IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)** **(Jointly Administered)**
Debtors.	:	**Hearing Date: August 24, 2009 at 11:30 a.m.** **Objection Deadline: July 31, 2009 at 4:00 p.m.**

MOTION OF DEBTORS PURSUANT TO RULE 9024 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE FOR RECONSIDERATION OF THE ORDER APPROVING THAT CERTAIN STIPULATION BY AND BETWEEN THE DEBTORS AND DELL MARKETING, L.P., DATED AS OF DECEMBER 17, 2008

Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment"), as debtors and debtors in possession (together, the "Debtors"), hereby file this motion (the "Motion") for reconsideration of the order, dated December 19, 2008 [Dkt. No. 474] (the "Order"), approving that certain Stipulation, Agreement and Order for the Return of Certain Equipment to Dell Marketing, L.P. and the Allowance of an Administrative Expense Claim, dated December 17, 2008, (the "Stipulation"),[2] and respectfully represent as follows:

Jurisdiction

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

[2] A copy of the Order is attached hereto as Exhibit A. A copy of the Stipulation is attached as Exhibit 1 to the Order.

Background

2. On September 26, 2008 (the "Commencement Date"), each of the Debtors commenced with this Court a voluntary case pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). As of the date hereof, the Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On October 3, 2008, this Court entered an order pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the joint administration of the Debtors' chapter 11 cases.

4. On October 15, 2008, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors' Committee"). No trustee or examiner has been appointed in these cases.

WMI's Business

5. WMI is a holding company incorporated in the State of Washington and headquartered at 1301 Second Avenue, Seattle, Washington 98101. WMI is the direct parent of WMI Investment, which serves as an investment vehicle for WMI and holds a variety of securities. WMI Investment is incorporated in the State of Delaware.

6. Prior to the Commencement Date, WMI was a savings and loan holding company that owned Washington Mutual Bank ("WMB") and such bank's subsidiaries, including Washington Mutual Bank fsb ("WMBfsb"). WMI also has certain non-banking, non-debtor subsidiaries. Like all savings and loan holding companies, WMI was subject to regulation by the Office of Thrift Supervision (the "OTS"). WMB and WMBfsb, in turn, like all depository institutions with federal thrift charters, were subject to regulation and examination by the OTS.

In addition, WMI's banking and nonbanking subsidiaries were overseen by various federal and state authorities, including the Federal Deposit Insurance Corporation ("FDIC").

7. On September 25, 2008, the Director of the OTS, by order number 2008-36, appointed the FDIC as receiver for WMB and advised that the receiver was immediately taking possession of WMB. Immediately after its appointment as receiver, the FDIC sold substantially all the assets of WMB, including the stock of WMBfsb, to JPMorgan Chase Bank, N.A. ("JPMC") pursuant to that certain Purchase and Assumption Agreement, Whole Bank, dated as of September 25, 2008 (the "Purchase Agreement") (publicly available at http://www.fdic.gov/about/freedom/popular.html).

8. WMI's assets include its common stock interest in WMB, its interest in its non-banking subsidiaries, and more than $4 billion of cash that WMI and its non-banking subsidiaries (including WMI Investment) had on deposit at WMB and WMBfsb immediately prior to the time the FDIC was appointed as receiver. WMI is in the process of evaluating these and other assets for purposes of ultimate distribution to its creditors.

The Stipulation

9. Dell Marketing, L.P. ("Dell") and WMI were parties to that certain U.S. Purchase Agreement for Products and Services (Direct and Reseller), dated as of August 3, 2007 (the "Dell Agreement"),[3] pursuant to which WMI and its subsidiaries, including WMB, were permitted to order certain computer and related goods from Dell.[4]

10. On October 15, 2008, Dell filed a motion [Dkt No. 79] (the "Admin Claim Motion") with the Bankruptcy Court for an order directing the allowance and payment of certain

[3] A copy of the Dell Agreement is attached hereto as Exhibit B.

[4] Pursuant to a Notice of Rejection of Executory Contracts, dated March 9, 2009, the Debtors rejected the Dell Agreement.

administrative expense claims pursuant to section 503(b)(9) of the Bankruptcy Code in the amount of $413,607.61 (the "Dell Admin Claim") arising from the delivery of certain computer goods within twenty (20) days prior to the Commencement Date (the "Dell Equipment").[5]

11. At the time Dell filed the Admin Claim Motion, and as a result of the sale of WMB, the Dell Equipment was in the possession and custody of JPMC. Because of this, the Debtors contacted JPMC in their efforts to evaluate the Admin Claim Motion and their response thereto. JPMC represented to the Debtors that the majority of the Dell Equipment was new and unopened in its original packaging. (See Emails, dated December 9, 2008, and December 10, 2008, from Robert Urband, counsel to JPMC, copies of which are attached hereto as Exhibit C). The remaining Dell Equipment, according to JPMC, was opened, but had never been used under "production loads." (See Email, dated December 9, 2008, from Robert Urband, a copy of which is attached hereto as Exhibit D). Based on such representations, the Debtors, after consultation with and approval by the Creditors' Committee, agreed to settle the Dell Admin Claim and enter into the Stipulation. Pursuant thereto, Dell was granted an allowed administrative expense claim in the amount of the Dell Admin Claim minus any amounts that were recovered by Dell after resale of the Dell Equipment (subject to the Debtors' rights to contest such credit). It was the Debtors' expectation and understanding based on communications with JPMC and Dell that the Debtors would receive significant credits for both the opened and unopened Dell Equipment. At the time, and based upon the information provided by JPMC, the Debtors believed that the Stipulation was in the best interests of all parties as it avoided potentially costly litigation with

[5] The Admin Claim Motion also asserted a reclamation claim for goods delivered between forty-five (45) and twenty (20) days prior to the Commencement Date. Without prejudicing any of the arguments herein, the Debtors submit that the reclamation claim was satisfied upon the return to Dell of the Dell Equipment.

Dell and provided the Debtors the opportunity to recover a substantial portion of the Dell Admin Claim.

12. Subsequent to the entry of the Stipulation, upon information and belief, JPMC engaged Dell in discussions to buy back the Dell Equipment, which would have resulted in a dollar-for-dollar credit to the Debtors against the Dell Admin Claim. However, at some point subsequent thereto, JPMC decided against such course of action. Instead, pursuant to the terms of the Stipulation, the Dell Equipment was delivered to Dell for resale. Contrary to the understanding of the parties, however, upon receipt of the Dell Equipment, Dell discovered that ***none*** of the Dell Equipment was new and unopened, as had previously been represented by JPMC. Rather, not only was all the Dell Equipment opened, but the bundled software included with the Dell Equipment had been activated by JPMC. According to Dell, the activation of the software rendered the Dell Equipment worthless and unable to be resold.[6] Consequently, on July 2, 2009, Dell provided notice (the "Credit Notice")[7] pursuant to the terms of the Stipulation that the Debtors would be receiving only a *de minimis* credit against the Dell Admin Claim reflecting the Dell Equipment's scrap value.

13. Upon information and belief, and as indicated in the Credit Notice, the Dell Equipment was opened and the software activated at various points between October 1, 2008 and October 14, 2008 – ***before*** Dell even filed its Admin Claim Motion and ***after*** WMB's seizure and sale to JPMC.

[6] It is the Debtors' understanding that, pursuant to the license agreement between Dell and the respective software provider for the Dell Equipment, once the software is activated, the terms of the license prohibit that piece of equipment's resale.

[7] A copy of the Credit Notice is attached hereto as Exhibit E.

Relief Requested

14. As stated above, the Debtors entered into the Stipulation based on information that was, through no fault of their own, incorrect at the time it was received. Had the Debtors known the true facts, they would not have entered into the Stipulation, as it would have provided no benefit to these estates. Therefore, by this Motion, pursuant to Federal Rule of Bankruptcy Procedure 9024, which incorporates Rule 60 of the Federal Rules of Civil Procedure, the Debtors respectfully request that the Court reconsider and vacate the Order approving the Stipulation. Further, to the extent this Motion is granted, the Debtors also seek to object to the allowance of the Dell Admin Claim in its entirety.

Argument

I. The Stipulation Should be Reconsidered Pursuant to Rule 60 of the Federal Rules of Civil Procedure

A. Rule 60(b)(1) of the Federal Rules of Civil Procedure – Mistake – is Applicable

15. Rule 60 of the Federal Rules of Civil Procedure provides a mechanism by which a court can "relieve a party…from a final judgment, order, or proceeding" on the basis of, among other reasons, "mistake, inadvertence, surprise, or excusable neglect." See FED. R. CIV. P. 60(b)(1). In general, motions brought pursuant to Rule 60(b)(1) and premised on mistake are appropriate under two circumstances: (1) when the party has made an excusable litigation mistake; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order. See Yapp v. Excel Corp., 186 F.3d 1222, 1231 (10th Cir. 1999). The case law on Rule 60(b)(1) is clear that "[e]xcusable litigation mistakes are not those which were the result of a deliberate and counseled decision by the complaining party." Id. However, mistakes that are remediable under Rule 60(b)(1) include "litigation mistakes that a party could not have protected against." Id. In addition, "[c]ourts apply Rule 60(b)(1) 'equitably and liberally…to

achieve substantial justice.'" Burrell v. Henderson, 434 F.3d 826, 832 (6th Cir. 2006) (internal citations omitted).

16. Here, the Stipulation was entered into upon the mistaken belief, held by both Dell and the Debtors after being so informed by JPMC, that the majority of the Dell Equipment was new and unopened. This is clearly a "litigation mistake" that the parties could not have protected against. The only source of information regarding the condition of the Dell Equipment was JPMC, and, as a result of the seizure, the Debtors had no choice but to rely on such information in good faith. Indeed, it is important to note that both Dell and the Debtors were operating under the assumption that the majority of the Dell Equipment was new and unopened and, therefore, had significant resale value. Courts have held that "'the existence of fraud or ***mutual mistake*** can justify reopening an otherwise valid settlement agreement.'" In re Harbor Fin. Group, Inc., 303 B.R. 124, 134 (Bankr. N.D. Tex. 2003) (quoting Brown v. County of Genesee, 872 F.2d 169, 174 (6th Cir. 1989)) (emphasis added); see also Patterson v. TNA Entertainment, LLC, Case No. 04-0192, 2006 WL 587696, at *6 (E.D. Wis. March 10, 2006).[8]

17. The Patterson case is instructive. There, after a court-appointed mediation resulted in an agreed-upon order signed by the court dismissing the underlying action between the parties, TNA Entertainment sought reconsideration on the grounds that one of the representations made during the mediation was false. The court noted that, even if the plaintiff had not intentionally misrepresented the subject fact, grounds to reconsider the order still existed on the basis that a mutual mistake of material fact existed. Id. Indeed, the court noted that the subject fact was "the main motivating factor" behind the agreement. Id. On this basis, the court ordered that the agreed-upon order entered in the underlying case be set aside. Id. at *7.

[8] A copy of this unreported decision is attached hereto as Exhibit F.

18. Similar to the facts in Patterson, here, the main motivating factor behind execution of the Stipulation was the belief that value could be recovered through the resale of the Dell Equipment. Critically, the only way value could have been recovered was if the Dell Equipment had been new and the software not activated. Had the parties known the true condition of the Dell Equipment, the Stipulation would not have been entered into, as it would have benefited ***neither*** party. Consequently, the information relied upon by ***both*** parties at the time the Stipulation was entered certainly constitutes a mutual mistake of material fact. Accordingly, cause exists to reconsider and vacate the Order pursuant to Rule 60(b)(1).

B. Rule 60(b)(2) of the Federal Rules of Civil Procedure – Newly Discovered Evidence – is Applicable

19. Also providing a basis for relief, Rule 60(b)(2) of the Federal Rules of Civil Procedure authorizes the Court to reconsider a judgment if the moving party demonstrates (1) the existence of "newly discovered evidence," (2) that it exercised due diligence to discover the evidence initially, and (3) that the evidence "would probably have changed the outcome of the trial." Compass Tech., Inc. v. Tseng Laboratories, Inc., 71 F.3d 1125, 1130 (3d Cir. 1995); see also Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 211 (9th Cir. 1987).

20. Here, the circumstances and equities of the instant situation warrant relief pursuant to Rule 60(b)(2). First, the fact that the entirety of the Dell Equipment was opened, and the licenses activated, prior to the Stipulation's entry only came to light after the equipment was shipped back to Dell. And, because the Debtors were reliant on JPMC for information, there was no other way for the Debtors to verify the condition of the Dell Equipment prior to entering into the Stipulation. Second, the Debtors exercised due diligence in assessing the facts prior to executing the Stipulation and entry of the Order. The Debtors had extensive communications with JPMC regarding the Dell Equipment and entered into the Stipulation only after it was

confirmed in writing that the Dell Equipment was, for the most part, new and unopened. Third, had the Debtors known that all of the Dell Equipment had been opened and activated, they surely would not have entered into the Stipulation. The Debtors made the calculated decision to enter into the Stipulation because the Stipulation (i) avoided potentially costly litigation with Dell and (ii) allowed the Debtors to recoup a significant portion of the Dell Admin Claim. If the Debtors had known that all of the Dell Equipment was opened and activated and, therefore, had no resale value, they would not have entered into the Stipulation. Accordingly, this newly discovered evidence is surely of a magnitude sufficient to have changed the resolution of the Admin Claim Motion. This is especially so since, as will be described more fully below, the Debtors do not believe that Dell is entitled to a valid administrative claim.

C. Rule 60(b)(6) of the Federal Rules of Civil Procedure Also Provides a Basis for Relief

21. Rule 60(b)(6) of the Federal Rules of Civil Procedure further authorizes the Court to modify a final judgment for "any other reason justifying relief from the operation of the judgment." See FED. R. CIV. P. 60(b)(6). In general, a motion under Rule 60(b)(6) requires extraordinary circumstances and that the movant be free of any fault. See Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998). In determining whether a movant has met their burden under Rule 60(b)(6), courts may also consider, among other things, "the existence of a meritorious claim or defense" and " the absence of unfair prejudice to the opposing party if the requested relief is granted." In re Teligent, Inc., 326 B.R. 219, 227 (S.D.N.Y. 2005). In this case, the Debtors submit that, not only are extraordinary circumstances present, but that the current situation resulted from no fault of their own. The Debtors also submit that, absent reconsideration of the Order and vacatur of the Stipulation, the Debtors will be severely and unfairly prejudiced, while, by contrast, any prejudice that Dell would suffer will be minimal.

