. at 842. Debtors' Rule 2004 examination of JPMC is not only improper because it ***could*** establish an "unavoidable and unintentional back door" for discovery relevant to the Related Litigations, it is improper because it ***expressly*** seeks documents and testimony directly relevant to the claims asserted in the Related Litigations and, as Debtors' own motion asserts, "counterclaims" or additional claims Debtors may seek to assert in those litigations.

Debtors cannot seriously dispute that this is the case. Debtors' Motion for Extension expressly states that the Rule 2004 discovery "is critical to the Debtors' full understanding of affirmative *claims and counterclaims against JPMC*." (Mot. for Ext. at 2 (emphasis added); *see also* Rule 2004 Mot. at 3.) This is an admission that the discovery relates to the pending litigation. All of Debtors' potential "counterclaims" against JPMC necessarily relate to the Adversary Proceeding. And discovery regarding Debtors' potential claims,

whatever those might be, is being sought from JPMC, which is either a "party to" or "affected by" the D.C. Action and the Adversary Proceeding.

Debtors cannot evade the limitations on Rule 2004 discovery by simply claiming that the discovery "seeks facts on many issues not raised by the JPMC complaint . . . ." (Mot. for Ext. at 5; *see also* Rule 2004 Mot. at 2.) Any careful lawyer could draft a Rule 2004 discovery request that purports to "seek[] facts" and raise "issues" not in the plain *text* of a pending complaint. Rule 2004 discovery is improper when another pending proceeding is "related," such that discovery is sought from one "affected by" that proceeding. *In re Bennett Funding Group, Inc.*, 203 B.R. at 28-29; *Snyder*, 181 B.R. at 41. Thus, in *Bennett*, the court denied a Rule 2004 motion because the requested examination would "involve issues and parties within the scope of" a pending adversary proceeding. 203 B.R. at 30.

In *Bennett*, the trustee alleged in an adversary proceeding that the defendants had diverted certain assets from the debtor for construction of a hotel and racetrack. *Id.* at 26. The Rule 2004 motion sought, among other things, information generally related to the same defendants' bank accounts, ownership of property, and transfers of funds from the debtor that were involved in the basic allegations. *Id.* at 29. Despite the trustee's assertion that it sought examination only into matters necessary to fully ascertain the extent of the estate and not related to the hotel and racetrack, the court denied the motion after noting the "likelihood" that the examination would "delv[e] into issues" covered by the adversary proceeding and holding that it was likely that "information elicited will relate directly to issues and parties already named in the adversary proceeding." *Id.* at 29-30.

Here, the Rule 2004 discovery requests are designed to "elicit[] [information that] will relate directly to issues and parties already named in the adversary proceeding," and

therefore the Rule 2004 discovery is improper. For example, Debtors' Document Request 17 seeks "[a]ll documents concerning any communications between JPMC and any Governmental Unit concerning any Transaction on September 25, 2008." These are the documents that relate to, among other things, negotiation and execution of the P&A, which is central to JPMC's claims in the Adversary Proceeding (in which it asserts ownership rights pursuant to the P&A) and in the D.C. Action, in which Debtors are seeking to divest JPMC of assets it acquired pursuant to the P&A. (Adversary Proceeding Comp. ¶ 89-90.) Thus, precisely the same discovery is going to be relevant to and sought in the Adversary Proceeding and the D.C. Action.

More broadly, a review of the three areas Debtors identify as the basis for their Rule 2004 discovery establishes that they each implicate matters that are the subject of one or more of the Related Litigations, including allegations that Debtors have themselves made in those Related Litigations. This is fatal to Debtors' Rule 2004 motion:[9]

Rule 2004 Discovery Requests	Sample Allegations from Related Litigations
Discovery relating to the conduct of the FDIC, OTS, JPMC or others concerning any attempt to "drive down WMB's value so that [JPMC] could purchase WMB's assets at a fire-sale price," which is the "crux" of Debtors' Rule 2004 Motion. (Rule 2004 Mot. at 6; *see, e.g.*, Document Requests 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 23, 32, 33, 37, 35, 36, 38, 39.)	D.C. Action: WMI has alleged that the OTS closed the bank and appointed the FDIC as receiver. (D.C. Action ¶¶ 85-86.) "[T]he FDIC entered into the Purchase and Assumption Agreement with JPMorgan Chase [by which it sold] . . . "the assets of WMB, less the liabilities assumed" for less than would have been obtained had the FDIC conducted the sale "in a prudent and reasonable manner." (*Id.* ¶¶ 85-86.) "The FDIC breached its statutory duty to maximize the net present value of WMB's assets." (*Id.* at ¶ 89.) The FDIC [engaged in a] wasting of WMB's assets." (*Id.* at ¶ 92.) Adversary Proceeding: [T]he OTS placed WMB in receivership because of significant concerns over the safety and soundness of the institution. To ensure

[9] This table has been created for demonstrative purposes to establish that the existence of the Related Litigations make Debtors' request for Rule 2004 discovery inappropriate. JPMC does not waive any rights with respect to any discovery sought on any of the issues or factual matters reflected herein. JPMC likewise preserves its right to seek a protective order with respect to any discovery request propounded as a result of Debtors' motion or otherwise, should the parties be unable to reach agreement on particular discovery matters.

Rule 2004 Discovery Requests	Sample Allegations from Related Litigations
	continuity of operations, maximize public confidence and minimize cost to the public treasury, the FDIC ran an accelerated bidding process . . . . (Adversary Complaint ¶ 25).
Discovery relating to capital contributions made by WMI to WMB to determine whether "there exists claims against JPMC for fraudulent transfer." (Rule 2004 Mot. at 9; Document Requests 11, 15, 19, 20, 31, 33, 40, 41, 42.)	D.C. Action: WMI has alleged that the "FDIC or the OTS [improperly] induced WMI to make one or more Capital Contributions." (D.C. Action ¶ 27.) These allegedly give rise to not only claims for "fraudulent transfer," but also "all other claims or causes of action, under any theory, applicable to the Capital Contributions." (*Id.* ¶ 28.) The Capital Contributions at issue date back to December 1, 2007. (*Id.* ¶ 25.) Adversary Proceeding: WMI formally contributed to WMB at least $6.5 billion of the approximately $10.2 billion in capital it had raised. (Adversary Complaint ¶ 35.)
Discovery relating to the FDIC's sale to JPMC of certain assets and liabilities of WMB and determination of which assets and liabilities JPMC acquired under the P&A. (Rule 2004 Mot. at 9; Document Requests 1, 2, 3, 5, 6, 13, 14, 15, 16, 18, 19, 20, 21, 22, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 39, 43, 44, 45, 46, 47.)	D.C. Action: WMI has alleged that the OTS closed the bank and appointed the FDIC as receiver. (D.C. Action ¶¶ 85-86.) "[T]he FDIC entered into the Purchase and Assumption Agreement with JPMorgan Chase [by which it sold] . . . "the assets of WMB, less the liabilities assumed" for less than would have been obtained had the FDIC conducted the sale "in a prudent and reasonable manner." (*Id.* ¶¶ 85-86.) Adversary Proceeding: JPMC "brings this action in order to ensure that [JPMC] and its subsidiaries are not divested of their assets and interests purchased in good faith from the [FDIC] as receiver . . . for [WMB]." (Adversary Complaint ¶ 1). "[T]he assets and liabilities of the Debtors and their direct and indirect subsidiaries, including the Affiliated Banks, were connected and in many cases, commingled and intertwined. Prior to the Receivership, the Debtors and their direct and indirect subsidiaries operated a centralized and consolidated cash management system pursuant to which external receipts and payments were accounted for on a consolidated basis . . . ." (*Id.* ¶ 37).

With regard to the spurious allegations in the Texas complaint about espionage and collusion in connection with the FDIC's sale of WMB's assets to JPMC, any discovery relating to JPMC's "purchase of WMB's assets" would certainly "delv[e] into issues," *In re*

Bennett Funding Group, Inc., 203 B.R. at 30, directly related to the Adversary Proceeding and D.C. Action. Indeed, because the Rule 2004 discovery sought broadly relates to an "allegedly premeditated plan by JPMC designed to push WMB and WMB fsb into receivership, position JPMC as the winning bidder, and allow JPMC to walk off with WMB's assets . . . to the detriment of its largest stakeholder WMI" (Mot. for Ext. at 6), it is nearly impossible to envision a Rule 2004 examination that could avoid addressing topics at issue in and related to the Related Litigations, such as the circumstances that led to the sale to JPMC, the terms of the P&A, the nature and value of assets acquired by JPMC and the extent to which WMI may have claims related to the property JPMC acquired under the P&A.