22. These chapter 11 cases were precipitated by the largest bank failure in the history of the United States. The result of the Receivership was the unanticipated separation of a parent entity from its primary operating subsidiary, a result that presented numerous legal and operational challenges in the months following. When the Admin Claim Motion was filed, the Debtors had to analyze the Dell Admin Claim, which pertained to equipment that was not in the Debtors' possession. Indeed, the Dell Equipment was never in the Debtors' possession, as it was ordered by and delivered to WMB, which, after the Receivership, was controlled by JPMC. The Debtors were, therefore, forced to rely in good faith on statements and representations made by JPMC. That those statements and representations later turned out to be false ***even at the time they were made*** cannot be attributed to any fault of the Debtors.

23. Furthermore, absent reconsideration of the Stipulation, the Debtors will be unjustly prejudiced. Because Dell, pursuant to the Credit Notice, has stated its intention to give the Debtors only a *de minimis* credit against the Dell Admin Claim, the Debtors will be forced to pay an administrative expense claim for which they would otherwise have had no liability. As is discussed in more detail below, the Dell Equipment was ordered and received by employees of WMB. As a result, forcing WMI to pay for equipment it neither received nor benefited from would be manifestly unjust.

24. By contrast, the prejudice to Dell, while unfortunate, would be minimal. If this Motion for Reconsideration is granted, Dell will be placed in the exact same position it was prior to entry of the Stipulation – it will have to prove its entitlement to a 503(b)(9) claim. None of the actions of the parties have prejudiced, in any way, Dell's argument with respect to its entitlement to a 503(b)(9) claim. Indeed, had the parties not entered the Stipulation, and even assuming Dell had prevailed in its Admin Claim Motion, Dell may not have been paid any

amounts on account of its claim until the end of these chapter 11 cases. See In re Global Home Prods., LLC, No. 06-10340, 2006 WL 3791955, at *3 (Bankr. D. Del. Dec. 21, 2006) (holding that the timing of the payment of administrative claims is within the discretion of the court); In re HQ Global Holdings, Inc., 282 B.R. 169, 173 (Bankr. D. Del. 2002) (same); *In re Continental Airlines, Inc.*, 146 B.R. 520, 531 (Bankr. D. Del. 1992) (holding that "[t]o qualify for exceptional immediate payment, a creditor must show that there is a necessity to pay and not merely that the Debtor has the ability to pay"). Accordingly, Dell cannot credibly argue that it relied upon or expected the receipt of any funds on account of the Dell Admin Claim. Reconsidering the Stipulation and litigating the Dell Admin Claim will only result in Dell having to litigate an issue it would have had to, and was prepared to, litigate previously. And, because Dell could not have expected to have been paid immediately in any event, the timing of the litigation is immaterial. Consequently, while the need to reconsider the Stipulation is unfortunate, Dell will not suffer any significant prejudice.

25. There is no doubt that had the facts and circumstances as understood by both Dell and the Debtors at the time been true and accurate, the Stipulation would have benefited all. The Debtors would have avoided a costly litigation and been able to recoup a substantial amount of the Dell Admin Claim. Dell, on the other hand, would have ensured payment well in advance of what it could have otherwise expected. Unfortunately for all parties, those facts and circumstances turned out to be false. Accordingly, the Debtors further submit that Rule 60(b)(6) provides a basis upon which the Court can grant the relief requested herein. The Debtors, therefore, request that the Court reconsider the Order, vacate the Stipulation and restore the parties to their ex ante positions prior to entry thereof.

II. Dell is Not Entitled a 503(b)(9) Administrative Claim

26. In the event the Court grants this Motion and vacates the Order, the Debtors object to the allowance of the Dell Admin Claim. The obligations giving rise to the Dell Admin Claim are simply not obligations for which the Debtors are contractually liable. Furthermore, Dell has not, and cannot, satisfy the statutory predicates for a 503(b)(9) claim against these estates. Accordingly, the Dell Admin Claim should be disallowed in its entirety.

A. WMI Was Not Contractually Obligated to Pay for the Dell Equipment

27. As a preliminary matter, neither of the Debtors actually ordered or contracted for the Dell Equipment. The Dell Equipment was, instead, ordered by and delivered to, as indicated on the Dell invoices, employees of WMB.[9] While the Dell Agreement may have been signed by WMI, it specifically contemplated that "Affiliates" of WMI would be able to order goods from Dell and be bound by the terms of the Dell Agreement. Specifically, Section 21.7 of the Dell Agreement provides as follows:

> This Agreement inures to the benefit of Customer's Affiliates, subsidiaries, and successors-in-interest, all of which shall have the right to place Orders and receive Products and Services under the same terms and conditions of Customer; *submission of an Order referring to this Agreement shall constitute a binding agreement by such Affiliate.*

(See Dell Agreement § 21.7.) (emphasis added.) As such, the Dell Agreement contemplated affiliates of WMI, including WMB, being able to order products and services on the same terms as WMI, but the Dell Agreement provided that, if an Affiliate placed an order, such Affiliate – not WMI – would be bound by the terms of the Dell Agreement. Accordingly, by the express

[9] Certain of the invoices included with the Admin Claim Motion indicate "Sold to: Account Payable WaMu." Upon information and belief, this reference is to the WMB Accounts Payable department, as no accounts payable department existed at WMI or WMI Investment.

terms of the Dell Agreement, WMI is not liable for the Dell Equipment – WMB is.[10] As a result, Dell should have no claim against WMI on account of the Dell Equipment, let alone a 503(b)(9) administrative priority claim.

B. Dell Has Not Satisfied the Statutory Predicates to Section 503(b)(9)

28. Section 503(b)(9) provides that there shall be an allowed administrative expense of the estate for:

> the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold *to the debtor* in the ordinary course of such debtor's business.

See 11 U.S.C. § 503(b)(9). The statute, therefore, provides a claimant a 503(b)(9) administrative priority claim if the claimant can show: "(1) the vendor sold 'goods' to the debtor; (2) the goods were received by the debtor within twenty days prior to filing; and (3) the goods were sold to the debtor in the ordinary course of business." In re Goody's Family Clothing, Inc., 401 B.R. 131, 133 (Bankr. D. Del. 2009). Here, Dell cannot establish a single element of its entitlement to a 503(b)(9) claim.

29. First, the invoices attached to the Admin Claim Motion indicate that the Dell Equipment was ordered by and shipped to individuals who were *not* employees of WMI, but, instead, were employees of WMB (or a WMB subsidiary). The Dell Agreement makes clear that goods ordered by an "Affiliate" are treated as if that Affiliate entered into a separate and binding agreement with Dell. (See Dell Agreement § 21.7.) Consequently, the Dell Equipment was not sold to WMI – a statutory requirement to be entitled to a 503(b)(9) claim.

30. Second, WMI never received the goods at issue here. The invoices attached to the Admin Claim Motion indicate that the Dell Equipment was shipped to and

[10] In support of this position, the Debtors rely on the declaration of Carl C. Carl, dated July 9, 2009, in support of the Motion, a copy of which is attached hereto as Exhibit G.

received by WMB employees. And, because hornbook principles of corporate law establish that a subsidiary's relationship to its parent entity, by itself, is insufficient to create an agency relationship, WMB's receipt of the Dell Equipment cannot be imputed to WMI. See Binder v. Bristol-Myers Squibb, Co., 184 F. Supp. 2d 762, 773 (N.D. Ill. 2001) ("[T]he status of wholly-owned subsidiary to parent corporation alone does not make a subsidiary the agent of its parent."); Glass v. Volkswagen of America, Inc., 172 F. Supp. 2d 743, (D. Md. 2001) (same). Similarly, section 503(b)(9) requires that the debtor actually receive the "goods" themselves, not just their value. See In re Plastech Engineered Products, Inc., 2008 WL 5233014 (Bankr. E.D. Mich. Oct. 7, 2008) (holding that "§ 503(b)(9) does require that a debtor receive the *goods*, and no just the *value* of such goods") (emphasis in original). Consequently, to the extent that WMI, as the parent of WMB, derived some derivative value from WMB's receipt of the goods, such value is inadequate to give rise to a 503(b)(9) claim. As a result, WMI simply did not receive the goods at issue, and Dell is, therefore, not entitled to a 503(b)(9) claim.

31. Third, and lastly, because WMI neither ordered nor received the Dell Equipment, WMI simply cannot be found to have purchased the Dell Equipment in the ordinary course of business. Therefore, because Dell cannot satisfy the basic statutory requirements, Dell is not entitled to a 503(b)(9) administrative priority claim for the Dell Equipment.

Notice

32. No trustee or examiner has been appointed in these chapter 11 cases. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) counsel for the Creditors' Committee; (iii) counsel to Dell; and (iv) parties entitled to receive notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002. The Debtors submit that no other or further notice need be provided.

No Previous Request

33. No previous request for the relief sought herein has been made to this or any other Court.

WHEREFORE the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit H, granting the relief requested herein and such other and further relief as it deems just and proper.

Dated: July 10, 2009
Wilmington, Delaware

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ATTORNEYS TO THE DEBTORS
AND DEBTORS IN POSSESSION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	**Case No. 08-12229 (MFW)**
	(Jointly Administered)
Debtors.	
	Hearing Date: August 24, 2009 at 11:30 a.m. (EDT)
	Objection Deadline: July 31, 2009 at 4:00 p.m. (EDT)

NOTICE OF MOTION AND HEARING

PLEASE TAKE NOTICE that, on July 10, 2009, the above-captioned debtors and debtors in possession (collectively, the "Debtors") filed the **Motion of the Debtors Pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure for Reconsideration of the Order Approving that Certain Stipulation By and Between the Debtors and Dell Marketing, L.P., Dated as of December 17, 2008** (the "Motion") with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be filed in writing with the Bankruptcy Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon and received by the undersigned counsel for the Debtors on or before **July 31, 2009 at 4:00 p.m. (Eastern Daylight Time).**

PLEASE TAKE FURTHER NOTICE that if an objection is timely filed, served and received and such objection is not otherwise timely resolved, a hearing to consider such

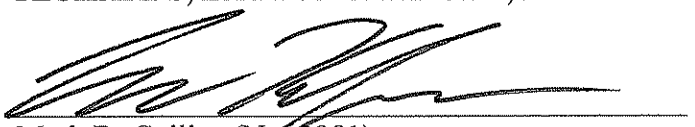
[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

objection and the Motion will be held before The Honorable Mary F. Walrath at the Bankruptcy Court, 824 Market Street, 5th Floor, Courtroom 4, Wilmington, Delaware 19801 on **August 24, 2009 at 11:30 a.m. (Eastern Daylight Time)**.

IF NO OBJECTIONS TO THE MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: July 10, 2009
Wilmington, Delaware

RICHARDS, LAYTON & FINGER, P.A.



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Attorneys to the Debtors and Debtors in Possession

EXHIBIT A

(The Order)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
	:	**(Jointly Administered)**
Debtors.	:	**Re: Docket No. _____**

ORDER APPROVING STIPULATION, AGREEMENT AND ORDER FOR THE RETURN OF CERTAIN EQUIPMENT TO DELL MARKETING, L.P. AND THE ALLOWANCE OF AN ADMINISTRATIVE EXPENSE CLAIM

Upon consideration of the *Stipulation, Agreement and Order for the Return of Certain Equipment to Dell Marketing, L.P. and the Allowance of an Administrative Expense Claim* (the "Stipulation"), a copy of which is attached hereto as Exhibit 1, as agreed to by and among Dell Marketing, L.P. ("Dell") and the above captioned debtors and debtors in possession (collectively, the "Debtors" and together with Dell, the "Parties"), it is hereby

ORDERED that the Stipulation is APPROVED; and it is further

ORDERED that the Parties are hereby authorized to take any and all actions reasonably necessary to effectuate the terms of the Stipulation; and it is further

ORDERED that this Court shall retain jurisdiction over any and all matters arising from or related to the implementation or interpretation of the Stipulation of this Order.

Dated: December 19, 2008
Wilmington, Delaware

THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
WASHINGTON MUTUAL, INC., et al.,[1]	:	Case No. 08-12229 (MFW)
	:	(Jointly Administered)
Debtors.	:	

STIPULATION, AGREEMENT AND ORDER FOR THE RETURN OF CERTAIN EQUIPMENT TO DELL MARKETING, L.P. AND THE ALLOWANCE OF AN ADMINISTRATIVE EXPENSE CLAIM

Washington Mutual, Inc. ("WMI") and WMI Investment Corporation ("WMI Investment" and together with WMI, collectively, the "Debtors"), as debtors and debtors in possession, and Dell Marketing L.P. ("Dell," and together with the Debtors, the "Parties"), hereby submit this Stipulation, Agreement and Order and in support thereof, respectfully stipulate as follows:

RECITALS

A. On September 25, 2008,[2] the Federal Deposit Insurance Corporation (the "FDIC"), in its corporate capacity and as receiver of Washington Mutual Bank, Henderson, Nevada ("WMB") and JP Morgan Chase, N.A. entered into that certain Purchase and Assumption Agreement, Whole Bank, dated as of September 25, 2008 (the "Purchase Agreement"), which Purchase Agreement is publicly available at

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

[2] Prior to September 25, 2008, WMI was a savings and loan holding company that owned WMB (as defined below) and such bank's subsidiaries, including Washington Mutual Bank fsb ("WMBfsb").

http://www.fdic.gov/about/freedom/popular.html.

B. On September 26, 2008 (the "Commencement Date"), each of the Debtors filed a voluntary case (collectively, the "Bankruptcy Cases") pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

C. As of the date hereof, the Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

D. Dell and WMI are party to that certain U.S. Purchase Agreement for Products and Services (Direct and Reseller), dated as of August 3, 2007 (the "Contract"), by and between WMI and Dell. Pursuant to the Contract, on behalf of itself and its subsidiaries, including Washington Mutual Bank ("WMB"), WMI from time to time purchased various computer-related goods and services from Dell. Prior to the Commencement Date, WMI purchased certain computer products (the "Goods") from Dell for the benefit of WMB. Such Goods were delivered to WMB prior to the Commencement Date.

E. On October 15, 2008, Dell filed a Motion for Allowance and Payment of Administrative Expense Claim under 11 U.S.C. § 503(b)(9) (the "Administrative Claim Motion"), wherein, Dell requests (i) the allowance of an administrative expense claim for the value of the Goods in the amount of $413,607.61 (the "Asserted Administrative Claim") and (ii) the return of certain other goods (the "Reclamation Goods") valued at approximately $1,874.48 (the "Reclamation Request").

F. WMI has determined that it has no use for the Goods and, therefore, wishes to return the Goods and the Reclamation Goods to Dell. Dell has agreed to accept return delivery

of the Goods and the Reclamation Goods. In addition, Dell has agreed to deduct any amount realized from the re-sale of the Goods (minus reasonable costs and expenses incurred in connection with the re-sale) (such amount to be deducted, the "Credit") from the amount of the Asserted Administrative Claim. The Credit does not and will not include the Reclamation Goods.

AGREEMENT

1. This Stipulation shall not become effective unless and until it is entered by the Bankruptcy Court (the "Effective Date").

2. Upon the Effective Date, or as soon as practicable thereafter, WMI shall, using insured commercial carriers, pay for freight and return of the Goods to Dell. Each package of Goods returned will be affixed with a Return Authorization Number, which number shall be provided by Dell.

3. Upon receipt, Dell shall examine and inspect the Goods and provide notice (the "Credit Notice") to WMI of the proposed amount of the Credit (the "Proposed Credit") to be applied and deducted from the Asserted Administrative Claim. Upon receipt of all of the Reclamation Goods, Dell's Reclamation Request shall be deemed satisfied in full.

4. WMI shall have ten (10) business days from the date of the Credit Notice to object or otherwise inform Dell of its disagreement with the amount of the Proposed Credit. Dell and WMI shall negotiate in good faith to determine the final amount of the Credit (the "Final Credit"). If the Parties cannot reach a consensual resolution with respect to the amount of the Final Credit, such determination shall be made by this Court, with a hearing to be held on an expedited basis, but in no event on less than ten (10) business' days notice.

5. Dell shall be entitled to an allowed administrative expense claim pursuant to

section 503(b) of the Bankruptcy Code in an amount equal to the Asserted Administrative Claim minus the Final Credit (such amount, the "Allowed Administrative Claim"). Within ten (10) business days after agreement of the Parties or entry of a final order fixing the amount of the Final Credit, WMI shall pay to Dell the Allowed Administrative Claim. Upon receipt of payment, (i) the Allowed Administrative Claim shall be deemed satisfied in full, (ii) Dell shall have no further claims against the Debtors arising out of the purchase of the Goods and (iii) the Administrative Claim Motion shall be deemed withdrawn.

6. This Stipulation may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

7. The Parties hereto represent and warrant to each other that: (i) each is authorized to execute this Stipulation; (ii) each has full power and authority to enter into and perform in accordance with the terms of this Stipulation (subject to Bankruptcy Court approval); and (iii) this Stipulation is duly executed and delivered and constitutes a valid and binding agreement in accordance with its terms (subject to Bankruptcy Court approval).

8. The Bankruptcy Court shall retain jurisdiction (and the Parties shall consent to such retention of jurisdiction) to resolve any disputes or controversies arising from or related to this Stipulation.

Dated: December 17, 2008
Wilmington, Delaware

SEITZ, VAN OGTROP & GREEN, P.A.

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EXHIBIT B

(The Dell Agreement)

U.S. Purchase Agreement for Products and Services (Direct and Reseller)

This U.S. Purchase Agreement for Products and Services (Direct and Reseller) (this "Agreement") is effective as of August 3, 2007 (the "Effective Date") by and between Washington Mutual, Inc., a Washington corporation, with business operations at 1301 Second Avenue, Seattle, Washington 98101, and its direct and indirect subsidiaries and Affiliates (hereinafter referred to as "Customer"), and Dell Marketing, LP, a Texas limited partnership and an indirectly wholly owned subsidiary of Dell, Inc., with its principal place of business at One Dell Way, Round Rock, Texas 78682 ("Supplier"). Customer and Supplier may be referred to individually as a "Party" and collectively as "the Parties."

Whereas, Supplier considers Customer a strategic customer and wishes to create a strategic vendor relationship with Customer;

Whereas, Supplier acknowledges that Customer is a major banking and financial services vendor and a national leader in the delivery of leading-edge solutions to support the Customer's financial services offerings;

Whereas, Supplier requests that Supplier's products, as approved by Customer, be included in Customer's Technology Standards List;

Whereas, Supplier acknowledges that Supplier's ability to participate in the onsite system certification and testing of product destined for Customer's Technology Standards List is greatly beneficial to Supplier;

Whereas, Supplier acknowledges Customer's willingness to provide onsite facility accommodations as outlined in this Agreement; and

Whereas, for those future products that Customer may add to its Technology Standards List, Supplier requests Customer's feedback in Supplier's development of its product design requirements and planning stages.

NOW, THEREFORE, in consideration of the representations and agreements contained herein, the Parties hereby covenant and agree as follows:

1. Scope.

This Agreement sets forth the terms and conditions controlling Supplier's provision of, and Customer's Order of, any Products or Services during the period commencing on the Effective Date and continuing for the Term. Customer may purchase and Supplier shall provide the Products or Services as described in this Agreement, Exhibit A (Product Description and Pricing Schedule) and Exhibit B-1 (Statement of Work), at the prices specified and in accordance with the Service Levels. Capitalized terms used herein are defined on Appendix A or throughout this Agreement. To the extent milestones, timelines or performance dates are set forth in this Agreement or the SOW, including without limitation the Delivery date set forth on any Order, Supplier acknowledges and agrees that time is of the essence in relation to such milestones, timelines or performance dates.

2. Orders.

2.1 Placement and Acceptance of Direct Orders. Supplier shall sell to Customer, and Customer shall purchase from Supplier, Products or Services in the quantities specified in Orders that Customer may from time to time submit to Supplier. Customer may at any time place an Order by

sending a Purchase Order to Supplier at its address for notices or by electronically submitting an eProcurement Purchase Order (as more fully set forth in Section 7 (Electronic Procurement; Account Integration).

Supplier shall accept, process (which shall include, without limitation, the provision of an electronic acknowledgment and advanced shipping notice), and commence fulfillment of Orders on the day of receipt of the Order, or on the next Business Day for Orders received after 3:00 p.m. Central Time ("Order Receipt"). Supplier shall have the obligation to accept any Order that complies with the terms and conditions of this Agreement, including the pricing terms. The Parties acknowledge that, in the case of Orders transmitted electronically, paper purchase orders will not be issued (i.e., such Orders will not be printed on paper and signed). The Parties agree not to contest the validity or enforceability of Orders transmitted electronically under any provision of applicable law requiring that contracts be in writing and signed by the party to be bound. Supplier shall only accept Orders from Requesters.

2.2 Form of Orders. Each Order shall contain, without limitation, the following terms: (a) the specific Products or Services to be ordered; (b) the quantity; (c) the price (subject, however, to Section 5 (Prices/Fees) herein); (d) the total purchase price; (e) shipping instructions, including the date the Product or Service line item is needed; (f) an indication of whether the Order is to be shipped on a normal or Expedited Delivery basis (as defined in Section 3.1 below); (g) ship-to addresses along with the name of the Delivery contact; (h) the name of the Requester; (i) the cost center billing information; and (j) any other mutually agreed upon special instructions.

2.3 Interpretation of Orders. The terms and conditions of this Agreement shall prevail over any inconsistent terms contained on the Order, in accompanying correspondence, or in related acknowledgments, invoices, or confirmations. Both Parties expressly limit acceptance only to the terms of this Agreement and hereby timely object to any inconsistent, additional, or different terms in any prior or subsequent invoice, acknowledgment, confirmation, or other document. If the terms of an invoice issued by or on behalf of Supplier are inconsistent with the terms of this Agreement, they shall not be binding on Customer and will not apply to any Order.

2.4 Effect of Orders. Upon acceptance of an Order by Supplier in accordance with Section 2.1, and subject to Section 2.5 regarding changes, Customer shall be bound to purchase, and Supplier shall be bound to provide, the Products or Services specified in the Order, in accordance with the terms of this Agreement.

2.5 Changes. No alteration, amendment, modification, or change in any of the terms, conditions, Delivery, price, quality, quantities, or specifications of any Order will be effective without the prior written consent of the Customer Representative; provided, however, that Customer reserves the right at any time to make changes in any one or more of the following: (a) Specifications incorporated in any Order where the Products or Services to be furnished are to be specifically provided for Customer (provided such changes are made by Customer prior to the beginning of factory line assembly for such Product); (b) methods of shipping or packing; (c) place of Delivery and inspection; (d) time of Delivery in accordance with Section 3.1 (Direct Order Delivery); (e) specific Products ordered (provided such changes are made by Customer prior to the beginning of factory line assembly for such Product); or (f) adjustments in quantities (provided such changes are made by Customer prior to the beginning of factory line assembly for such Product). If any such change causes an increase or decrease in the cost of or the time required for performance of any Order, an equitable adjustment shall be made in the purchase price or Delivery schedule or both. Such changes will be prospective and thus will be effective regarding any affected Products to the extent not yet Delivered by Supplier. Any claim by Supplier for adjustment under this Section shall be deemed waived unless it is requested in writing within ten (10) Business Days from receipt by Supplier of Customer's request for change. Price increases or extensions of time for

Delivery shall not be binding upon Customer unless evidenced by an electronic Purchase Order change notice issued by Customer or a signed manual Purchase Order change notice issued by Customer. If Supplier considers that Customer's conduct constitutes a change to an Order, Supplier shall, prior to further performance, notify Customer promptly in writing as to the nature of such conduct and its effect upon Supplier's performance under the applicable Order. Pending direction from Customer, Supplier shall take no action to implement any such change. Information, advice, approvals, or instructions from Customer's technical personnel, or anyone other than the Customer Representative, will be deemed expressions of personal opinions only and will not affect Customer or Supplier's rights and obligations hereunder unless and until agreed in writing by the Parties expressly providing for any necessary change to this Agreement, including addenda.

2.6 Products and Purchase Orders through Resellers. Customer may, at its sole option, use a Supplier-authorized reseller (and to the extent that reseller is not authorized, Supplier will make good faith efforts to authorize such reseller within thirty (30) days) as so selected by Customer ("Reseller") to acquire Supplier's Products. The relationship between Supplier and the Reseller shall be governed by a separate agreement between the Reseller and Supplier.

2.7 Products and Purchase Orders through Lessors. Customer may, at its sole option, use a third-party leasing company, as selected by Customer ("Lessor"), to acquire the Products. Lessor may place Orders with Supplier on Customer's behalf in accordance with the terms of an executed Assignment of On-Order Equipment document in substantially the form attached hereto as Exhibit C (Assignment of On-Order Equipment).

2.8 End of Life Products. Supplier will provide notification to Customer of all End of Life dates for Product purchased by Customer. Supplier agrees to continue to provide such Product for a minimum of one hundred twenty days (120) days from date of such notification. Except as otherwise agreed to in writing by the Parties, should Supplier fail to notify Customer of the End of Life date for any Product in accordance with this requirement, Supplier shall continue providing Product, or an agreed-to Product that has equal or greater Specifications and that is on Customer's then-current Technology Standards List, with no increase in cost to Customer until such notice is given and for one hundred twenty (120) days from such notice; provided, however, that in the event that there is no Product that has equal or greater Specifications that is on Customer's then-current Technology Standards List, Supplier will, at Customer's option, provide Customer with a Product that has equal or greater Specifications and that Supplier has already certified to run with Customer's applicable Image(s). After the expiration of the one hundred and twenty (120) day period, prices charged for Products introduced to replace End of Life Products shall be calculated pursuant to Exhibit A (Product Description and Pricing Schedule).

2.9 Modified Products. Supplier reserves the right to propose modifications to the then-current components contained in any existing Product (as documented on the then-current infrastructure workstation architectural roadmap maintained by Customer), but shall provide Customer one hundred twenty (120) days advance notification of such proposed modification. In the event that Customer agrees in writing to Order Products with the proposed modification, then Supplier will use commercially reasonable efforts to provide Customer an evaluation unit of the modified Product no later than ninety (90) days prior to production of the modified Product in accordance with Section 7.2 (Product Evaluation and Testing Requirements) of the SOW for Customer's Product evaluation and testing requirements. Except as otherwise agreed to in writing by the Parties, should: (a) Supplier fail to notify Customer of the modification date for any Product in accordance with this requirement; (b) Supplier fail to provide an evaluation unit no later than ninety (90) days prior to the production of the modified Product; or (c) the modified Product fail to operate in Customer's environment or with Customer's Image, Supplier shall continue providing the Product, or, at Customer's option, an agreed-to Product that has equal or greater Specifications and that is on Customer's then-current Technology Standards List, with no

increase in cost to Customer until the later of: (i) such notice being given and for one hundred twenty (120) days from such notice; or (ii) such time as Customer can ensure that the modified Product operates in Customer's environment or with Customer's Image; provided, however, that in the event that there is no Product that has equal or greater Specifications that is on Customer's then-current Technology Standards List, Supplier will, at Customer's option and at no increase in cost to Customer, either provide Customer with a Product that has equal or greater Specifications and that Supplier has already certified to run with Customer's applicable Image(s) or provide Customer with another Product that is pre-approved by Customer in writing. After the expiration of the later of the one hundred and twenty (120) day period or such time as is necessary for Customer to ensure that the modified Product operates in Customer's environment or with Customer's Image, prices charged for Products introduced to replace the modified Products shall be calculated pursuant to Exhibit A (Product Description and Pricing Schedule).