Lastly, the implication that allowing Rule 2004 discovery to proceed first is an efficient and sensible discovery plan is incorrect. (Rule 2004 Mot. at 11.) The Rule 2004 Motion is a not-so-subtle attempt to proceed with duplicative discovery and circumvent the protections and efficiencies that a comprehensive discovery schedule would provide. This is not the right way forward. JPMC's proposed pre-trial order will address the parties' need to proceed with discovery. The proposed schedule will ensure that the parties have access to relevant documents on all the related issues, prior to the taking of depositions. The proposed schedule will ensure, as is particularly appropriate in complex litigation such as this, that witnesses are not subjected to multiple depositions. There is no justification for permitting Debtors to proceed with piecemeal Rule 2004 discovery while full-scale discovery is ready to proceed. Debtors' proposed course is destined to lead to precisely the sort of inefficiency that the traditional sequenced approach to discovery is designed to avoid.

For all these reasons, Debtors' motion for Rule 2004 discovery should be denied.

II. DEBTORS' MOTION FOR AN EXTENSION OF TIME TO FILE COUNTERCLAIMS SHOULD ALSO BE DENIED.

In connection with seeking a Rule 2004 examination, Debtors also seek "an order enlarging the time in which Debtors may assert counterclaims against JPMC in the Adversary Proceeding to a date 60 days following the completion of the Requested Examination." (Mot. for Ext. at 6.) The motion should be denied for two reasons—(1) given the denial of the Rule 2004 Motion there is no need for an extension, and (2) there is no legal basis for the request in any event.

First, the primary predicate for Debtors' Motion for an Extension is to delay the assertion of counterclaims until after the Rule 2004 discovery is complete. If the Rule 2004 Motion is denied, there is no need for this delay. And by asking for a delay to accommodate the Rule 2004 discovery, Debtors have necessarily acknowledged that the 2004 discovery "relates to" a pending litigation, which requires that their 2004 Motion be denied.

Moreover, the possibility that Debtors may develop new counterclaims as these litigations progress is not a basis for the requested extension. In the D.C. Action, Debtors have already laid out claims that would be compulsory counterclaims to the Adversary Proceeding. For example, JPMC has sought relief with respect to the acquisition of certain Trust Securities. (Adversary Complaint ¶¶ 180-90.) Debtors are going to attempt to claw back the Trust Securities because they were purportedly contributed to WMB at a time when WMI or WMB was insolvent. (D.C. Action Complaint ¶¶ 29-35.) Debtors have made similar claims relating to tax refunds, capital contributions and other assets that now rightfully belong to JPMC. (*Id.* ¶¶ 22-35.) These are compulsory counterclaims.

The strategic reason for Debtors' delay in asserting these counterclaims is obvious. Under federal law, these counterclaims had to be directed to the FDIC in the

receivership claims process, *see* 12 U.S.C. § 1821(d)(13)(D), and now must be pursued in the D.C. Action, *see* 12 U.S.C. § 1821(d)(6)(A). *See also Vill. of Oakwood* v. *State Bank & Trust Co.*, 539 F.3d 373, 386 (6th Cir. 2008) (holding that claims against a purchaser, such as JPMC, for assets subject to the receivership must be pursued through the processes set out in Title 12). Any claim that purportedly arises from the Texas Action will run into the same problem. Indeed, JPMC and the FDIC have filed papers as recently as this week in the Texas Action establishing that the Texas claims are barred by Title 12 of the United States Code.

Second, regardless of how discovery proceeds, this Court should deny the Motion for an Extension. In essence, Debtors seek to avoid the requirement that a party must move for leave to amend an answer because adherence to the Rules would prejudice them. (*See* Mot. for Ext. at 8.) Denial of this motion will not "severely prejudice the Debtors." (*Id.* at 3.) To the extent that subsequent discovery gives Debtors a purported basis to assert new counterclaims against JPMC, Debtors could move the Court for leave to amend its answer with additional counterclaims "if justice so requires." *See* Fed. R. Bankr. P. 7013; Fed. R. Civ. P. 13(f) (incorporated to apply to adversary proceedings through Rule 7013); Fed. R. Civ. P. 15(a)(2) (incorporated through Bankruptcy Rule 7015). Such a motion is appropriate because the determination of whether to allow a party to assert counterclaims is necessarily fact-intensive. It is impossible for the Court to determine at this premature date whether the filing of additional, yet unidentified, counterclaims would be proper. Likewise, there is no way for JPMC to assert the proper objections to an amended pleading it has not yet seen. For this reason alone, the Motion for Extension should be denied.

The three arguments Debtors proffered in support of their motion do not change this conclusion. *First*, Rule 7013 does not, as Debtors contend, provide "that the deadline for a

trustee or debtor in possession to assert counterclaims may be extended." (Mot. for Ext. at 7.) Rather, the Rule provides that a trustee or debtor "may *by leave of court* amend the pleading, or commence a new adversary proceeding or separate action." Fed. R. Bankr. P. 7013 (emphasis added).

Second, Debtors' reliance on Bankruptcy Rule 9006(b) is misplaced. Rule 9006(b) and its equivalent Federal Rule 6(b) provide that the Court may enlarge the time for a party to respond under a particular bankruptcy rule. 1 MOORE'S FEDERAL PRACTICE § 6.06[1][a] (Matthew Bender 3d ed.). While a court is authorized to change the return date for a court filing, for example, Rule 9006(b) does not permit a court to rewrite the applicable rules regarding motions for leave to amend an answer.

Third, Debtors cannot seek to invoke the inherent powers of this Court under 11 U.S.C. § 105(a). Section 105(a) is not invoked to create rights "that would otherwise be unavailable under the Code." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 236 (3d Cir. 2004) (citations omitted); *see also In re Barbieri*, 199 F.3d 616, 620-21 (2d Cir. 1999) (warning the "equitable powers emanating from § 105(a) . . . are not a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules") (citations omitted). "When a specific Code section addresses an issue, a court may not employ its equitable powers to achieve a result not contemplated by the Code." *In re Combustion Eng'g, Inc.*, 391 F.3d at 236 (quoting *In re Fesco Plastics Corp.*, 996 F.2d 152, 154-55 (7th Cir. 1993)); *In re Lowenschuss*, 67 F.3d 1394, 1402 (9th Cir. 1995) ("[S]ection 105 does not authorize relief inconsistent with more specific law"). Here, Debtors are required by Federal Rule 13(f) and Bankruptcy Rule 7013 to seek leave of the Court if they wish to amend their answer to assert new counterclaims or

otherwise. They have offered no justification to be relieved of compliance with the ordinary rules that govern the conduct of debtors, other litigants and litigations every day and everywhere.

The Court should deny Debtors' Motion for Extension.

CONCLUSION

For the foregoing reasons, Debtors' Motions for an Order Pursuant to Rule 2004 and Local Bankruptcy Rule 2004.1 Directing the Examination of JPMorgan Chase, N.A. and an Order Pursuant to 11 U.S.C. § 105(a) and Federal Rules of Bankruptcy Procedure 7013 and 9006(b) Enlarging the Time for Asserting Counterclaims Against JPMorgan Chase Bank, N.A. should be denied.

Dated: May 13, 2009
Wilmington, Delaware

Respectfully submitted,

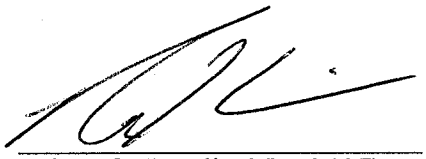

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON MUTUAL, INC., 1301 Second Avenue Seattle, Washington 98101, and WMI INVESTMENT CORP., 1301 Second Avenue Seattle, Washington 98101, Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORPORATION, 550 17th Street, NW Washington, DC 20429, in its capacity as receiver for Washington Mutual Bank, and in its corporate capacity, Defendant.	Case No. **JURY TRIAL DEMANDED**

COMPLAINT

Plaintiffs Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment" and together with WMI, the "Plaintiffs"), by their undersigned counsel alleges as follows:

PARTIES

1. Washington Mutual Bank, Henderson, Nevada ("WMB") was a federal savings bank chartered pursuant to the Home Owners' Loan Act, 12 U.S.C. §§ 1461-70.

2. Defendant Federal Deposit Insurance Corporation ("FDIC") is the agency charged by law with, among other duties, administering the Federal Deposit Insurance Act and the federal bank deposit insurance system. The FDIC is sued in its corporate capacity ("FDIC-

Corporate") and in its capacity as the Receiver of WMB ("FDIC-Receiver"). This Complaint uses "FDIC" to refer to FDIC-Receiver and FDIC-Corporate collectively.

3. WMI is a holding company incorporated in the State of Washington with its principal place of business at 1301 Second Avenue, Seattle, Washington 98101. Prior to the Receivership Date and the Bankruptcy Petition Date (both as defined below), WMI was a savings and loan holding company that owned WMB, and indirectly owned WMB's subsidiaries, including Washington Mutual Bank fsb ("WMBfsb" and together with WMB and their respective banking subsidiaries, the "Banking Subsidiaries").

4. WMI Investment is a corporation organized under the laws of Delaware, with its principal place of business at 1301 Second Avenue, Seattle, Washington 98101, and is a wholly-owned subsidiary of WMI.