3. Delivery/Shipping.

3.1 Direct Order Delivery. Supplier shall Deliver Products, whether purchased directly by Customer or through a Lessor, at the prices set forth in Exhibit A (Product Description and Pricing Schedule) and in accordance with the terms of this Agreement and the Statement of Work set forth in Exhibit B-1 (Statement of Work) and the Service Levels. Unless an Order is designated for "Expedited Delivery", Supplier shall Deliver all Products in each Order within five (5) Business Days from Order Receipt, or such later date as may be set forth in the applicable Order. For Orders designated for Expedited Delivery, Supplier shall Deliver all Products in such Orders within one (1) Business Day from Order Receipt. Additional charges, if any, for Expedited Delivery, will be as set forth in Exhibit A (Product Description and Pricing Schedule). Supplier shall guarantee the availability of exact model and configuration for all Products Ordered that are on the then-current Technology Standards List. If at any time Supplier becomes aware that Supplier may not be able to provide Products or Services as required (whether due to Supplier error or to any other cause), Supplier will, at no additional charge or administrative burden to Customer: (a) notify the Requester by email or fax prior to the original Delivery date; (b) use Supplier's internal prioritization process to expedite Delivery in accordance with the Delivery date set forth in the applicable Order or as communicated to Supplier by the Requester; (c) use Supplier's own procurement system, utilizing alternate channels to fulfill the Order in accordance with the Delivery date set forth in the applicable Order; and (d) if the steps in (a)-(c) above fail to provide Customer with the Product in accordance with the Delivery date set forth in the applicable Order, offer the next higher level of Product that meets or exceeds the applicable Specifications that is then currently on the Technology Standards List, with the same configuration or better for the same price as the original unavailable Product; provided, however, that in the event that there is no Product that has equal or greater Specifications that is on Customer's then-current Technology Standards List, Supplier will, at Customer's option, provide Customer with a Product that has equal or greater Specifications and that Supplier has already certified to run with Customer's applicable Image(s). Delivery shall be deemed to be complete only when the Products have been actually received and signed for by the end-user designated on the applicable Order at the destination set forth in the applicable Order ("Delivery or Delivered"). If Delivery or performance is not timely completed after exhausting the options set forth in items (b)-(d) above, Customer may refuse Delivery of any or all of the Products and cancel all or any part of the applicable Order without penalty of any kind. If Customer elects to use alternate sources to acquire replacement products to cover the Products that Supplier failed to provide in accordance with the Order, Supplier shall, in addition to any other remedies provided by law, reimburse Customer for all reasonable costs and expenses incurred and documented by Customer in procuring such Products to the extent that such costs and expenses exceed the Supplier's charges hereunder for such Products; the foregoing right to cover shall apply even if Supplier's failure to provide the Product is due to an event of Force Majeure (as defined in Section 3.6 below). Any provisions herein for the Delivery of Products or the rendering of Services by installment shall not be construed as making the obligations of Supplier severable.

3.2 Reseller Order Delivery. Delivery of Products will be determined between Customer and Reseller. Supplier agrees to make reasonable efforts to meet any scheduled delivery to Customer's Reseller. If Supplier is unable to meet any scheduled delivery to Customer's Reseller, Supplier shall provide reasonable and prompt advance notice to Customer's Reseller that it will not meet such delivery schedule. In addition, the notice by Supplier to Customer's Reseller will include an anticipated date of delivery. If Customer's Reseller fails to deliver Product allocated by Supplier to Customer's Reseller chain for delivery to Customer, Supplier will provide Customer replacement Product allocation through an alternate source within ten (10) days of the original delivery date.

3.3 Allocation of Short Supply. If Products Ordered under this Agreement (whether through Customer or Customer's Lessor or Reseller) are in short supply, Supplier shall first allocate Products available to the western United States region (which shall equal half of the available Products designated for the United States) equitably to its top three (3) customers in the western United States, which Supplier acknowledges includes Customer.

3.4 Packing. Each shipment of Products shall include a packing list, which contains at least the following information: (i) the Order number; (ii) the name of the Delivery contact (or Requester's name, if no Delivery contact is indicated); and (iii) the description and quantity of the Products. Each box shall be numbered and reference the total number of boxes associated with the Order number. Supplier shall be responsible for any loss or damage due to its failure to properly preserve, package, handle, or pack the Products.

3.5 Shipping. Products shall be shipped FOB the Customer location designated in the Order. Supplier shall include on each invoice the applicable shipping charges incurred for the shipment of Products Ordered under this Agreement. Individual shipping charges applied to each Order will be equal to the amount set forth in Exhibit A (Product Description and Pricing Schedule). To the extent that Exhibit A (Product Description and Pricing Schedule) does not designate shipping charges applicable to a Product, prior to Supplier shipping such Product, the Parties will agree, through a signed amendment to Exhibit A (Product Description and Pricing Schedule), to the shipping charges applicable to such Product. Charges imposed by the carrier for Expedited Delivery may be passed to the Customer only in connection with Orders specifically designated for Expedited Delivery in the applicable Purchase Order or by the Requester, and then only in accordance with the terms of Exhibit A (Product Description and Pricing Schedule). Customer is under no obligation to compensate Supplier for any shipping, special handling, or re-Delivery fees incurred by Supplier should Supplier fail to follow specified Product Delivery instructions provided in this Agreement or the applicable Order. Supplier shall bear all other costs associated with shipping and Delivery including packing, handling, warehouse storage (if any), and insurance if Customer uses Supplier's carrier. The risk of loss or damage shall remain with Supplier until Delivery.

3.6 Force Majeure. Notwithstanding any other provision of this Agreement, neither Party to the Agreement shall be deemed in default or breach of this Agreement for any delay or failure in performance hereunder solely due to acts of God, court order, riots, compliance with any governmental act, regulation or request, war, general labor disturbances not related to Supplier or its suppliers, shippers, agents or subcontractors, or terrorism (collectively, "Force Majeure"). Whenever either Party has knowledge that any circumstances may result in a Force Majeure event, such Party will promptly notify the other Party of all relevant information and will continue notification of any material change in the situation. If Supplier is unable to ship the Products to Customer due to the occurrence of any one of the above-cited events, and such inability delays or will delay the Delivery date of such Products, Customer shall have the right, upon written notice to Supplier, to terminate the affected Purchase Order with no obligation to pay for the Product and without penalty of any kind. The excused time period for non-performance will be limited to the duration of the Force Majeure event, and the Parties shall

promptly resume performance hereunder after the Force Majeure event has passed. If the Force Majeure event continues for more than fifteen (15) days, then Customer will have the right to terminate all or a portion of this Agreement immediately, without penalty, upon delivery of written notice.

4. Acceptance and Ownership.

4.1 Specifications. All Products purchased under this Agreement must conform to the specific configuration specifications and technical requirements provided by Customer, including the Specifications, and to the Image. To the extent such documents or information (including, without limitation, Customer's Image) is proprietary to Customer, it shall not be copied or duplicated in any manner except as explicitly provided for in this Agreement or the SOW and then, only to the extent necessary to be used in the manufacture and production of Products or performance of Services for Customer and shall be returned to Customer upon request. Customer's Image, artwork, negatives, dies, jigs, fixtures, patterns, and other equipment furnished or specifically paid for by Customer shall be and remain the personal property of Customer. Such property, while in Supplier's custody or control, shall be held and used at Supplier's risk and shall be returned to Customer in the same condition as received at Customer's request.

4.2 Rejection. In addition to any other remedies under this Agreement or at law or in equity, Customer has the right to refuse Delivery of Products and/or request return of the Products to Supplier, require prompt correction or cure at no cost to Customer, or accept any non-conforming Products with an equitable adjustment in price, in the event that the Products do not comply with applicable Specifications. Within ten (10) Business Days from Delivery, Customer may return non-conforming Products to Supplier at Supplier's risk and expense, including transportation and handling costs, and such return shall not be subject to the Return Material Authorization process set forth in Exhibit B-1 (Statement of Work). If Customer elects to return a non-conforming Product, Supplier will, at Customer's option, either ship, via Expedited Delivery, a replacement Product at no additional charge to Customer or provide Customer with a credit or refund of all associated Fees, costs, and expenses paid for such Product. The right to test and inspect a Product, whether exercised or not, shall not affect Customer's right to pursue other remedies if non-conformities are later discovered even if the non-conformity could have been discovered upon testing or inspection.

4.3 Ownership. Except as otherwise set forth in Section 4.4, Customer shall own all right, title, and interest in and to all items that are conceived, made, discovered, written or created by Supplier personnel alone or jointly with third parties in the course of the performance of the Services that are unique to Customer or Customer's business, or contain any Confidential Information of Customer (collectively, "Proprietary Products"). All Proprietary Products, in whole and in part, shall be deemed works made for hire of Customer for all purposes of copyright law, and the copyright shall belong solely to Customer. To the extent that any such Proprietary Products do not fall within the specifically enumerated works that constitute works made for hire under the United States copyright laws, and to the extent that any Proprietary Products include materials subject to copyright, patent, trade secret, or other proprietary right protection, Supplier hereby irrevocably assigns all inventions, copyrights, patents, trade secrets, and other proprietary rights therein (including renewals thereof) to Customer. Supplier shall obtain, at its expense, such assignments to Customer from Supplier's employees, agents, and contractors as necessary to effectuate the purposes of the preceding sentence. Supplier also agrees not to assert any moral rights under applicable copyright law with regard to such Proprietary Products.

4.4 Pre-Existing Materials and Tools. Notwithstanding Section 4.3, Proprietary Products shall not include Supplier's Tools or pre-existing software, inventions, copyrights, patents, trade secrets, trademarks and other proprietary rights, including ideas, concepts and know-how of Supplier, that existed before the commencement of the Services and which are included in the Proprietary Products

(collectively, the "Pre-Existing Materials"). Notwithstanding anything to the contrary herein, all rights of Supplier in Pre-Existing Materials and Tools shall remain with Supplier. Upon payment in full for the Services and associated Proprietary Products, to the extent a Tool or Pre-Existing Material is explicitly identified in an SOW as being included in a Proprietary Product, or is otherwise necessary to use and exploit the Proprietary Products, Supplier hereby grants to Customer a non-exclusive, worldwide, perpetual (without regard to any termination or expiration of this Agreement), irrevocable, fully paid, royalty-free license to use the Pre-Existing Materials and Tools to the extent they are included in, and as necessary to use and exploit, the Proprietary Products.

4.5 Return. In addition to any other remedies under this Agreement or at law or in equity, Customer shall have the right to return to Supplier any unopened Product purchased directly from Supplier or through a Reseller or Lessor for any reason within thirty (30) days of the date such Product was Delivered in accordance with the Return Material Authorization procedure set forth in Exhibit B-1 (Statement of Work). Customer shall be obligated for any actual shipping costs pursuant to the terms of Section 3.5 (Shipping) for any Product returned by Customer pursuant to this Section. Notwithstanding the foregoing, Customer shall only be allowed to return to Reseller at any given time a maximum of three percent (3%) of the Products purchased by Reseller from Supplier for Customer over the prior rolling ninety (90) day period.

4.6 Software License and Support. For all Software provided by Supplier to Customer under this Agreement (whether pre-installed on the Product or otherwise), Supplier grants to Customer, and its agents and subcontractors and third party service and product providers providing services and/or products for or to Customer that are utilizing the Software on behalf of Customer, a worldwide, irrevocable, nontransferable, non-exclusive, perpetual, paid-up royalty-free license to copy, install, run and use the Software in conjunction with the Products and/or Services as necessary to use and exploit the Products. Customer may transfer the foregoing licenses in conjunction with the transfer of the Products, either to an Affiliate, a third party service provider whose use of the Software is necessary to provide services to Customer, or a successor owner by sale or lease. In addition, at Customer's request, Supplier shall provide the software maintenance and support set forth in Section 8.3 of Exhibit B-1 (Statement of Work) for each item of Software.

For avoidance of doubt, the Parties acknowledge that this Agreement does not cover the purchase of stand-alone third party software and peripherals products ("S&P Products") except for peripheral Products that are contemplated for purchase pursuant to Exhibit A (Product Description and Pricing Schedule). The Parties will negotiate separate terms and will enter into a separate written agreement to cover S&P Products if/when Customer elects to purchase such S&P Products from Supplier and the term "Software" as used in this Agreement does not include S&P Products.

4.7 License to Customer Image. Customer hereby grants to Supplier a non-exclusive, non-transferable, limited, and terminable, right to use Customer's Image during the Term of this Agreement solely for the express purposes set forth in the SOW, and for no other purposes.

5. Prices/Fees.

5.1 Pricing.

(a) Direct Orders. The price for all Products and Services shall be the lower of the price set forth on Exhibit A (Product Description and Pricing Schedule) for such Product or Service or the price calculated by application of the various price reduction methodologies specified in this Agreement (the "Fees"). Accordingly, price reductions that might result from Benchmarking under Section 5.1(d), the most favored pricing terms under this Section 5.1(a), and Gain Sharing under Section 20 (Innovation

Proposals; Gain Sharing) will be calculated separately and the lowest cost pricing will apply. If application of the price reduction methodologies renders lower cost pricing than what is contained in Exhibit A (Product Description and Pricing Schedule), then Exhibit A (Product Description and Pricing Schedule) will be revised as necessary to reflect the lower cost pricing. Supplier agrees that prices of the Products or Services purchased hereunder will be as favorable as, and will not exceed, those charged by Supplier to any other customers purchasing the same Products or Services in like or smaller quantities and under the same or similar terms and conditions. If at any time prior to Delivery of Products or completion of performance of Services hereunder, Supplier sells or offers to sell to a third party products or services substantially of the same type, quality, and quantity as set forth herein at lower prices than those stated in this Agreement, or both, Supplier agrees that from that time forward the prices herein shall be adjusted to equal the lowest prices and most favorable terms at which Supplier is selling or offering to sell such Products or Services. Such changes will be added to this Agreement through a written amendment signed by both Parties. In the event Customer becomes entitled to lower prices but has made payments in excess of the lower prices, Supplier shall promptly refund Customer the difference between the prices paid and the adjusted price. Supplier agrees to meet the price of legitimate competition or accept cancellation and termination of any Order by Customer without any claim for damages. Supplier will conduct an internal evaluation sufficient to determine and to certify to Customer, one (1) year after the Effective Date, and once every subsequent year during the Term, that Exhibit A (Product Description and Pricing Schedule) reflects Supplier's most favorable terms. At Customer's request, Supplier will describe the process it intends to use for such determination. Supplier's certification to Customer will be in the form of a letter to Customer from one of Supplier's senior executives either (a) confirming that the pricing set forth on Exhibit A (Product Description and Pricing Schedule) is in compliance with this Section, or (b) submitting to Customer, for its approval, a revised Exhibit A (Product Description and Pricing Schedule) reflecting appropriate price reductions to enable Supplier to make such certification. Any such revisions to Exhibit A (Product Description and Pricing Schedule) proposed by Supplier hereunder will be finalized by the Parties in an amendment thereto. The new pricing will be effective retroactively, to the time that Supplier began charging lower prices to another corporate customer purchasing similar products and services in similar volumes and upon similar terms, and Supplier will issue Customer a retroactive credit for fees paid by Customer in excess of the new pricing.

(b) Lessor Orders. In the event Customer elects to acquire Products through a Lessor, Supplier shall provide the Products to Customer through the Lessor at the prices determined pursuant to this Section 5 and as set forth in Exhibit A (Product Description and Pricing Schedule).

(c) Reseller Orders. In the event Customer elects to acquire Products through a Reseller, Supplier shall provide the Products to Customer's Reseller for purchase by Customer at the prices determined pursuant to this Section 5 and as set forth in Exhibit A (Product Description and Pricing Schedule). If at any time the pricing that Supplier offers to the Reseller involved in supplying Customer with Product falls below the then-current pricing, Supplier shall then reduce the pricing supporting the Customer opportunity to the Reseller. Nothing in this Section or this Agreement shall be deemed to affect the ability of Customer to independently source and purchase Products from Resellers of its choice.

(d) Benchmarking. At Customer's election and with Supplier's cooperation, the Parties agree that the Parties shall undertake a benchmarking program that will determine the competitiveness of prices for the Products then-currently being ordered by Customer. The benchmarking program will compare Supplier's prices for such Products and associated Services (e.g., imaging, Warranty Services, etc.) and service levels (the "Benchmarking Factors") with that of a comparable peer group that uses a similar pricing model to ensure that Supplier's terms relating to the Benchmarking Factors are competitive, i.e., within the top 25th percentile of the peer group. Customer may elect to benchmark not more than once during each twelve (12) month period during the Term at Supplier's expense. Customer may benchmark more frequently at Customer's expense and the terms of this Section

will apply to such benchmark. The benchmark will cover, at Customer's election, a particular category of Products or Services or all Products or Services in the aggregate provided by Supplier hereunder over a benchmark data period selected by Customer.

(i) Supplier shall pay the applicable benchmarking fees for one benchmark study during each twelve (12) month period during the Term; provided, however, that the fees that Supplier shall pay for each benchmarking study shall not exceed ten thousand dollars ($10,000). Customer will be responsible for contracting with the benchmarker, which shall be selected by Customer so long as such benchmarker is a nationally recognized provider of such services. Customer will be responsible for receiving and paying the benchmarker's invoices. Supplier will issue a free credit to Customer for all fees and charges for such benchmarking on Supplier's first invoice(s) following receipt from Customer of a copy of the benchmarker's invoice(s) with such backup materials as may be reasonably requested.

(ii) Customer and Supplier will work cooperatively with the benchmarker, making such personnel and information available as the benchmarker reasonably requests, including, on a confidential basis, such Party's charges, rates, and any other information the benchmarker deems appropriate and applicable. Each Party will have the opportunity to advise the benchmarker of any information or factors that it deems relevant to the conduct of the benchmarking, so long as such information is either disclosed to the other Party or, in the case of confidential information marked by the disclosing Party as being released only to the benchmarker, described in sufficient detail to describe the nature of the information.

(iii) The benchmarker will rank Supplier's terms relating to the Benchmarking Factors against other suppliers at a reasonable sample size as the benchmarker deems appropriate (whether external suppliers or internal suppliers within Customer or other companies) in order to compare pricing and service levels for like products and services. Supplier's fees will be deemed to be "not competitive" in the event that the prices set forth in Exhibit A (Product Description and Pricing Schedule) are not within the 25th percentile of the most competitive (lowest) price (with comparable services) within the peer group, the latter being the "Benchmark Target." Multiple processes for identification of peer groups and rankings may be utilized, as deemed appropriate by the benchmarker, to ensure comparability if more than one category of services is being benchmarked.

(iv) The benchmarker will provide reports on the benchmarking to both Customer and Supplier. If, as a result of any such benchmarking, the benchmarker determines that the prices set forth in Exhibit A (Product Description and Pricing Schedule) are competitive with respect to the Products and Services and the scope of the Services and Service Levels, then no changes to the Agreement will occur. If the benchmarking firm determines that the prices set forth in Exhibit A (Product Description and Pricing Schedule) with respect to the Products and Services and the scope of the Services and Service Levels are not competitive, then Supplier will propose to Customer in writing: (a) a revision to Exhibit A (Product Description and Pricing Schedule) ("New Pricing") that reflects a prospective price reduction meeting the levels established by the benchmark as required to be within the best price identified within the Benchmark Target for each of the Benchmarking Factors, and (b) a credit for fees paid by Customer in excess of such New Pricing from and after the date that Customer engaged the benchmarker to perform the benchmark study. If Supplier fails to timely submit its proposed New Pricing and credit for approval in a manner that satisfies the Benchmark Target and otherwise complies herewith, then Customer may declare Supplier in material breach of the Agreement pursuant to Section 13.3 (Termination for Cause).

5.2 Records and Audit. For any Products or Services purchased under this Agreement, Supplier shall maintain complete and accurate books and records of the amounts charged and the Products

and Services delivered to Customer in connection with such items. Supplier shall retain such records for seven (7) years after issuance of the invoice and shall make such records available to Customer, or its third party auditor, during normal business hours upon reasonable advance written notice; provided, however, that the foregoing shall not require Supplier to disclose to Customer its internal costs or amounts paid to its upstream subcontractors. If Supplier has overcharged Customer (including, without limitation, with respect to pricing requirements set forth in any written agreement between the Parties or with respect to the pricing offered/posted by Supplier on Customer's electronic procurement system), Customer shall notify Supplier of the amount of such overcharge, and Supplier shall promptly pay such amount to Customer. If the overcharge on the invoice(s) exceeds five percent (5%) of the total amount charged to Customer by Supplier for the Products or Services subject to the audit, then Supplier shall reimburse Customer for the reasonable cost of such audit.

5.3 Office of Thrift Supervision ("OTS") Audit Requirements. By entering into this Agreement, Supplier agrees that the Office of Thrift Supervision will have the authority and responsibility provided by Section 5(d)(7)(D) of the Home Owners Loan Act, as amended, 12 U.S.C. §1464(d)(7)(D), relating to Services performed and Products provided by Supplier under this Agreement or otherwise. Supplier shall, at no charge, provide the OTS district director of the district in which the Services are being performed and the Products are being provided with one (1) copy, and Customer with two (2) copies, of the current Service Auditor's Report (SAS 70) when a review has been performed.

5.4 Expanding Scope. Customer may at any time request a quotation for Products or Services not included or otherwise addressed in Exhibit A (Product Description and Pricing Schedule), in which case Supplier shall submit to Customer a proposal including pricing terms and delivery commitments for such Products or Services within fifteen (15) days after Supplier's receipt of Customer's request or, if the scope of the proposal is such that fifteen (15) days would be insufficient, within a mutually agreed-upon time. All quotations shall be valid for not less than ninety (90) days. Upon acceptance by Customer, such quotation shall be incorporated into this Agreement, supplementing Exhibit A (Product Description and Pricing Schedule).

5.5 Expense Reimbursement. Except as otherwise expressly stated in Exhibit A (Product Description and Pricing Schedule), Customer will not pay Supplier any additional fees, assessments, reimbursements, or expenses for labor and general business expenses (including travel, meals, and overhead expenses) associated with the provision of the Products or performance of any Services.

5.6 Services Included in Product Orders. There shall be no additional charge for ordinary Services incidental to fulfilling Orders, including, but not limited to: (i) customer service and support, program management, and reporting services; and (ii) warehousing, inventory management, fulfillment, and distribution services. Supplier shall bear all of its own expenses in providing Services, including, but not limited to, costs of labor, long-distance phone charges, equipment, tools, office space, and other overhead.

5.7 Cost Avoidance. Supplier will make best efforts to offer the lowest possible pricing without compromising quality requirements and without deviating from agreed-upon timelines. Supplier shall, in good faith, recommend to Customer processes, programs, or alternative products that may increase efficiency or productivity or otherwise result in savings. Supplier will provide a quarterly report of cost savings/avoidance efforts representative of purchases made on Customer's behalf.

5.8 Taxes. Customer is responsible for any sales, use, excise, services, ad valorem, or similar taxes imposed on Products or Services furnished by Supplier in connection with this Agreement, except where the particular transaction is tax-exempt as determined by reference to any valid exemption certificate provided by Customer. If Supplier is obligated by applicable law or regulation to collect and

remit any such sales taxes relating to the Products or Services, then Supplier will add the appropriate amount of such tax to Customer's invoices as a separate line item. Supplier is solely responsible for paying or otherwise discharging any taxes imposed upon Supplier based upon Supplier's income or assets or employment obligations to its payrolled employees, and Customer shall have no liability therefor. Prices quoted for the Products or Services do not include federal, state, and local sales and use taxes, ad valorem taxes, tariffs, duties, or other charges, whether domestic or foreign, imposed on the Products or Services and payable by Customer hereunder. Supplier shall timely pay all taxes to the appropriate authorities and properly file all applicable tax returns. Customer is responsible for personal property taxes for each product from the date of Delivery. Supplier is also responsible for collecting and remitting any other fees required by applicable law to be collected on sales of the Products to Customer, including, without limitation, any Electronic Waste Recycling Fee imposed by the State of California or any similar fee imposed by California or any other state, federal, or local jurisdiction, and Supplier will add any such additional fees to Customer's invoices as a separate line item. Supplier will indemnify, defend, and hold harmless Customer from and against any interest, penalties, or other charges resulting from the non-payment or late payment of taxes or other fees or charges that Supplier has either failed to invoice to Customer or to pay in a timely manner; notwithstanding the foregoing, Customer remains responsible for payment of any tax underlying any such interest, penalty, or other charges.

6. Invoices/Payment Terms.

6.1 Consolidated Billing. Supplier will generate a single monthly invoice for Orders placed by Customer under this Agreement for all Products or Services Delivered during the previous billing cycle, regardless of the number of individual Requesters and regardless of which Customer site was designated as the shipping destination. In the case of Products ordered by eProcurement, Supplier will generate a monthly report showing total purchases.

6.2 Form of Invoices. All invoices must reference the applicable Order number and include sufficient information and/or documentation to enable Customer to reasonably ascertain and substantiate the appropriateness of the charges, including: description of the Products or Services, point of shipment, and point of destination. **TERMS AND CONDITIONS CONTAINED ON SUPPLIER'S INVOICE SHALL NOT BE EFFECTIVE.**

6.3 Payment Terms. Payment is due forty-five (45) days from the date of the invoice, which shall be dated no earlier than the last day of the applicable month. Invoices are payable in U.S. dollars. If Customer disputes in good faith the amount of the invoice, Customer agrees to pay the entire undisputed amount. No interest, service charges, or finance charges shall be assessed to Customer or accrue on Customer's account unless agreed to in a writing signed by the Customer Representative. If required by Customer, Supplier will in most cases accept bank-issued procurement cards or other electronic forms of payment.

6.4 Invoice Submission. Supplier must submit all invoices to the person set forth in Section 21.2 (Notices) below or as otherwise directed by the Customer Representative; provided, however, that Supplier shall be deemed to have waived all charges, fees and approved expenses that are not invoiced within ninety (90) days after the end of the calendar year in which the charges were incurred.

6.5 Credits/Discrepancies. Supplier will post any and all known credits due to Customer on the next invoice specifically relating to those credits. Supplier will register all invoice discrepancies in its "Dispute System," and the invoice will be tracked until resolution. All credits will be issued to Customer once the invoice is resolved.

7. Electronic Procurement; Account Integration.

7.1 Electronic Procurement; Account Integration. At no cost to Customer, Supplier shall integrate its secure electronic procurement catalog system with Customer's eProcurement system. Supplier shall use commercially reasonable efforts to complete its integration obligations within forty-five (45) days of this Agreement's Effective Date, unless otherwise agreed to in writing between the Parties. Supplier shall comply with the "Catalog Creation Process" and implementation processes attached hereto as Exhibit D (eProcurement Catalog Creation Process). Supplier shall develop and commit to a formal implementation plan, catalog format, access controls, and project schedule within ten (10) Business Days after execution of this Agreement. For avoidance of doubt, Supplier shall be responsible for all costs incurred in Supplier's support and use of the eProcurement and service delivery system, including, without limitation, training, tools, interfaces, or test environments and shall provide all maintenance and support for its interface with and use of the eProcurement system, service delivery system, and user accounts. Supplier acknowledges and agrees that the eProcurement system and service delivery system are provided by Customer at will and can be deactivated by Customer at any time.

7.2 Monitoring and Updating of Service Delivery System. For all Orders, Supplier shall proactively monitor and update in real time Customer's service delivery system in order to track the progress of all service requests in accordance with Customer's then-current service delivery system guidelines. Customer's service delivery guidelines in place as of the Effective Date are attached hereto as Exhibit E (Service Delivery Guidelines).

7.3 Electronic Procurement Management and Maintenance. Supplier shall proactively monitor all eProcurement system accounts for Orders and service delivery systems for service requests and shall process such Orders in accordance with Section 2 (Orders). All Supplier activity within or relating to Orders placed through Customer's eProcurement system or service delivery system is governed by Customer's eProcurement terms and conditions located on the eProcurement system homepage, to the extent such terms and conditions are not inconsistent with the terms and conditions of this Agreement, and Supplier expressly agrees to adhere to such eProcurement terms and conditions. Supplier shall add Product lines and Services into the eProcurement system catalogs within one (1) Business Day of receiving a request from Customer, and Supplier shall ensure that all pricing corrections and updates relating to any Products or Services are available in the eProcurement system or service delivery system within one (1) day of reporting or identifying such correction or update.