JURISDICTION AND VENUE

5. This action arises under the Constitution and laws of the United States, including, without limitation, the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1811 et seq., as amended, the Fifth Amendment to the United States Constitution, and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. This Court has jurisdiction over the subject matter of this action pursuant to 12 U.S.C. §§ 1819(b)(2)(A) and 1821(d)(6), and 28 U.S.C. § 1331.

6. Venue is proper in this Court under 12 U.S.C. § 1821(d)(6) and 28 U.S.C. § 1391(e).

BACKGROUND

7. On September 25, 2008 (the "Receivership Date"), the Director of the Office of Thrift Supervision ("OTS"), by order number 2008-36, appointed FDIC-Receiver as receiver for WMB and advised that FDIC-Receiver was immediately taking possession of WMB.

8. Immediately after its appointment as receiver, FDIC-Receiver, together with FDIC-Corporate, sold substantially all the assets of WMB, including the stock of WMBfsb, to JPMorgan Chase Bank, National Association ("JPMorgan Chase") pursuant to that certain Purchase and Assumption Agreement, Whole Bank, dated as of September 25, 2008 (the "Purchase and Assumption Agreement").

9. On September 26, 2008 (the "Bankruptcy Petition Date"), the Plaintiffs each commenced a voluntary case (the "WMI Bankruptcy Proceeding") pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). The automatic stay in the Plaintiffs' chapter 11 cases prohibits any entity, including the FDIC and JPMorgan Chase, from, among other things, taking any action to obtain possession of property of the Plaintiffs' estates or to exercise control over such property.

THE PROOF OF CLAIM

10. Pursuant to section 11(d) of the FDI Act, 12 U.S.C. § 1821(d), FDIC-Receiver set December 30, 2008, as the last day to file claims against the Receivership. As described in detail below, Plaintiffs asserted claims against the Receivership (each a "Claim") by filing a proof of claim on December 30, 2008 (the "Proof of Claim").

11. Plaintiffs reserved all rights to amend and/or supplement the Proof of Claim at any time and in any respect and to assert any and all other claims of whatever kind or

nature that they have, or may have, against WMB. (This includes, but is not limited to, the reservation of rights set forth in paragraphs 60-65 of the Proof of Claim.) Plaintiffs likewise reserve all rights to amend and/or supplement this Complaint under the Federal Rules of Civil Procedure.

12. The Claims are unsecured, unless otherwise noted, and except to the extent that WMB asserts claims against the Plaintiffs. To the extent of any such claims asserted by WMB, Plaintiffs assert that the claims asserted hereunder are secured.

13. On the Receivership Date, many of the Plaintiffs' books and records were seized by the FDIC and transferred to the custody of JPMorgan Chase. As a result, the Proof of Claim was prepared, and this Complaint has been prepared, using the information available to the Plaintiffs, which was, in certain instances, only summary information set forth in the Plaintiffs' books and records. Plaintiffs endeavored to support the Claims with documentation in the Proof of Claim, where such documentation was reasonably available to the Plaintiffs. However, Plaintiffs did not attach supporting documentation where it would have been too voluminous but rather stated that such supporting documentation may be made available upon the FDIC's request.

A. Intercompany Loans

14. As of the Receivership Date, WMB was indebted to WMI, or to one of its subsidiaries identified below, for the outstanding principal, accrued interest, and other amounts due under the following promissory notes (the "Promissory Notes"):

- $82,048,081 under that certain Revolving Master Note, dated as of December 22, 2005, by and between WMB, as borrower, and H.S. Loan Corporation, as lender. H.S. Loan Corporation is a subsidiary of WMI, in which WMB owns 1.5748%.

- $73,670,153 under that certain Revolving Master Note, dated as of December 22, 2005, by and between WMB, as borrower, and H.S. Loan Partners, as lender. H.S. Loan Partners is an indirect, wholly-owned subsidiary of WMI.

- $7,781,240 under that certain Revolving Master Note, dated as of February 11, 2005, by and between WMB, as borrower, and WMHFA Delaware Holdings LLC, as lender. WMHFA Delaware Holdings LLC is an indirect, wholly-owned subsidiary of WMI.

- $13,576,245 under that certain Registered Security, Note A, dated as of December 17, 2004, by and between University Street, Inc., as payor and predecessor in interest to WMB, and WMRP Delaware Holdings LLC, as payee, and predecessor in interest to PCA Asset Holdings LLC. This Promissory Note is recorded on WMI's books and records as an obligation owed to PCA Asset Holdings LLC, an indirect subsidiary of WMI, by WMB.

15. Accordingly, WMI asserts a claim in the aggregate amount of $177,075,719 on account of the outstanding principal and accrued interest due under the Promissory Notes, plus a liquidated, unsecured claim for all other amounts due under the Promissory Notes, as described in paragraphs 8-9 of the Proof of Claim and Exhibit A to the Proof of Claim.

B. Intercompany Receivables

16. Prior to the Receivership Date, Plaintiffs incurred expenses on behalf of WMB, which expenses resulted in intercompany receivables owed by WMB to the respective Plaintiff and are reflected as such in the books and records of Plaintiffs and WMB (the "Intercompany Receivable Claims").

17. In particular, WMI has Intercompany Receivable Claims against WMB and WaMu Capital Corp., a subsidiary of WMB, for $22,528,014, relating principally to WMI's issuance of stock-based compensation to certain WMB and WaMu Capital Corp. employees. A summary of the amounts owed to WMI and the corresponding intercompany account numbers is as follows:

Account Debtor	WMI Account Receivable Number	Amount
WMB	28101	$9,298,479
WMB	28120	$13,200,977
WaMu Capital Corp.	28025	$28,558

18. In addition, as of the Receivership Date, pursuant to certain servicing agreements and pursuant to that certain Administrative Services Agreement (collectively, the "Servicing Agreements"), WMB or one of the Banking Subsidiaries serviced certain mortgage loans held by WMI or its subsidiaries. Pursuant to the Servicing Agreements, WMB, as servicer, collected amounts due under the mortgage loans and, at pre-determined intervals, remitted such amounts to WMI or its subsidiaries, as the holders of such mortgage loans. As of the Receivership Date, WMB had failed to remit certain amounts due to Plaintiffs in the aggregate approximate amount of $184,849 on account of the mortgage loans. A summary of the amounts owed to WMI and certain of its subsidiaries on account of such Servicing Agreements is as follows:

Account Debtor	Obligee	Amount
WMB	H.S. Loan Corp.	$17,477
WMB	Ahmanson Obligation Co.	$143,657
WMB	Sutter Bay Corp.	$11,129
WMB	Flower Street Corp.	$10,396
WMB	H.S. Loan Partners LLC	$2,190

19. Accordingly, Plaintiffs assert Claims for each of these amounts owed, as described in paragraphs 10-14 of the Proof of Claim and Exhibit B to the Proof of Claim.

C. Taxes

20. WMI, WMB, WMBfsb, and certain other direct and indirect subsidiaries of WMI and WMB are parties to that certain Tax Sharing Agreement, dated as of August 31, 1999. Pursuant to the Tax Sharing Agreement, all federal income taxes were paid directly by WMI on behalf of the consolidated tax group, which includes WMB and its subsidiaries. A

copy of the Tax Sharing Agreement is set forth at Exhibit C to the Proof of Claim. Historically, in accordance with the Tax Sharing Agreement, each subsidiary member to the Tax Sharing Agreement made federal-tax related payments to WMI in respect of the hypothetical, separate federal income tax liabilities of such member and its subsidiaries. Prior to the Receivership Date, pursuant to the Tax Sharing Agreement, WMI paid federal taxes due and owing by the consolidated tax group, including amounts due and owing by WMB and/or its subsidiaries. However, as of the Receivership Date, WMB and its subsidiaries had not paid WMI all federal-tax related amounts under the Tax Sharing Agreement. Accordingly, WMI asserts an unliquidated claim against WMB on account of any and all federal taxes paid on behalf of WMB and/or its subsidiaries and WMI reserved all rights to assert any and all such claims against WMB and its subsidiaries, including any claims arising from any ongoing federal tax audits, as described in paragraph 15 of the Proof of Claim.

21. In addition, WMI has certain claims against WMB and its subsidiaries on account of state, local and possibly foreign taxes paid on behalf of WMB and its subsidiaries and WMI reserved all rights to assert any and all such claims against WMB and its subsidiaries, as described in paragraph 16 of the Proof of Claim.