8. Service Level Agreements.

8.1 Service Levels. Supplier shall provide the Products and Services in accordance with the Service Levels together with any adjustments made pursuant to Section 8.2.

8.2 Adjustment of Service Levels.

(a) (i) At the request of Customer, Customer and Supplier (1) will review the Service Levels for the preceding twelve (12) months during the last calendar quarter of every twelve (12) month period following the Effective Date; and (2) with respect to those Service Levels that are no longer appropriate because of an increase, decrease, or change to the Products or Services, Customer will present such adjustments to Supplier for the purpose of having Supplier make such adjustments for the subsequent twelve (12) month period, and Supplier shall make such adjustment as provided for in Section 8.2(b) and (c).

(ii) Customer may, from time to time, change the Service Levels to reflect its changing business needs, including removing a Service Level, and Supplier shall make such changes as provided for in Section 8.2(b) and (c).

(b) All new Service Levels will take effect no more than sixty (60) days after Customer requests the new Service Level, unless otherwise agreed in writing by the Parties.

(c) Notwithstanding the foregoing, if Supplier can demonstrate to Customer's reasonable satisfaction that such new Service Level will materially increase Supplier's cost of performing, measuring, reporting, or implementing the Products or Services, Customer may only add that new Service Level if:

(i) Supplier agrees;

(ii) Supplier does not agree, but Customer removes an existing Service Level at the same time as introducing the new Service Level; and the cost of providing the Products or Services in accordance with the new Service Level and the cost of measuring and reporting on such new Service Level is not materially higher than the cost of providing the Products and Services under the existing Service Level and the cost of measuring and reporting on the existing Service Level; or

(iii) Customer agrees to pay Supplier for its incremental cost of providing the Products or Services under the new Service Level and the cost of measuring, reporting, and implementing the new Service Level.

8.3 Measurement and Monitoring Tools. As of the Effective Date (or other date specified in Exhibit F (Service Levels and Key Performance Indicators)), Supplier will implement the measurement and monitoring tools and procedures required to measure and report (as contemplated by Exhibit F (Service Levels and Key Performance Indicators)) Supplier's provision of the Products and performance of the Services against the applicable Service Levels. Such measurement and monitoring tools and procedures related to Supplier's provision of the Products and performance of the Services and applicable Service Levels herein will be subject to audit, pursuant to the procedures set forth in Section 5.2 (Records and Audit) of this Agreement, by Customer or its designee.

8.4 Root-Cause Analysis.

(a) With respect to Supplier's failure to meet a Service Level, Supplier will, in addition to its other obligations under this Agreement, including Exhibit F (Service Levels and Key Performance Indicators), (i) promptly investigate and identify the problem causing the failure and report to Customer, (ii) correct the problem as soon as practicable and resume meeting the Service Levels, (iii) advise Customer of the status of the problem at time intervals mutually agreed by the Parties, (iv) perform a root cause analysis on the failure, and (v) demonstrate to Customer that all reasonable action has been taken to prevent any recurrence of such default or failure.

(b) Supplier will, at any time that Supplier anticipates it will fail to meet a Service Level, advise Customer of the status of the problem at time intervals mutually agreed to by the Parties.

(c) In connection with each root cause analysis conducted, Supplier will develop and maintain an issues log to track the status of each problem. The final status or resolution of each problem will be maintained by Supplier and made available to Customer for use in historical analysis.

8.5 Continuous Improvement and Best Practices. Supplier will work to (a) identify ways to improve performance under the Service Levels and (b) identify and apply proven techniques and tools from other transactions and from within Supplier's operations that would benefit Customer either operationally or financially without significantly increasing Supplier's costs, and Customer will cooperate with Supplier in such efforts. Supplier will, from time to time, include updates with respect to such improvements, techniques, and tools in the reports provided to Customer pursuant to Exhibit B-1 (Statement of Work).

8.6 Performance Credits. In the event of a failure to provide the Products or Services set forth in this Agreement in accordance with the applicable Service Levels, Supplier will incur the performance credits identified in and according to the schedule set forth in Exhibit F (Service Levels and Key Performance Indicators) (the "Performance Credits"). Performance Credits will be allocated among the Service Levels and calculated in accordance with the procedure set forth in Exhibit F (Service Levels and Key Performance Indicators). The Performance Credits will not limit Customer's right to recover other damages incurred by Customer as a result of such failure; provided, however, that any award of damages in respect of any such failure will be reduced by any Performance Credits already credited by Supplier to Customer in respect of such failure. Nothing in this Section will be deemed to limit or obviate Customer's right to terminate this Agreement pursuant to Section 13 (Term/Termination) of this Agreement.

9. Representations and Warranties.

9.1 Services. Supplier shall perform the Services in a professional and workmanlike manner with high quality and according to the Specifications and mutually agreed to schedule and terms set forth in this Agreement (including, without limitation, the Statement of Work and other attachments and exhibits to this Agreement). In the event that Supplier is in breach of the foregoing warranty, Supplier shall at its own expense, promptly re-perform any Services that do not comply with such warranty. Where it is impractical, as determined by Customer, to re-perform such Services, Supplier shall promptly provide Customer with a credit or refund, as elected by Customer, in the amount that Customer paid for such Services and any other Services affected by the non-complying Services. The foregoing rights shall be in addition to, and not in lieu of, all other rights and remedies that customer is entitled to pursuant to this Agreement (including, without limitation, Exhibit F (Service Levels and Key Performance Indicators), at law or in equity).

9.2 Product Warranties. In addition to the other warranties set forth in this Agreement, with respect to the Products, Supplier further represents and warrants that:

(a) For three (3) years from the date of Delivery (the "Warranty Period"), for each Product or Software that fails to perform in accordance with the Specifications, or fails to properly function in conjunction with the Image, Supplier shall, within one (1) Business Day of being notified of such failure in the manner set forth in Exhibit B-1 (Statement of Work) (or within two (2) Business Days if Supplier is notified after 3 p.m. Central Time), and at no additional cost to Customer, (i) repair such Product or Software onsite so that it functions in accordance with the Specifications, the Image, and/or the requirements of this Agreement, or (ii) remove the defective Product or Software from Customer's premises and provide replacement Software or a replacement Product of the same model and type, or, upon approval by Customer, provide a different model and type of equal or greater functionality so long as such different model is on the then-current Technology Standards List. To the extent that Customer elects, at its sole option, to have the foregoing repair or replacement Services performed by an Authorized Service Provider, as opposed to being provided directly by Supplier, Supplier's obligation shall be to provide all assistance necessary to allow the Authorized Service Provider to perform the foregoing

Warranty Service obligations (including, without limitation, making all necessary parts or replacement Products available and compensating the Authorized Service Provider for such services).

(b) Supplier shall ensure that any and all license rights and/or warranties related to the Products and Software are transferred to and held by Customer, whether such Product is purchased directly through Supplier or through a Reseller or Lessor, and that any applicable Warranty Period shall not commence until Delivery of the applicable Product.

(c) Supplier shall preserve original Warranty Period of each Product (i.e., the Warranty Period for all replacement parts installed as part of a Warranty Service call shall be concurrent with the Warranty Period of the Product regardless of manufacture date of replacement parts).

(d) Upon expiration of the Warranty Period, Supplier shall use commercially reasonable efforts to assist Customer in obtaining warranty coverage from the Original Equipment Manufacturer ("OEM") to the extent a component in the Product has warranty coverage that exceeds the Products Warranty Period or any Extended Warranty (it being acknowledged that this Section is not intended to obligate Supplier in any way for extended warranty service with respect to such Product component). By way of example, if a memory OEM passes to Supplier a lifetime warranty on the OEM's memory component of a Product, Supplier will use commercially reasonable efforts to assist Customer with obtaining warranty coverage on such component to the extent available to Customer through the OEM.

(e) Supplier agrees to allow the use of Supplier certified/approved third-party products and/or parts without voiding the Warranty Period. Additionally, upon internal certification and acceptance by Customer of any third party product to be used with Supplier's Product, Supplier agrees to allow, without voiding the Warranty Period, the use of such Product, provided that such product is not the cause of any direct failure of the Product to comply with the warranties set forth in this Section 9.

(f) Any Product that is repaired or replaced by Supplier during the Warranty Period will carry the remainder of the original Warranty Period.

(g) Supplier shall, without limitation, replace rather than repair any Product that has been repaired at least three (3) times within the first thirty (30) days of Delivery to Customer; such replacement shall occur within one (1) Business Day of being notified of such failure, or within two (2) Business Days if Supplier is notified after 3 p.m. Central Time, and shall not be subject to the Return Material Authorization process set forth in Exhibit B-1 (Statement of Work). In addition, for any Product that has three (3) failures of the same component during the first 12 months of the applicable Warranty Period, Customer, at its option, may request, and Supplier will Deliver, a whole unit replacement; such replacement shall occur within one (1) Business Day of being notified of such failure, or within two (2) Business Days if Supplier is notified after 3 p.m. Central Time, and shall not be subject to the Return Material Authorization process set forth in Exhibit B-1 (Statement of Work).

9.3 No Liens. Supplier warrants that it has the right, title, and interest to convey the Products and that the Products are free of all liens, charges, encumbrances, or claims of any person, except for any purchase money security interest that Supplier may have in Products until full payment for Products is made to Supplier. If at any time Supplier shall incur any indebtedness that has become a lien upon the Products or any part thereof or that may become a claim against Customer, or in the event a claim is asserted against Customer alleging that the Products or Services are subject to a lien, Supplier shall cause such lien to be released and discharged at its expense.

9.4 No Viruses. To the extent any Products are, or include, Software, none of the Software shall, at the time of Delivery, contain any virus, Trojan horse, worm, time bomb, back door, or other software routine designed to disable a computer program automatically or permit unauthorized access (collectively, a "Virus"), and Supplier shall not introduce any Virus during the performance of any Services.

9.5 Requisite Authority. Supplier has the necessary authority to enter into this Agreement and to grant to Customer the rights described herein, including, without limitation, licenses to the Software; and Supplier is not subject to any agreement or other constraint that would prohibit or restrict its right or ability to enter into, or carry out, its obligations hereunder.

9.6 Compliance with Laws. In accepting any Order, Supplier represents that it has complied with, and will continue during the fulfillment of such Orders and its performance under this Agreement to comply with, the applicable provisions of all federal, state, and local laws and regulations from which liability may accrue to Customer from any violation thereof, including, without limitation, compliance with the Fair Labor Standards Act of 1938; Section 202 of Executive Order No. 11246 of September 24, 1965 (Equal Opportunity Clause); 41 C.F.R. §60-741 (Employment of the Handicapped Clause) and any existing or future amendments to any of these laws or regulations. Supplier agrees that it will continue to comply with and be subject to all of the applicable terms and conditions imposed by statutes and regulations, including the foregoing, during the Supplier's performance under this Agreement.

9.7 No Litigation. To the best of Supplier's knowledge, there is no litigation or proceeding whatsoever, actual or threatened, against Supplier or breach, default, or alleged breach or default of any agreement, order, or award binding upon it, in each case, that would materially affect Supplier's ability to perform any of its obligations under this Agreement.

9.8 Subcontractors. Supplier will be responsible for the acts and omissions of Supplier and its employees, as well as those agents and authorized subcontractors employed or contracted by Supplier, including without limitation any Authorized Service Provider, while such agents and subcontractors are performing Services for Customer on Supplier's behalf. Except for the subcontractors set forth on Exhibit G (Approved Subcontractors), Supplier shall not use any subcontractors who work directly on Customer's behalf supporting the provision of the Products or Services under this Agreement without Customer's express prior written consent.

9.9 Damage to Customer Property. At all times, Supplier will, and will ensure that any subcontractor thereof will, use suitable precautions to prevent damage to Customer's property. If any tangible property is damaged by the negligence of Supplier or any subcontractor thereof, Supplier will, at no cost to Customer, promptly and equitably reimburse Customer for such damage or repair or otherwise restore such property to its previous condition. If Supplier fails to do so, Customer may do so and recover from Supplier the cost thereof. The foregoing remedy will not limit Customer's other rights under this Agreement or at law or in equity to recover other damages incurred by Customer as a result of Supplier's negligent acts; provided, however, that any award of damages in respect of any such acts will be reduced by any amounts previously recovered by Customer pursuant to this Section 9.9.

10. Assignment.

Neither Party shall assign, transfer, or subcontract this Agreement or all or any portion of the provision of the Products or Services or delegate any of its duties hereunder without the other Party's express, prior written consent. Any assignment in contravention of this provision shall be null and void. This Agreement shall be binding on all assignees and successors in interest. Supplier, however, shall be permitted to assign its rights to payments under this Agreement without obtaining Customer's consent,

and Customer shall have the right, without obtaining Supplier's consent, to transfer and assign its interest in this Agreement, to any entity: (a) acquiring all or substantially all of its assets or stock; or (b) surviving a merger with or resulting from a reorganization of Customer; or (c) an Affiliate.

11. Confidentiality/No Publicity.

11.1 Definition. "Confidential Information" of a Party means all confidential or proprietary information, including all information not generally known to the public, the terms of this Agreement and Party Data. "Party Data" shall mean all data and information that is submitted, directly or indirectly, to one Party hereto to the other Party in connection with the Services provided by Supplier under this Agreement and the SOW, including, with respect to Customer, Customer 's Image and information relating to Customer's customers, technology, operations, facilities, consumer markets, products, capacities, systems, procedures, security practices, research, development, business affairs, ideas, concepts, innovations, inventions, designs, business methodologies, improvements, trade secrets, copyrightable subject matter and other proprietary information of a Party hereto. All Party Data is and shall remain the property of the disclosing party and shall be protected as described in this Section 11. Without limiting the foregoing, Confidential Information shall include all such information provided to each Party by the other Party both before and after the date of this Agreement.