22. Further, on account of WMI's payment of federal, state and local taxes for the consolidated or combined tax group, WMI is, or will be, entitled to tax refunds currently estimated to be approximately $3 billion (the "Tax Refunds"). Pursuant to the Tax Sharing Agreement, all refunds for federal taxes are payable to WMI, regardless of whether such refunds are on account of federal taxes paid in respect of WMB or its subsidiaries or any of WMI's other subsidiaries. In addition, certain state and local tax refunds are payable to WMI in respect of group tax filings that included WMB or its subsidiaries. In anticipation of the receipt of certain

Tax Refunds in respect of which certain amounts would be payable by WMI to WMB pursuant to or in furtherance of the Tax Sharing Agreement, WMI paid such amounts to WMB prior to the Receivership Date by crediting such amounts against tax payments otherwise due from WMB at such time. WMI therefore asserts a claim against WMB for the amounts so paid by WMI. In addition, in the event that FDIC-Receiver asserts a claim to and obtains any portion of the Tax Refunds directly or indirectly from the Internal Revenue Service, WMI asserts a claim against WMB and/or its subsidiaries on account of such refunded amounts. WMI may also have claims against WMB and its subsidiaries in respect of all or a portion of state, local and foreign tax refunds received by WMB and its subsidiaries and asserts a claim against WMB and its subsidiaries for any and all such claims, as described in paragraph 17 of the Proof of Claim.

23. WMI is currently undergoing several federal, state, local and foreign tax audits. To the extent that any federal, state, local or foreign taxing authority, including, without limitation, those taxing authorities that are currently auditing WMI, assesses additional taxes against WMI, WMI expressly reserves all rights to supplement and/or amend the Proof of Claim to include any amounts attributable to WMB or its subsidiaries.

24. In the event FDIC-Receiver seeks to repudiate the Tax Sharing Agreement in accordance with section 1821(e) of title 12 of the United States Code, Plaintiffs assert a claim for any and all damages or claims that arise from such repudiation (and Plaintiffs expressly reserve all rights to oppose any such attempt to repudiate the Tax Sharing Agreement).

D. Capital Contribution Claims

25. From December, 2007, through April, 2008, WMI raised approximately $10 billion in the capital markets. During that period, WMI's principal assets consisted of cash, the stock of WMB, and the stock of the other Plaintiff and other WMI subsidiaries. Throughout 2008, WMI's debt obligations approximated $7 billion. In 2007 and 2008, WMI made $6.5

billion of capital contributions to WMB in the amounts and on the dates specified below (the "Capital Contributions"):

Date	Amount
December 1, 2007	$1,000,000,000.00
April 18, 2008	$3,000,000,000.00
July 21, 2008	$2,000,000,000.00
September 10, 2008	$500,000,000.00

The Capital Contributions are more fully described in paragraph 20 of the Proof of Claim and Exhibit D to the Proof of Claim.

26. At the time of each of the Capital Contributions, WMB had public debt obligations of approximately $22 billion.[1] WMI or WMB may have been insolvent at the time that the Capital Contributions were made. If, at the time of each Capital Contribution, WMB was insolvent, had unreasonably small capital, and/or was unable to pay its own debt obligations as they matured, WMI did not receive any value in exchange for the Capital Contributions. In addition, the Capital Contributions may have (i) been made while WMI was insolvent or rendered WMI insolvent, (ii) been made while WMI had unreasonably small capital for its business operations, and/or (iii) left WMI unable to repay its own obligations as they matured.

27. Moreover, upon information and belief, the FDIC or the OTS induced WMI to make one or more of the Capital Contributions at a time when such agencies knew or should have known that appointment of the FDIC as receiver for WMB was imminent.

28. Accordingly, if WMI was insolvent at the time any of the Capital Contributions were made, WMI asserts a fraudulent transfer claim pursuant to sections 544 and

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[1] Due to some debt repurchases, the principal balance outstanding is approximately $21.3 billion.

548 of the Bankruptcy Code in an amount up to $6.5 billion, and for all other claims or causes of action, under any theory, applicable to the Capital Contributions.

E. Trust Preferred Securities Claims

29. In February 2006, Washington Mutual Preferred Funding LLC ("WMPF"), a Delaware limited liability company, was formed to facilitate capital-raising transactions through the issuance of preferred securities to investors (such preferred securities are referred to herein collectively as "Trust Preferred Securities") by certain special purpose entities (the "SPEs"). These securities were offered solely to "qualified institutional buyers" or "qualified purchasers." The Trust Preferred Securities have an aggregate liquidation preference of $4 billion.

30. WMPF's assets were limited to direct or indirect interests in mortgages or mortgage-related assets, cash and other permitted assets. These assets were held in certain Delaware statutory trusts (the "Asset Trusts"). WMPF issued preferred securities (the "WMPF Preferred Securities"), which were held by and were the sole asset of the SPEs and which were senior in priority to WMB's indirect common equity interest in WMPF. Thus, the Trust Preferred Securities issued by the SPEs (which had no material creditors) represented an interest in the WMPF Preferred Securities and, in turn, an indirect interest in the assets held by the Asset Trusts. Immediately before the Receivership Date, WMPF was an indirect subsidiary of WMB and as a result, WMB held an indirect interest in the assets held in the Asset Trusts, subordinate to the liquidation preference of the Trust Preferred Securities.

31. The Trust Preferred Securities were sold to investors subject to a "conditional exchange" feature. This feature provided that if the OTS so directed, upon (i) WMB becoming undercapitalized, (ii) WMB being placed into receivership or conservatorship or (iii) the OTS anticipating, in its sole discretion, WMB becoming undercapitalized in the near

term or taking a supervisory action that limited the payment of dividends by WMB, then the Trust Preferred Securities were required to be exchanged into shares of preferred stock of WMI (or depositary shares representing an interest in preferred stock of WMI). The OTS notified WMI on the Receivership Date that an "exchange event" occurred, as such term is defined in the documentation governing the Trust Preferred Securities. According to the terms of the Trust Preferred Securities, the exchange of the Trust Preferred Securities for preferred stock of WMI (or depositary shares representing an interest in preferred stock of WMI) is deemed to occur automatically following the issuance by WMI of a press release announcing the exchange event. WMI issued such a press release and the conditional exchange became effective at 8:00 a.m. ET on September 26, 2008.

32. In addition, WMI purportedly executed an assignment as of September 25, 2008, in which it purported to assign to WMB all its right, title, and interest in and to any and all of the Trust Preferred Securities or preferred securities issued by WMPF, as the case may be, in its possession or coming into its possession (the "Assignment Agreement"). Assuming arguendo that the terms of the Trust Preferred Securities (and the documents and agreements related to the issuance of such securities) and the Assignment Agreement are legally effective and enforceable, and that there are no defenses to the enforceability of such agreements under the Bankruptcy Code or other applicable law, all of which defenses and claims WMI expressly reserves and hereby asserts, the effect of these transactions was to cause the Trust Preferred Securities to be owned by WMI and then purportedly transferred to WMB immediately before the commencement of WMI's chapter 11 bankruptcy case on September 26, 2008.

33. On information and belief, the Trust Preferred Securities have a value of as much as $4 billion. WMI may not have received any value for the purported transfer of the

Trust Preferred Securities to WMB because, at the time of such purported transfer, WMB may have been insolvent, may have had unreasonably small capital, and/or may have been unable to pay its own debt obligations as they matured. With respect to the purported transfer of the Trust Preferred Securities, WMI asserts fraudulent transfer claims against WMB pursuant to sections 544 and 548 of the Bankruptcy Code in connection with the transfer of the Trust Preferred Securities.

34. Furthermore, if WMI was insolvent at the time of such purported transfer and the Trust Preferred Securities were transferred to WMB on account of an antecedent debt owed to WMB, WMI also asserts a claim to recover such securities as a voidable preference pursuant to sections 544 and 547 of the Bankruptcy Code.

35. In addition, if the Trust Preferred Securities were wrongfully transferred to WMB, WMI asserts a claim for such wrongful transfer and the return of such assets. In the alternative, WMI asserts that the purported transfer of the Trust Preferred Securities was not properly executed, and, therefore, ineffectual. Accordingly, WMI asserts that it is the owner of the Trust Preferred Securities. Finally, as a result of the FDIC's actions purporting to transfer the Trust Preferred Securities from WMI to WMB, and then to JPMorgan Chase or any other party, WMI has been deprived of the use of the Trust Preferred Securities and their proceeds from the Receivership Date onward and asserts a claim with respect thereto against WMB. WMI reserves all other claims or causes of action, under any theory, with respect to the Trust Preferred Securities, as set forth in paragraphs 24-30 of the Proof of Claim.

F. Preference Claims

36. On or before the Receivership Date, on numerous occasions, WMI transferred property to, or caused its property (or an interest in its property) to be transferred to, WMB or to certain third parties for the benefit of WMB (the "Transfers") on account of

antecedent obligations of WMI to WMB. The approximate amount of the Transfers occurring during the one-year period before the Bankruptcy Petition Date is $151,934,564. A list of such Transfers is attached hereto as Exhibit 1.[2]

37. At the time of the Transfers, WMB was (i) an "insider" of WMI as that term is defined in the Bankruptcy Code or under applicable non-bankruptcy law and (ii) a "creditor" of WMI, as that term is defined in the Bankruptcy Code or under applicable non-bankruptcy law.