11.2 Use and Disclosure. All Confidential Information relating to a Party shall be held in confidence by the other Party to the same extent and with at least the same degree of care as such Party protects its own confidential or proprietary information of like kind and import, but in no event using less than a reasonable degree of care. Neither Party shall disclose, duplicate, publish, release, transfer or otherwise make available Confidential Information of the other Party in any form to, or for the use or benefit of, any person or entity without the other Party's prior written consent. Each Party shall, however, be permitted to disclose relevant aspects of the other Party's Confidential Information to its officers, agents, subcontractors, employees and servants to the extent that such disclosure is reasonably necessary for the performance of its duties and obligations under this Agreement and such disclosure is not prohibited by the Gramm-Leach-Bliley Act of 1999 (15 U.S.C. §6801, et seq.), as it may be amended from time to time (the "GLB Act"), the regulations promulgated thereunder or other applicable law. Each Party shall establish commercially reasonable controls to ensure the confidentiality of the Confidential Information and to ensure that the Confidential Information is not disclosed contrary to the provisions of this Agreement, the GLB Act or any other applicable privacy laws and regulations. Without limiting the foregoing, each Party shall, at a minimum, implement such physical and other security measures as are necessary to: (i) ensure the security and confidentiality of the Confidential Information; (ii) protect against any threats or hazards to the security and integrity of the Confidential Information; and (iii) protect against any unauthorized access to or use of the Confidential Information. To the extent Supplier receives or obtains non-public personal information (as defined in the GLB Act) of Customer's customers, Supplier shall, at a minimum, establish and maintain such data security program as is necessary to meet the objectives of the Interagency Guidelines Establishing Standards for Safeguarding Customer Information as set forth in the Code of Federal Regulations at 12 C.F.R. Parts 30, 208, 211, 225, 263, 308, 364, 568 and 570. To the extent that a Party hereto delegates any duties and responsibilities under this Agreement to an agent or other subcontractor in accordance with the terms hereof, such Party ensures that such agents and subcontractors shall adhere to the same requirements with which such Party is required to comply under this Agreement.

11.3 Exceptions. The obligations in Section 11.2 above shall not restrict any disclosure by either Party (a) pursuant to any applicable law, or by order of any court or government agency (provided that the disclosing Party shall give prompt notice to the non-disclosing Party of such order and shall cooperate at the disclosing Party's expense in any effort to comply with or to contest the order); or (b) to either Party's accountants, legal advisors, auditors and financial advisors. Further, the obligations in

Section 11.2 above shall not apply with respect to information that: (i) is developed by the other Party without violating the disclosing Party's proprietary rights; (ii) is or becomes publicly known (other than through unauthorized disclosure); (iii) is disclosed to, or learned by, the recipient from a third party free of any obligation of confidentiality; and/or (iv) is already known by such Party without an obligation of confidentiality other than pursuant to this Agreement or any confidentiality agreements entered into before the Effective Date between Customer and Supplier. If the GLB Act, the regulations promulgated thereunder or other applicable law now or hereafter in effect imposes a higher standard of confidentiality to the Confidential Information, such standard shall prevail over the provisions of this Section 11.

11.4 Disclosure of Confidential Information. In the event of a breach of this Section 11 or other compromise of Customer Confidential Information of which Supplier is or should be aware (whether or not resulting from a breach), Supplier shall immediately notify Customer in a writing detailing all information known to Supplier about the compromise, the Customer Confidential Information affected, and the steps taken by Supplier to prevent the recurrence of such breach and to mitigate the risk to Customer. Such notice shall be sent to the address indicated in the Notice section of this Agreement, including a copy to the Chief Legal Officer as identified therein. If and to the extent that any compromised Customer Confidential Information includes any customer data, Supplier shall also identify the customers and customer information affected. Supplier shall provide Customer with access to all information related to the security breach as reasonably requested by Customer.

11.5 Return of Materials. Upon request and/or upon termination of this Agreement for any reason, Supplier shall return, destroy or cause the destruction of, any and all records or copies of records relating to Customer or its business, including Confidential Information (except for Confidential Information of Customer that is rightfully contained in Supplier's work papers, provided that Supplier maintains the confidentiality of such Confidential Information as required herein) according to Customer's instructions or relevant industry best practices if no instructions are provided. Upon request, Supplier shall certify in writing that all such Confidential Information has been so returned or destroyed. Upon request, Customer shall return, destroy or cause the destruction of, any and all records or copies of records relating to Supplier or its business, including Confidential Information (except for Confidential Information of Supplier that is rightfully contained in Customer's work papers, provided that Customer maintains the confidentiality of such Confidential Information as required herein).

11.6 Consumer Privacy. Supplier acknowledges to Customer that: (i) Customer has a privacy policy (available on Customer's website at www.wamu.com or successor website) designed to communicate to Customer's customers and consumers (as defined in the GLB Act) its policies and procedures regarding its use of non-public personal information (the "Privacy Policy"); and (ii) Supplier has received, read and understood the terms of the Privacy Policy as of the Effective Date. Supplier shall be responsible for periodically reviewing the Privacy Policy during the Term of this Agreement.

11.7 Language Conflict. In the event of a conflict between the Information Security Requirements and the provisions of this Section 11, the provisions that are, in Customer's opinion, more favorable to Customer shall control.

11.8 No Publicity. Neither Party shall use the other Party's name or mark in any advertising, written sales promotion, press releases, and/or other publicity matters without the other Party's written consent. Supplier acknowledges that Customer has a no publicity policy regarding its vendor relationships.

12. Remedies and Indemnification.

All remedies shall be cumulative and may be exercised concurrently or separately (which shall not be deemed to constitute an election of any one remedy to the exclusion of any other). In addition to any other remedy provided for herein, the following shall be available.

12.1 Injunctive Relief. Supplier acknowledges that Customer may be substantially or irreparably harmed and may have no adequate remedy at law in the event of a breach of Section 11 (Confidentiality/No Publicity), and that Customer is, in addition to other remedies, entitled to seek immediate injunctive and equitable relief from a court of competent jurisdiction.

12.2 Setoff. In the event that either Party fails to timely pay any liability to the other Party, including any liability under any agreement to indemnify, then the other Party shall have the right to set off such amounts against amounts otherwise due. In particular, Customer may adjust payments made for rejected Products or Services or for any overpayments by deducting from subsequent payments due.

12.3 General Indemnification--Supplier. Supplier shall indemnify, defend, and hold harmless Customer and its officers, directors, employees, agents, and servants from and against any and all damages, liabilities, penalties, fines, losses, costs, and expenses including reasonable attorneys' fees (collectively, "Losses") arising from or relating to any third party claim or allegation: (a) arising from or relating to the gross negligence or willful misconduct of Supplier, or any of Supplier's employees, personnel, agents, or vendors; (b) arising from or relating to Supplier's breach of Section 11 (Confidentiality/No Publicity); (c) for wages or benefits and/or related taxes of Customer by Supplier or its employees, personnel, agents or vendors to the extent such claim is not caused by the gross negligence or willful misconduct of Customer; (d) with respect to bodily injury, death or damage to tangible property sustained as a result of the Products or Services; (e) with respect to the use of Customer's Image other than as expressly provided for in this Agreement or the SOW; (f) with respect to the export of the Product (including any Software contained therein); (g) alleging the non-payment by Supplier of any monies due and owing a third party with whom Supplier has contracted to provide services, products or component parts either to Supplier in support of its obligations under this Agreement or directly to Customer under this Agreement, including without limitation any Authorized Service Provider; (f) asserting a lien or other encumbrance on any Product; or (g) arising from or relating to Supplier's obligations in Section 15.2 (Compensation of Employees) or 16.1 (Account Management/Supplier's Personnel).

12.4 General Indemnity--Customer. Customer shall indemnify, defend, and hold harmless Supplier and its officers, directors, employees, agents, and servants from and against any and all Losses arising from or relating to any third party claim or allegation: (a) arising from or relating to the gross negligence or willful misconduct of Customer, or any of Customer's employees, personnel, agents, or vendors; or (b) arising from or relating to Customer's breach of Section 11 (Confidentiality/No Publicity).

12.5 Intellectual Property Indemnification. Supplier shall indemnify, defend, and hold harmless Customer and its officers, employees, agents, and servants from and against any and all Losses arising from any claim or allegation that the Products, Services or Software infringe a patent, copyright, trademark, or other proprietary right, or misappropriate a trade secret of a third party enforceable in any country or jurisdiction in which Customer uses a Product, Software or Service. For avoidance of doubt, Supplier's indemnity obligation under this Section 12.5 shall include, without limitation, any amounts owing by Customer to a Lessor as a result of any such claim of infringement. Supplier will have no obligation under this Section for any claim resulting or arising from Customer's: (a) modifications of a Product that were not made and approved by Supplier (the modification of which causes the infringement); or (b) the combination, operation or use of a Product with a third party product, software or service not required or recommended for use with such Product (the combination, operation or use of

which causes the infringement). If any Product, Service or Software, in whole or in part, constitute or may constitute an infringement of a third party's patent, copyright, trademark, or other proprietary right, or a misappropriation of a third party's trade secrets, and/or if Customer's use thereof is or may be enjoined, Supplier, in addition to its indemnification obligations hereunder, shall promptly either (i) secure for Customer rights to continue using such infringing Product, Service or Software, or (ii) replace or re-perform such Product, Service or Software with a comparable non-infringing product, service or software, or (iii) modify the Product, Service or Software so that it becomes non-infringing. In the event Supplier is unable to procure one of the aforementioned remedies, Supplier shall, in addition to its indemnification obligations hereunder, promptly refund to Customer the amount paid to Supplier for the Product, Service or Software under this Agreement and any other Product, Service or Software that is substantially impaired by the infringing Product, Service or Software. This is the exclusive remedy for intellectual property indemnification under this Agreement.

12.6 Obligations. The Party seeking to be indemnified (the "Indemnified Party") shall give the other Party (the "Indemnifying Party") prompt written notice of any claim subject to indemnification; provided that the Indemnified Party's failure to promptly notify the Indemnifying Party shall not affect the Indemnifying Party's obligations hereunder except to the extent that the Indemnified Party's delay materially prejudices the Indemnifying Party's ability to defend such claim. The Indemnifying Party shall have the right to defend against any such claim with counsel of its own choosing and to settle such claim as the Indemnifying Party deems appropriate, provided that the Indemnifying Party shall not enter into any settlement that assesses blame against the Indemnified Party without the Indemnified Party's prior written consent. The Indemnified Party agrees to reasonably cooperate with the Indemnifying Party in the defense and settlement of any such claim, at the Indemnifying Party's expense.

12.7 Limitation of Liability. Except for indemnification obligations arising under Section 12 (Remedies and Indemnification) of this Agreement and any liability arising out of breach of the confidentiality obligations under Section 11 (Confidentiality/No Publicity), in no event will either Party (including Affiliates, subsidiaries, other related legal entities, officers, directors, employees, or representatives) be liable to the other Party for any amount in excess of the amounts paid by Customer to Supplier under this Agreement during the twelve (12) month period immediately prior to the event giving rise to the indemnity obligation. Except for the indemnification obligations arising under Section 12 (Remedies and Indemnification) and any liability arising out of breach of the confidentiality obligations under Section 11 (Confidentiality/No Publicity), neither Party shall be liable for any lost revenues, lost profits, lost data, or incidental, indirect, consequential, special, or punitive damages.

13. Term/Termination.

13.1 Term. The initial term of this Agreement shall begin on the Effective Date and shall continue for three (3) years (the "Initial Term") from the Effective Date, unless earlier terminated as set forth herein. If the Parties mutually agree in writing, this Agreement may be renewed and extended for additional successive one (1) year terms (each, a "Renewal Term") after expiration of the Initial Term or then-current Renewal Term, if any. If Services under the SOW extend beyond the Term (e.g., Warranty Services, etc.), this Agreement shall continue with respect to the SOW until the satisfactory completion of the Services thereunder. The Initial Term and any Renewal Term may be together referred to as the "Term."

13.2 Termination for Convenience. Customer may terminate all or any part of this Agreement or the SOW at any time or times without cause by providing at least sixty (60) days written notice to Supplier.

13.3 Termination for Cause. Either Party may terminate this Agreement and/or the SOW for material breach or default of the other Party upon not less than thirty (30) days' written notice to the breaching Party ("Notification Period"). If the breaching Party does not cure the material breach or default within the Notification Period, or such longer period as mutually agreed upon by the Parties, this Agreement shall automatically terminate at the end of the Notification Period. A material breach under the SOW may be considered a material breach of this Agreement, and, for purposes of this Section, material breach shall also include an aggregate of the same non-material breaches where the cumulative effect of such breaches is material.

13.4 Survival. If the Term expires during the term of any Warranty Period, or Extended Warranty (as defined in Exhibit A (Product Description and Pricing Schedule)) purchased by Customer, the terms and conditions of this Agreement shall survive with respect to such Warranty Period or Extended Warranty for the term of such Warranty Period or Extended Warranty. The rights and obligations of the Parties pursuant to Sections 4.3, 4.4, 4.5, 4.6, 5.2, 5.3, 5.8, 9, 11, 12, 13, 14, 17, 19, and 21 and any other provision of this Agreement to the extent that provision creates an indemnity obligation, or provides for rights or remedies after termination, shall survive the termination of this Agreement.

13.5 Termination Due to Adverse Financial Condition. If either Party makes an assignment for the benefit of creditors, admits in writing its inability to pay its debts as they become due, files a voluntary, or has filed against it an involuntary, petition for bankruptcy or reorganization, is adjudicated a bankrupt or insolvent, or applies for or consents to the appointment of a receiver for it or its property, the other Party may terminate this Agreement by written notice. Such termination shall not relieve either Party from any obligation accrued hereunder up to the date of receipt of notice of termination.