38. If WMI was insolvent at the time the Transfers were made to WMB, the Transfers may be voidable pursuant to, among other applicable law, (i) sections 544 (applying applicable non-bankruptcy law) and 547 of the Bankruptcy Code and (ii) applicable non-bankruptcy law.

39. Specifically, if WMI was insolvent at the time such Transfers were made, WMI seeks to recover each Transfer from WMB as a voidable preference on the grounds that such Transfer (i) was to or for the benefit of a creditor, (ii) was to or on account of an antecedent debt of WMI, (iii) was made while WMI was insolvent, (iv) was made within one year or less from the date that WMI's bankruptcy case was commenced, and (v) would permit WMB to receive more than it would receive in a case under chapter 7 of the Bankruptcy Code if such Transfer had not been made.

40. Accordingly, Plaintiffs assert a claim for all transactions constituting a voidable preference, as described in paragraphs 31-35 of the Proof of Claim.

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[2] Exhibit 1 may not be an exhaustive list of all Transfers. Accordingly, Plaintiffs reserve their rights to amend and/or supplement Exhibit 1 and the corresponding aggregate amount of the Transfers.

G. Vendor Contract Claims

41. WMI is party to numerous agreements with vendors (the "Vendors") who lease property, perform services, deliver goods, or license software that primarily benefit the banking operations formerly owned by WMB (the "Vendor Contracts"). Typically, prior to the Receivership, WMB, as the primary beneficiary, paid Vendors for goods and services received pursuant to the Vendor Contracts. After the Receivership Date, JPMorgan Chase paid certain Vendors for outstanding pre- and post-Receivership obligations incurred in connection with the Vendor Contracts. Notwithstanding these payments, there continue to be unpaid obligations outstanding in connection with certain of the Vendor Contracts. Accordingly, as a party to the Vendor Contracts, WMI asserts a claim against WMB for any and all outstanding liabilities on account of goods or services provided to WMB. Similarly, to the extent Vendors assert claims against WMI for WMI's rejection of any of the Vendor Contracts in its bankruptcy cases, WMI asserts a claim against WMB for any and all such Vendor claims.

H. Subrogation Claims

42. Predecessors in interest to WMB issued the debt securities identified below (the "WMB Predecessor Notes") pursuant to the indentures listed opposite such WMB Predecessor Notes below (the "Indentures"). The WMB Predecessor Notes were issued to evidence loans made to WMB's predecessors in interest of the proceeds from the issuance by certain statutory trusts (the "CCB Capital Trusts") of preferred and common beneficial interests in the assets of such trusts:

- 10.18% Junior Subordinated Deferrable Interest Debentures due 2031 issued pursuant to that certain Indenture by and between Hawthorne Financial Corporation, as Issuer, and Wilmington Trust Company, as Debenture Trustee, dated as of March 28, 2001, as amended from time to time.
- Floating Rate Junior Subordinated Debt Securities due 2033 issued pursuant to that certain Indenture by and between Commercial Capital Bancorp, Inc., as

Issuer, and Wilmington Trust Company, as Trustee, dated as of September 25, 2003, as amended from time to time.

- Floating Rate Junior Subordinated Debt Securities due 2034 issues pursuant to that certain Indenture by and between Commercial Capital Bancorp, Inc., as Issuer, and Wilmington Trust Company, as Trustee, dated as of December 19, 2003, as amended from time to time.

- Floating Rate Junior Subordinated Notes due 2034 issued pursuant to that certain Junior Subordinated Indenture by and between Commercial Capital Bancorp, Inc., as Issuer, and Deutsche Bank Trust Company Americas, as Trustee, dated as of March 31, 2004, as amended from time to time.

- Floating Rate Junior Subordinated Debt Securities due 2034 issued pursuant to that certain Indenture by and between Commercial Capital Bancorp, Inc., as Issuer, and Wilmington Trust Company, as Trustee, dated as of May 27, 2004, as amended from time to time.

- Floating Rate Junior Subordinated Debt Securities due 2034 issued pursuant to that certain Indenture by and between Commercial Capital Bancorp, Inc., as Issuer, and Wilmington Trust Company, as Trustee, dated as of June 22, 2004, as amended from time to time.

- Junior Subordinated Notes due 2035 issued pursuant to that certain Junior Subordinated Indenture by and between Commercial Capital Bancorp, Inc., as Issuer, and Deutsche Bank Trust Company Americas, as Trustee, dated as of February 2, 2005, as amended from time to time.

43. By supplemental indentures or other agreements relating to each of the Indentures, dated as of November 1, 2007, WMB assumed all obligations of the issuers pursuant to the Indentures. Pursuant to the terms of certain Indenture Guarantees, dated as of November 1, 2007, WMI guaranteed WMB's obligations under the WMB Predecessor Notes.

44. WMI asserts a subrogation claim against WMB for any amount it is obligated to pay pursuant to the Indenture Guarantees or any other guarantee of WMB's obligations, as described in paragraphs 37-39 of the Proof of Claim and Exhibit F to the Proof of Claim.

I. Improper Asset Sales

45. On the Receivership Date, the FDIC may have taken possession and control of certain property (including, but not limited to, furniture, fixtures, equipment, and other tangible and intangible assets) owned by Plaintiffs or for which transfer of such property from Plaintiffs' ownership was improper or subject to avoidance and recovery. To date, the FDIC has neither accounted for nor compensated the Plaintiffs for this property. The FDIC, may have converted Plaintiffs' property by purporting to transfer an ownership interest in some or all of such property to JPMorgan Chase. Plaintiffs thus assert a claim against WMB for recovery of such property or payment, in full, for such transferred property, to the extent applicable, in an amount to be determined.

46. Plaintiffs expressly reserve their rights to make additional claims against WMB for reasonable payment for the use-value of such property, plus interest, until such time as the property is returned to Plaintiff's use.

J. Deposit Claim

47. On the Receivership Date, WMI and its subsidiaries maintained twenty-eight separate demand deposit accounts with WMB (the "WMB Deposits Accounts") and a twenty ninth account with WMBfsb (the "FSB Deposit Account"). Of the accounts owned by non-debtor subsidiaries of WMI, as of the date of the Proof of Claim and this Complaint, twenty of the accounts (the "Non-Debtor Deposit Accounts") have been moved to other financial institutions and three (3) accounts remain on deposit with JPMorgan Chase (the "Non-Debtor WMB Deposit Accounts"). Furthermore, as of the date of the Proof of Claim and this Complaint, six (6) accounts owned by WMI or WMI Investment (the "Debtor Deposit Accounts") also remain on deposit with JPMorgan Chase.

48. On information and belief, each of the WMB Deposit Accounts was transferred to JPMorgan Chase pursuant to the Purchase and Assumption Agreement and JPMorgan Chase assumed all liability to WMI as a depositor with respect to the WMB Deposit Accounts. On information and belief, JPMorgan Chase acquired the stock of WMBfsb pursuant to the Purchase and Assumption Agreement and subsequently merged WBMfsb into JPMorgan Chase, thereby assuming all liability to WMI as a depositor with respect to the FSB Deposit Account.

49. Although WMI believes that it now is a depositor of JPMorgan Chase with respect to the Debtor Deposit Accounts and the Non-Debtor WMB Deposit Accounts and a depositor of an unrelated financial institution with respect to the Non-Debtor Deposit Accounts, on information and belief the FDIC and JPMorgan Chase continue to reserve certain rights with respect to the Debtor Deposit Accounts, the Non-Debtor WMB Deposit Accounts, and/or the Non-Debtor Deposit Accounts, including rights under the Purchase and Assumption Agreement. If Plaintiffs' rights to the Debtor Deposit Accounts, the Non-Debtor WMB Deposit Accounts, or the Non-Debtor Deposit Accounts are in any way compromised or modified, WMI asserts a claim against WMB for any lost value or other consequential damages. Without prejudice to WMI's position that it is a depositor of JPMorgan Chase, Plaintiffs asserted a protective claim for the outstanding balance on each of the Debtor Deposit Accounts, the Non-Debtor WMB Deposit Accounts, and the Non-Debtor Deposit accounts in the event FDIC exercises any rights it may have under the Purchase and Assumption Agreement, or otherwise, with respect to the Debtor Deposit Accounts, the Non-Debtor WMB Deposit Accounts, or the Non-Debtor Deposit Accounts, as described in paragraphs 43-45 of the Proof of Claim. This claim is entitled to priority pursuant to 12 U.S.C. § 1821(d)(11)(a)(ii). Furthermore, the FDIC does not have any

right of setoff with respect to either the Debtor Deposit Accounts, the Non-Debtor WMB Deposit Accounts, or the Non-Debtor Deposit Accounts on account of any claims it may assert against WMI or the other Plaintiffs.

50. In addition, by reason of the Receivership and the subsequent sale of substantially all of WMB's assets to JPMorgan Chase, Plaintiffs have been denied access to, control, and use of the WMB Deposit Accounts and the FSB Deposit Account by JPMorgan Chase and were unable to, among other things, invest the funds in the WMB Deposit Accounts and the FSB Deposit Account, move the funds to another institution, or transfer the funds to interest-bearing accounts. Accordingly, Plaintiffs hereby assert a claim against WMB for damages, including interest, for the lost use of the funds in the WMB Deposit Accounts and the FSB Deposit Account from September 25, 2008, until such time as Plaintiffs are able to transfer such funds to interest bearing accounts at other institutions.

K. Administrative Claims

51. In certain instances, WMI may have paid or become liable for costs and/or expenses that inured to the benefit of WMB subsequent to the Receivership Date. These amounts may include, without limitation, liability incurred by WMI as a result of JPMorgan Chase's decision to exclude certain contracts from the Purchase and Assumption Agreement and expenses incurred by WMI that may have benefited WMB. WMI asserts claims against WMB for all such costs and expenses, as described in paragraph 47 of the Proof of Claim.

L. Employee/Employer Related Costs and Insurance Claims

52. Prior to the Receivership, WMI was the sponsor of all employee benefit plans, including, among others, the Washington Mutual, Inc. Cash Balance Pension Plan, the Washington Mutual, Inc. Savings Plan, and the Washington Mutual, Inc. Flexible Benefits Plan (the "Benefit Plans"). These plans covered all of WMI's employees, as well as employees of

WMB. WMI may transfer sponsorship of certain of the Benefit Plans to JPMorgan Chase; however, WMI reserves all rights to assert a claim against WMB on account of all amounts paid by WMI on account of such plans for the benefit of WMB employees for which WMI was not reimbursed, as described in paragraph 48 of the Proof of Claim.

53. In addition, prior to the Receivership, WMI sponsored certain deferred compensation plans. To the extent that WMI is or becomes liable for amounts due under such deferred compensation plans, WMI asserts a claim for amounts due on account of past and/or present WMB employees and directors.

54. In addition, with respect to the Cash Balance Pension Plan (the "Pension Plan"), if it is determined that the Pension Plan is underfunded, WMI asserts a claim against WMB for the amount of such underfunding that is attributable to WMB and any other costs, expenses or liabilities associated therewith.

55. WMI also reserves all rights to assert claims against WMB for any and all other employee or employer related costs incurred by WMI on behalf of WMB and its employees, which may include, without limitation, payroll, severance and related taxes, as described in paragraphs 48-51 of the Proof of Claim.

56. In addition, WMI is the owner of certain bank-owned and corporation-owned life insurance policies (the "BOLI-COLI Policies"). In certain instances, as reflected in WMI's Schedules, WMI's ownership interest in the BOLI-COLI Policies is reflected on its books and records and in certain other instances, WMI may have an ownership interest in BOLI-COLI Policies reflected on WMB's books and records. WMI asserts a claim against WMB for any and all premiums and other charges paid by WMI on account of BOLI-COLI Policies owned by WMB. WMI also reserves all rights to assert a claim against WMB for the value and

proceeds of any BOLI-COLI Policies owned by WMI, but reflected on the books and records of WMB, as described in paragraph 52 of the Proof of Claim.

57. WMI also has an ownership interest in a variety of insurance policies. Certain of WMI's insurance policies name WMI and its subsidiaries, including WMB and its subsidiaries as insured persons. To the extent that WMB asserts claims to proceeds of such insurance policies, WMI asserts a claim against WMB for such amounts, as described in paragraph 53 of the Proof of Claim.

M. Indemnification Claims

58. WMI's bylaws provide for the indemnification of all WMI directors and officers. Prior to the Bankruptcy Petition Date, approximately sixty employees of WMB were officers of WMI. To the extent that such officers (or any directors, officers, or employees of WMB) assert indemnification or contribution claims against WMI, WMI asserts claims for reimbursement of such claims against WMB.

59. In addition, after the Bankruptcy Petition Date, WMI purchased an extension of the coverage period for its directors' and officers' liability insurance policy. To the extent that this extended insurance coverage benefits officers of WMB, WMI asserts a claim against WMB and/or its subsidiaries for their share of the cost of procuring the extended coverage.

N. Other Claims

60. Out of an abundance of caution, Plaintiffs assert contingent, unliquidated claims against WMB to the extent any of Plaintiffs are obligated, or become obligated, on account of WMB, including, but not limited to, on account of claims arising from WMB's mortgage loan origination business, as described in paragraph 53 of the Proof of Claim.

61. Plaintiffs further assert a claim for any other amounts due to Plaintiffs described in the Proof of Claim, including, but not limited to the amounts more fully described in paragraphs 57-59 of the Proof of Claim that are due to Plaintiffs for fees, costs, and expenses, for interest, and pursuant to WMI's equity interest in WMB.

THE FDIC'S DENIAL OF PLAINTIFFS' PROOF OF CLAIM

62. As alleged more fully above, Plaintiffs filed their proof of claim with FDIC-Receiver on December 30, 2008.

63. In a letter dated January 23, 2009, FDIC-Receiver provided WMI notice that Plaintiffs' claims had been disallowed. A copy of the FDIC-Receiver's notice is attached as Exhibit 2.

64. The FDIC-Receiver's notice stated that Plaintiffs' claims were disallowed because:

> The claims presented are unproven to the satisfaction of the Receiver since they lack sufficient documentation or specificity, they fail to state claims against the receivership, they appear to assert claims against a third party or there is no legal basis for the claims. Equity claims are paid in accordance with 12 U.S.C. sec. 1821(d)(11).

65. The notice provides no additional detail or explanation regarding the FDIC-Receiver's decision.

66. On information and belief, it is the FDIC-Receiver's practice to request further information from claimants if the FDIC-Receiver requires further information to determine whether a claim and/or the amount of such claim is valid. See, e.g., ALLTEL Info. Servs., Inc. v. FDIC, 970 F. Supp. 775, 776 (C.D. Cal. 1997) ("In response to a request by an FDIC claims representative, ALLTEL provided the FDIC a letter . . . which provided calculations in support of both Proofs of Claims.")

67. FDIC-Receiver did not request any further information from Plaintiffs or their counsel regarding the Proof of Claim.

68. On information and belief, FDIC-Receiver typically issues receivership certificates when it allows a claim, but has not yet determined the amount (if any) that the claimant will receive when the proceeds of the receivership estate are distributed.

69. FDIC-Receiver did not provide Plaintiffs with any receivership certificates, but rather disallowed their Claims outright.

70. Section 11(d)(2)(H) of the FDI Act states that FDIC-Receiver "shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." 12 U.S.C. § 1821(d)(2)(H).

71. FDIC-Receiver's refusal to consider Plaintiffs' Claims and cryptic disallowance of those Claims violated the FDIC-Receiver's statutory duty to pay all valid claims in accordance with the FDI Act.

72. Section 11(d)(5)(B) of the FDI Act further obligates FDIC-Receiver to "allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver." 12 U.S.C. § 1821(d)(5)(B).

73. FDIC-Receiver provided no grounds regarding why Plaintiffs' claims were not proven to its satisfaction. The FDIC-Receiver's failure to do so is a violation of its statutory duties.

74. The FDI Act provides that, when FDIC Receiver has disallowed a claim, the claimant may "request administrative review of the claim" 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).

75. The FDI Act further provides that, "[i]f any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record." 12 U.S.C. § 1821(d)(7)(A). "The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims . . . ." 12 U.S.C. § 1821(d)(7)(B)(i).

76. Notwithstanding these statutory directives, the FDIC-Receiver's notice sets forth no administrative review process in which Plaintiffs could seek a hearing regarding their claims. Nor does it appear that the FDIC has established any alternative dispute resolution mechanism to resolve proof of claim disputes.

77. Rather, FDIC-Receiver's notice directs Plaintiffs to file a lawsuit if Plaintiffs disagree with the disallowance of their claims. Accordingly, Plaintiffs filed this action.

CLAIMS FOR RELIEF

Count I
Determination of Plaintiffs' Proof of Claim

78. Plaintiffs incorporate the allegations and averments contained in paragraphs 5 through 77 as if set forth fully herein.

79. Under 12 U.S.C. § 1821(d)(6)(A), the Court has de novo jurisdiction to consider Plaintiffs' Claims set forth in the Proof of Claim. See, e.g. Freeman v. FDIC, 56 F. 3d 1394, 1400 (D.C. Cir. 1995) ("[U]nder section 1821(d)(6) [claimant] had recourse to de novo

judicial review of the FDIC's denial of [their] claim."); Benjamin Franklin Shareholders Litig. Fund v. FDIC, 501 F. Supp. 2d 103, 106 (D.D.C. 2007) ("[T]his Court reviews de novo claims filed with, and processed by the FDIC under its administrative claims process.") (citing Freeman v. FDIC, 56 F. 3d 1394, 1400 (D.C. Cir. 1995)).

80. Each Claim is a valid and proven claim against the Receivership and FDIC-Receiver is obligated to pay such Claims (subject to, and in accordance with, 12 U.S.C. § 1821(d)(11)).

Count II
Dissipation of WMB's Assets

81. Plaintiffs incorporate the allegations and averments contained in paragraphs 5 through 80 as if set forth fully herein.

82. According to the OTS's press release announcing the FDIC's appointment as receiver for WMB, the OTS stated that WMB had "insufficient liquidity to meet its obligations" and thus "was in an unsafe and unsound condition to transact business." A fact sheet accompanying that press release further stated that "[s]ignificant deposit outflows began on September 15, 2008" and that "[g]iven the Bank's limited sources of funds and significant deposit outflows, it was highly likely to be unable to pay its obligations and meet its operating liquidity needs." (Copies of the press release and fact sheet are attached as Exhibit 3.) Accordingly, on information and belief, the OTS's rationale for placing WMB into receivership was illiquidity, rather than insolvency.

83. According to the OTS fact sheet (see Exhibit 3), the OTS stated that WMB qualified as "well-capitalized" under the OTS's regulatory capital regulations through the Receivership Date.

84. Notwithstanding this, the FDIC has indicated that it "does not anticipate that subordinated debt holders of the bank will receive any recovery on their claims."[3] On information and belief, general creditors of WMB are unlikely to be paid in full as well.

85. Rather than a straight liquidation of WMB's assets, the FDIC entered into the Purchase and Assumption Agreement with JPMorgan Chase, described more fully above, for the purchase price of $1.9 billion.

86. On information and belief, the assets of WMB sold, less the liabilities assumed, were worth more than $1.9 billion, had such assets been liquidated in a prudent and reasonable manner.

87. On information and belief, Plaintiffs will not receive payments from the Receivership for their Claims that would be equal to or greater than the payments for that Plaintiffs would have received had the FDIC conducted a straight liquidation of WMB's assets and liabilities (and had the FDIC not improperly disallowed Plaintiffs' Claims).

88. The FDI Act requires "the Corporation [to] conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of such assets . . . ." 12 U.S.C. § 1821(d)(13)(E)(i).

89. By failing to liquidate WMB in a manner allowing WMB's creditors and other claimants to recover what they would have recovered in a straight liquidation, the FDIC breached its statutory duty to maximize the net present value of WMB's assets.

90. The FDI Act further provides that "[t]he maximum liability of the [FDIC], acting as receiver or in any other capacity, to any person having a claim against the receiver or

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[3] FDIC, Information for Washington Mutual Bank, Henderson, NV and Washington Mutual Bank, FSB, Park City, UT, *available at* http://www.fdic.gov/bank/individual/failed/wamu.html

the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the [FDIC] had liquidated the assets and liabilities of such institution . . . ." 12 U.S.C. § 1821(i)(2). Pursuant to this provision, the FDIC is obligated to pay damages to Plaintiffs equal to the difference between what Plaintiffs would have received in a straight liquidation of WMB and what they actually received.

Count III
Taking of Plaintiffs' Property Without Just Compensation

91. Plaintiffs incorporate the allegations and averments contained in paragraphs 5 through 90 as if set forth fully herein.

92. The FDIC's wasting of WMB's assets and failure to compensate Plaintiffs for their claims against WMB equivalent to what Plaintiffs would have received for such claims in a straight liquidation of WMB's assets constitutes a taking of Plaintiffs' property without just compensation in violation of the Fifth Amendment to the United States Constitution.

Count IV
Conversion of Plaintiffs' Property

93. Plaintiffs incorporate the allegations and averments contained in paragraphs 5 through 90 as if set forth fully herein.

94. The FDIC's refusal to compensate Plaintiffs for property taken into the Receivership that (a) belonged to Plaintiffs rather than WMB, (b) was improperly transferred to WMB, and/or (c) is property that otherwise should be returned to Plaintiffs under applicable law, constitutes conversion of Plaintiffs' property.

95. The FDIC's conversion of Plaintiffs' property is actionable under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671-80).

Count V
Declaration That the FDIC-Receiver's Disallowance Is Void

96. Plaintiffs incorporate the allegations and averments contained in paragraphs 5 through 90 as if set forth fully herein.

97. FDIC-Receiver's failure to consider Plaintiffs' Proof of Claim and the FDIC-Receiver's summary disallowance of the Proof of Claim without any meaningful explanation is an abrogation of FDIC-Receiver's statutory duties. Therefore, FDIC-Receiver's disallowance should be declared void and FDIC-Receiver should be required to reconsider Plaintiffs' Proof of Claim as if FDIC-Receiver's January 23rd disallowance never occurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to grant the following relief:

1. An order declaring Plaintiffs' Claims to be valid and proven against the Receivership;
2. An order directing FDIC-Receiver to pay the Claims from the assets of the Receivership in accordance with 12 U.S.C. § 1821(d)(11);
3. An order directing FDIC-Receiver to provide Plaintiffs with an accounting of the disposition of the assets of the Receivership if any Claim is not satisfied in full;
4. An order directing FDIC-Receiver to provide Plaintiffs with an accounting of all property transferred from Plaintiffs in connection with the Receivership;
5. Enter a judgment against FDIC-Corporate and FDIC-Receiver for damages, in an amount to be determined, equal to the amount of money Plaintiffs would have received in a straight liquidation of WMB's assets and liabilities less any amounts actually received from the Receivership;
6. Enter a judgment against FDIC-Corporate and FDIC-Receiver for damages, in an amount to be determined, equal to the value of Plaintiffs' property converted by the FDIC;
7. An order declaring that the FDIC's January 23, 2009 disallowance to be void, and that the parties should proceed as if such disallowance never occurred;
8. Award Plaintiffs costs and attorneys fees as may be permitted by law; and

9. Award Plaintiffs such other relief as may be just.

DEMAND FOR JURY TRIAL

Plaintiffs, by and through their attorneys, hereby demand a trial by jury on all claims otherwise triable by jury asserted in the complaint.

Dated: Washington, D.C.
March 20, 2009

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Facsimile: (212) 310-8007

Attorneys for Plaintiffs WMI and WMI Investment

EXHIBIT 1

Exhibit 1
(Payments to WMB)

Date Paid	Amount Paid to WMB
10/11/2007	857,230.47
10/18/2007	3,446,107.42
11/8/2007	1,189.73
11/15/2007	254,364.42
12/13/2007	186,438.82
1/10/2008	6,863,343.95
1/17/2008	2,190.72
2/7/2008	2,319,329.88
3/6/2008	7,948.56
3/13/2008	773,837.68
3/31/2008	14,030,414.67
4/10/2008	4,488,747.40
4/24/2008	3,759,043.02
5/8/2008	2,598,863.39
5/30/2008	1,240.005.70
6/19/2008	170.28
6/26/2008	10,520,771.72
7/24/2008	581,788.51
8/14/2008	1,431,922.60
8/21/2008	4,194,820.96
9/11/2008	112,923.51
9/25/2008	4,101,278.69
10/18/2007	175,635.71
10/25/2007	305,110.56
10/31/2007	1,434,522.37
11/8/2007	4,966,409.90
11/15/2007	725,599.67
12/13/2007	8,865,013.39
12/31/2007	6,205.49
1/10/2008	6,362,822.58
1/17/2008	914,011.32
1/31/2008	12,447,072.22
2/7/2008	3,377,908.39
2/14/2008	292,691.98
2/21/2008	671,242.69
2/29/2008	750,288.31
3/13/2008	3,256,230.57
3/20/2008	1,096,451.96

Date Paid	Amount Paid to WMB
4/10/2008	3,429,936.11
5/15/2008	1,956,466.25
5/22/2008	3,062,583.76
6/19/2008	1,422,177.59
6/30/2008	5,284,659.08
7/10/2008	2,598,631.45
7/24/2008	2,879,785.16
8/7/2008	1,805,099.83
8/14/2008	2,573,609.62
9/11/2008	614,326.45
9/18/2008	17,205,753.61
9/25/2008	1,681,646.07
Total:	151,934,564.19

EXHIBIT 2

FDIC
Federal Deposit Insurance Corporation
1601 Bryan Street, Dallas, TX 75201
Division of Resolutions and Receiverships

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7008 1830 0000 8032 2550

January 23, 2009

Washington Mutual, Inc.
ATTN: John Marciel
1301 Second Avenue, WMC3501
Seattle, WA 98101

SUBJECT: 10015–Washington Mutual Bank
Henderson, NV – In Receivership
NOTICE OF DISALLOWANCE OF CLAIM

Dear Claimant:

The Receiver of Washington Mutual Bank has reviewed your claim against the receivership. After a thorough review of your filed claim along with your supporting documentation, the Receiver has determined to disallow your claim for the following reason(s) :

> The claims presented are unproven to the satisfaction of the Receiver since they lack sufficient documentation or specificity, they fail to state claims against the receivership, they appear to assert claims against a third party or there is no legal basis for the claims. Equity claims are paid in accordance with 12 U.S.C. sec. 1821(d)(11).

Pursuant to 12 U.S.C. Section 1821 (d) (6), if you do not agree with this disallowance, you have the right to file a lawsuit on your claim (or continue any lawsuit commenced before the appointment of the Receiver), in the United States District (or Territorial) Court for the District within which the failed institution's principal place of business was located or the United States District Court for the District of Columbia within 60 days from the date of this notice.

IF YOU DO NOT FILE A LAWSUIT (or continue any lawsuit commenced before the appointment of the Receiver) **BEFORE THE END OF THE 60-DAY PERIOD, THE DISALLOWANCE WILL BE FINAL, YOUR CLAIM WILL BE FOREVER BARRED AND YOU WILL HAVE NO FURTHER RIGHTS OR REMEDIES WITH RESPECT TO YOUR CLAIM. 12 U.S.C. Section 1821(d)(6)(B).**

However, if a portion of your claim is for an insured deposit, your claim is not against the Receiver but rather is against the FDIC in its "corporate" capacity as deposit insurer. An insured depositor's rights are prescribed in 12 U.S.C. Section 1821(f) and differ from the rights described in the preceding paragraphs.

If you have any questions about this letter, please contact the undersigned at (972) 761-8049.

Sincerely,

Donald Grieser

Donald Grieser
Claims Department

RLS7218

EXHIBIT 3

Press Releases

September 25, 2008

OTS 08-046 - Washington Mutual Acquired by JPMorgan Chase

FOR RELEASE:
Thursday, Sept. 25, 2008

CONTACT: William Ruberry
(202) 906-6677
Cell – (202) 368-7727

Recent Upd
Press Relea
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Testimony
Website Su

Washington, DC — Washington Mutual Bank, the $307 billion thrift institution headquartered in Seattle, was acquired today by JPMorgan Chase, the Office of Thrift Supervision (OTS) announced.

The change will have no impact on the bank's depositors or other customers. Business will proceed uninterrupted and bank branches will open on Friday morning as usual.

Washington Mutual, or WaMu, specialized in providing home mortgages, credit cards and other retail lending products and services. WaMu became an OTS-regulated institution on December 27, 1988 and grew through acquisitions between 1996 and 2002 to become the largest savings association supervised by the agency. As of June 30, 2008, WaMu had more than 43,000 employees, more than 2,200 branch offices in 15 states and $188.3 billion in deposits.

"The housing market downturn had a significant impact on the performance of WaMu's mortgage portfolio and led to three straight quarters of losses totaling $6.1 billion," noted OTS Director John Reich.

Pressure on WaMu intensified in the last three months as market conditions worsened. An outflow of deposits began on September 15, 2008, totaling $16.7 billion. With insufficient liquidity to meet its obligations, WaMu was in an unsafe and unsound condition to transact business. The OTS closed the institution and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. The FDIC held the bidding process that resulted in the acquisition by JPMorgan Chase.

Customer questions regarding the institution, including questions about federal deposit insurance coverage, should be directed to the FDIC at 1-877-ASK-FDIC. WaMu customers with questions can also call the bank's service center at 1-800-788-7000.

Office of Thrift Supervision

FACT SHEET

1700 G Street, N.W., Washington, D.C. 20552 • Telephone (202) 906-6677 • www.ots.treas.gov

FOR RELEASE:
Thursday, September 25, 2008
OTS 08-046A

CONTACT:
William Ruberry
(202) 906-6677
Cell – (202) 368-7727

OTS Fact Sheet on Washington Mutual Bank

Institution Profile

- Total assets as of June 30, 2008: $307.02 billion
- Primary executive and business segment headquarters are located in Seattle, Washington.
- Branches: 2,239 retail branch offices operating in 15 states
- 4,932 owned and branded ATMs
- Employees: 43,198 at June 30, 2008

Recent Deposit Flows

- Because of adverse events in the financial markets, material outflows began on September 15, 2008. Coupled with further rating agency downgrades of Washington Mutual Inc. (WMI, the top-tier holding company) and Washington Mutual Bank (WMB or the Bank), the Bank experienced a net deposit loss of $16.7 billion through September 24, 2008.

Other Financial Details (as of June 30, 2008)

- Total deposits: $188.3 billion
- Brokered deposits: $34.04 billion
- Total borrowings: $82.9 billion primarily comprising Federal Home Loan Bank advances of $58.4 billion and $7.8 billion of subordinated debt
- Loans held: $118.9 billion in single-family loans held for investment - this includes $52.9 billion in payment option ARMs and $16.05 billion in subprime mortgage loans
- Home Equity Lines of Credit (HELOCs): $53.4 billion
- Credit Card Receivables: $10.6 billion

- Total loan servicing: $689.7 billion total loans serviced, including $442.7 billion in loans serviced for others and $26.3 billion of subprime mortgage loans
- Non-performing assets: $11.6 billion, including $3.23 billion payment option ARMs and $3.0 billion subprime mortgage loans

Institution History

- WMI is the top-tier savings and loan holding company and owns two banking subsidiaries, WMB and Washington Mutual Bank, fsb (WMBfsb), as well as nonbank subsidiaries.
- Since the early 1990s, WMI expanded its retail banking and lending operations organically and through a series of key acquisitions of retail banks and mortgage companies. The majority of growth resulted from acquisitions between 1996 and 2002. On October 1, 2005, the Bank entered the credit card lending business by acquiring Providian Financial Corporation. These acquisitions enabled WMB to expand across the country, build its customer base, and become the largest savings and loan association in the country.
- The Bank had four business segments: the Retail Banking Group, the Card Services Group, the Commercial Group and the Home Loans Group. WMB is a leading originator and servicer of both single- and multi-family mortgages and a major issuer of credit cards.

Recent Events

- *Changes in Business Strategy* - Beginning in late 2006 through today, WMB was proactively changing its business strategy to respond to declining housing and market conditions. Changes included tightening credit standards, eliminating purchasing and originating subprime mortgage loans, and discontinuing underwriting option ARM and stated income loans. Management reduced loans originated for sale and transferred held for sale loans to the held for investment portfolio. WMB was focusing on shrinking its balance sheet and developing a retail strategy through its branch operations.

- *Reduction of Overhead Expenses* - In December 2007, WMB announced the resizing of its Home Loans business including the elimination of approximately 2,600 employee positions, closure of approximately 190 home loan centers and sales offices, and closure of nine loan processing and call centers.

- *Maintaining Capital* - In late 2006 and 2007, WMB began to build its capital level through asset shrinkage and the sale of lower-yielding assets. In April 2008, WMI received $7.0 billion of new capital from the issuance of common stock. Since December 2007, WMI infused $6.5 billion into WMB. WMB met the well-capitalized standards through the date of receivership.

- *Operating Losses* - WMB recorded a net loss of $6.1 billion for the three quarters ended June 30, 2008. In the second quarter of 2008, WMB management disclosed that the Bank's credit quality had deteriorated and it might incur up to $19 billion in losses on its single-family residential mortgage portfolio. WMB increased its loan loss provisioning in response to the deteriorating housing market. Loan loss provisions increased from $1.6 billion in the fourth quarter of 2007, to $3.6 billion in the first quarter of 2008 and $6.0 billion in the second quarter of 2008.

- *Deposit Outflows* – Since July 2008, the pressure on WMB increased as market conditions continued to worsen. Significant deposit outflows began on September 15, 2008. During the next eight business days, WMB deposit outflows totaled $16.7 billion, shortening the time available to augment capital, improve liquidity, or find an equity partner. Given the Bank's limited sources of funds and significant deposit outflows, it was highly likely to be unable to pay its obligations and meet its operating liquidity needs.

- *Receivership* - With insufficient liquidity to meet its obligations, WMB was in an unsafe and unsound condition to transact business. OTS placed WMB into receivership on September 25, 2008. WMB was acquired today by JPMorgan Chase. The change will have no impact on the bank's depositors or other customers. Business will proceed uninterrupted and bank branches will open on Friday morning as usual.

OTS Enforcement Actions

- October 17, 2007 – Issued a Cease and Desist Order related to deficiencies in Bank Secrecy Act/Anti-Money Laundering (BSA/AML) programs
- October 17, 2007 – Assessed Civil Money Penalties (CMPs) related to violation of flood insurance regulations
- November 14, 2007 – Initiated a formal examination of the appraisal process to assess the validity of a complaint filed by the New York Attorney General's (NYAG) Office
- February 27, 2008 – Issued overall composite ratings downgrade and received a Board resolution in response to the supervisory action
- June 30, 2008 – Initiated discussions about Memorandums of Understanding with WMI and WMB
- September 7, 2008 - Issued Memorandums of Understanding to WMI and WMB
- September 18, 2008 – Issued overall composite ratings downgrade

OTS Profile
Established - 1989
Thrift institutions supervised as of June 30, 2008 - 829
Thrift industry assets supervised as of June 30, 2008 - $1.51 trillion
OTS employees - 1,055
Washington Mutual Bank assessment revenue – 12.2 percent of 2008 OTS budget