14. Insurance.

14.1 Coverage Requirements. During the Term, and for three (3) years thereafter, Supplier shall maintain the following insurance coverages with insurance carriers with an A.M. Best rating of at least A-VII, or such other insurance carriers approved in writing by Customer: (i) all insurance coverages required by federal, state, or local law, including, without limitation, statutory worker's compensation insurance and employers' liability insurance (and such employers' liability insurance shall provide a limit of at least $500,000 for each person); (ii) combined comprehensive or commercial general liability and excess liability insurance (which shall provide for a minimum combined bodily injury and property damage coverage limits of $10,000,000 per occurrence); (iii) comprehensive automobile liability covering all vehicles that Supplier owns, hires, or leases in an amount not less than $1,000,000 per occurrence; (iv) a comprehensive crime policy with a limit of $10,000,000 that shall include employee dishonesty and fidelity coverage for all Supplier employees and officers, and "on-premises" loss (loss inside the premises) and "in-transit" loss (loss outside the premises). In no event will Supplier's obligations under this Agreement be limited to the extent of any insurance available to or provided by Supplier or any subcontractor. Any self-insured retention, deductibles, and exclusions in coverage in the policies required under this Section 14 will be assumed by, for the account of, and at the sole risk of Supplier and will be paid by Supplier.

14.2 Additional Requirements. Supplier shall cause insurers to name Customer as an "additional insured" for the coverages required in Section 14.1 (ii) and (iii) and as a "loss payee" for the coverage required in Section 14(iv). Prior to providing any Products or commencing any Services under this Agreement, Supplier shall provide certificate(s) of insurance evidencing the coverages described in Section 14.1 above. Such certificates shall include a provision that the insurance carrier shall endeavor to provide directly to Customer thirty (30) days' written notice for termination, change, or cancellation which takes effect for policies evidenced on the certificate, regardless of whether such termination, change, or cancellation is initiated by Supplier or insurance carrier. The insurance carrier shall waive,

and Supplier hereby waives, all rights of recovery or subrogation against Customer that might arise with regard to damage or loss which is insured against under any Customer policies in force at the time of the damage or loss. The insurance requirements and coverages set forth in this Section shall not limit Supplier's liability to Customer or third parties under this Agreement. Failure of Supplier or any subcontractor thereof to furnish certificates of insurance or to procure and maintain the insurance required herein, or failure of Customer to request such certificates, endorsements, or other proof of coverage, will not constitute a waiver of Supplier's or subcontractor's obligations hereunder.

14.3 Subcontractors. If, pursuant to the terms of this Agreement, Supplier uses any subcontractor to provide any of the Services or Products, Supplier shall require that such subcontractor comply with the terms of this Section 14.

15. Personnel.

15.1 No Agency. Customer and Supplier are contractors independent of one another. Neither Supplier nor any employee, contractor, agent, or representative of Supplier is authorized to represent Customer or its Affiliates in an agency capacity, bind any Customer entity to any contract, make any representations on behalf of such entity, or otherwise act on Customer's behalf.

15.2 Compensation of Employees. Supplier shall at its own expense timely pay its employees or withhold: (a) all compensation, wages, salaries, and mandatory benefits; (b) all applicable federal, state, and local income taxes, payroll taxes, FICA, Medicare, unemployment insurance, and any other taxes, premiums, or assessments; and (c) statutory worker's compensation insurance as provided in Section 14 (Insurance). Supplier shall ensure that any subcontractors comply with the foregoing obligations.

15.3 Premises. The employees, contractors, and other personnel of either Party, upon entering the site or facility of the other Party, shall be subject at all times to the other Party's generally applicable rules and regulations regarding safety and security. The employer or principal of visiting personnel shall be solely responsible for the conduct of the personnel while present on the other Party's property. Without limiting the foregoing, Supplier and its personnel, including any authorized subcontractor(s) or Authorized Service Providers, shall be obligated to sign and comply with "Working With WaMu (for Contract Staff)" attached hereto as Exhibit H (Working with WaMu (for Contract Staff)) and, whether or not Services are being provided at a Customer facility, to comply with the "Vendor Code of Conduct" attached hereto as Exhibit I (Vendor Code of Conduct). Except as otherwise specifically authorized by Customer in writing in advance, all Services shall be provided to and from locations within the United States. At least twelve (12) months prior to the date that Supplier desires to perform any Services outside the United States, Supplier shall submit a written request to Customer seeking Customer's written permission for Supplier to provide (whether through itself, a parent, sister, or subsidiary), or for Supplier to use a third-party subcontractor to provide, Services outside the United States (referred to herein as "Off-shoring"), together with a description of the material terms of how such Services shall be provided (including precise descriptions of the Services being performed, the projected timing for moving such Services outside the United States, the geographic locations in which such services shall be provided, and any other information reasonably requested by Customer). Supplier agrees to provide Customer with the information necessary for Customer to comply with its regulatory obligations and to assess the impact, if any, of the change on Customer. In the event that Customer determines, in its sole discretion, that Customer's business interests or regulatory obligations prohibit the Off-shoring of such Services, Customer may deny Supplier's request without penalty of any kind. In addition, Customer reserves the right to require Supplier to bring any previously approved Off-shore Services back to the United States if Customer determines, in its sole discretion, that changed business interests or regulatory obligations so require. In such event, Customer shall provide Supplier with a written plan outlining the orderly

transition of the Services back to the United States. Moreover, any requests by Supplier to change the location of Services from one Off-shore site to a different Off-shore site must be made in writing at least ninety (90) days before the requested move date and is subject to site-specific security, technology, and disaster recovery assessments and must meet all Service requirements as set forth in this Agreement and its attached Exhibits.

15.4 Notice of Labor Disputes. Whenever an actual or potential labor dispute is delaying or threatens to delay any timely Delivery of Products or performance of any Order or Services, Supplier shall immediately give notice thereof to Customer. Such notice shall include all relevant information with respect to such dispute.

15.5 Supplier Diversity. It is Customer's policy that Diverse Suppliers (as defined in Exhibit J (Supplier Diversity Requirements)) have the maximum practicable opportunity to participate in its purchasing and contracting activities on a competitive basis. In order to support this policy, Supplier shall, at no additional cost to Customer, comply with Customer's supplier diversity requirements set forth in Exhibit J (Supplier Diversity Requirements).

16. Account Management/Reporting.

16.1 Account Management/Supplier's Personnel. Supplier shall provide experienced and qualified personnel to perform services and provide support regarding this Agreement. Upon request from Customer, Supplier will remove certain personnel from supporting Customer's account. Supplier shall promptly respond to such requests. Customer shall not be obligated to compensate Supplier for any fees, if applicable, of such replaced personnel or training of new such replacement personnel. Supplier will maintain backup and replacement procedures so as to ensure an orderly succession for any personnel who are replaced.

16.2 Reporting. Supplier shall, at no additional cost to Customer, develop, maintain, and deliver certain reports in an agreed-upon format and at the times set forth in Exhibit B-1 (Statement of Work).

16.3 Locking Mechanism or Code. Supplier shall not include or incorporate in its Product or Software any mechanism or software code that requires Customer to use special keys to use, maintain, report, or fix such Product or Software if such keys are only available from Supplier or Supplier's third party.

17. Governance.

Governance of the Parties' relationship under this Agreement will follow the guidelines and principles set out in Exhibit K (Governance), as such guidelines and principles may be amended or supplemented by the Parties from time to time during the term of this Agreement.

18. Technology Standards List.

18.1 If Supplier would like to propose a change to Customer's Technology Standards List, then Supplier will go through the following approval process, which will require Supplier to, among other things, create a written equipment change request ("ECR") and provide it to the Customer's authorized representative. The ECR must contain the following information:

(a) The proposed new model, and type;

(b) The Product that is being retired or replaced;

(c) The technical specifications related to the proposed new Product and retired Product; and

(d) The category of service that the Product is being proposed for.

18.2 Upon receipt of the ECR, Customer will request that sample Product be provided to Customer on a no-cost loan basis pursuant to, and for the purposes set forth in, Section 7.2 (Product Evaluation and Testing Requirements) of Exhibit B-1 (Statement of Work). All such Product(s) will be subject to all of the warranty and indemnity terms and conditions of this Agreement.

18.3 When Customer is satisfied that the proposed Product will meet its requirements and operate correctly within Customer's network infrastructure, Customer will approve the ECR. An approved ECR will result in the Product being included on the Technology Standards List.

18.4 For all Products identified as End of Life, or for any modified Product that Customer has agreed to Order pursuant to Section 2.9 (Modified Products), at the time such Product is identified as End of Life, or with respect to modified Products, at the time set forth in Section 2.9 (Modified Products), Supplier will provide a recommended alternate Product and prepare and submit to Customer a written ECR to go through the approval process set forth in this Section.

19. Disengagement.

19.1 Purpose and Application. This Section applies whenever Services are terminated from the scope of this Agreement or when notice of termination of this Agreement is provided. The Disengagement Period begins either (a) six (6) months prior to the end of the Term; or (b) if Services are terminated or removed from the scope of this Agreement or this Agreement is terminated before that date, the date on which (i) Customer or Supplier issues a termination notice under Section 13 (Term/Termination) in respect of all of the Services or this Agreement; or (ii) Customer notifies Supplier that it will remove certain Services from the scope of this Agreement. Services disengaged in accordance with this Section, whether they include all of the Services or only part of the Services, are referred to as the "Disengaged Services." The purpose of Disengagement is to enable Customer or its designee to transition into performing the Disengaged Services during the Disengagement Period and to eliminate or minimize any disruption to the Services (including the Disengaged Services) as a result of the transfer of the Disengaged Services to Customer or its designee.

19.2 Planning. Supplier shall, within ninety (90) days of the Effective Date, provide a draft Disengagement Plan to Customer for its approval. Failure of Supplier to provide the Disengagement Plan in the foregoing time frame shall be a material breach by Supplier of this Agreement. Once approved, the document will be the Disengagement Plan for the purpose of this Section. Supplier will make commercially reasonable efforts to ensure that, as a result of the Disengagement Plan, there is no degradation of Service Levels or quality of service during Disengagement, and there is no interruption to the Services during Disengagement. The Disengagement Plan will: (a) specify the resources that will perform Disengagement; (b) specify all things necessary to effect Disengagement as efficiently as possible and develop a list of those things the Parties did (or should have done) at the start of this Agreement to effect the transition to Supplier; and (c) set out a projected timetable and process for effecting Disengagement that will effectively resolve each of the issues in this Section and will enable Customer to complete Disengagement as quickly as possible without disrupting the quality of the Services. Such Disengagement Plan shall also include the following, if and to the extent such items can reasonably be described at the time the Disengagement Plan is prepared: (i) the principal, high-level tasks

to be performed by Supplier; (ii) the principal, high-level tasks to be performed by Customer; (iii) the principal, high-level tasks to be performed by third parties, if any; (iv) the types of resources to be provided by Customer and Supplier, respectively; (v) the criteria and process to be applied in evaluating deliverables; (vi) the provision for continued Services during the Disengagement Period; and (vii) other pertinent matters.

19.3 Implementation. Supplier will ensure that, at all times after Customer's approval of the initial Disengagement Plan, on thirty (30) days' notice, it is able to deploy all resources reasonably needed to complete Disengagement in accordance with the Disengagement Plan. If this Section applies, Supplier and Customer will comply with the Disengagement Plan and this Section 19 and do all things reasonably necessary to fulfill their respective responsibilities relating to Disengagement. Supplier acknowledges that any refusal by Supplier to provide Disengagement Services, or any material breach in the provision of such Disengagement Services that has not been cured in accordance with the terms of this Agreement, may cause Customer to be substantially or irreparably harmed and Customer may have no adequate remedy at law in such event, and that Customer is entitled, in such case, to seek specific performance or injunction to enforce its rights to receive Disengagement Services from Supplier, as monetary damages may not be sufficient relief.

20. Innovation Proposals; Gain Sharing.

20.1 General. Customer expects that innovation will be a part of this Agreement and that Supplier will submit "Innovation Proposals" that identify potential opportunities to increase the quality or efficiency of the Products and Services and/or reduce costs. These Innovation Proposals are considered a critical element of the Customer/Supplier relationship and the means to continually enhance and maintain Customer satisfaction. Innovation Proposals are in addition to expected improvements that Supplier can make, without Customer participation, to reduce its costs and improve Products and Services for the end users.

20.2 Proposals. Any Innovation Proposal must be actionable and must define and describe: (a) the current situation (e.g., identifying affected portions of all applicable Exhibits, and related costs), (b) the recommended changes, (c) the projected savings or service improvements, and (d) each Party's responsibilities if the savings or improvements are to be achieved.

20.3 Gain Sharing. If Customer agrees with an Innovation Proposal, the Parties will negotiate a modification to this Agreement and the applicable Exhibits, identifying any changes and setting forth the terms of sharing the economic gain from the Innovation Proposal. The Parties will mutually agree upon a method for defining the relevant "gain" and the measurement period, assigning values to any improvements in quality or efficiency. The Parties intend that "gain" shall generally occur only after recovery of any required investment but may agree upon a method for determining gain from investments to be recovered during periods longer than the term of the Agreement. In general, the Parties agree to share "gain" in a manner that allocates to Supplier fifty percent (50%) of the savings or value in improved Services for a period of twelve (12) months or such lesser period as agreed to by the Parties, after which all further savings or enhanced value will be realized by Customer.

20.4 Customer reserves the right to prioritize Innovation Proposals and to accept or reject any particular proposal in its sole discretion.

21. Miscellaneous.

21.1 Modification. This Agreement may be modified only by written amendment that makes reference to the specific section it purports to amend and shall be signed by an authorized representative

of the Party against which enforcement is sought. Any Supplier standard form that purports to govern acquisition of Products or Services ordered pursuant to this Agreement (whether or not signed by Customer) shall be ineffective to modify this Agreement and shall not be binding upon either Party to the extent it is inconsistent with this Agreement unless otherwise mutually agreed upon in writing.

21.2 Notices. All notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed to have been duly given: (i) on the next day if delivered personally to such Party; (ii) on the date three (3) days after mailing if mailed by registered or certified mail; or (iii) on the next day if delivered by courier. All notices shall be sent to the following addresses:

If to Customer:

Washington Mutual Bank
Attn: Chandan Sharma
Enterprise Spend Management
1301 Second Avenue, WMC0803
Seattle, WA 98101

With a copy as follows for notices of breach or termination and all notices pursuant to Section 11.4 (Disclosure of Confidential Information):

Washington Mutual Bank
Attn: Chief Legal Officer
1301 Second Avenue, WMC3501
Seattle, WA 98101

If to Supplier:

Dell Marketing, LP
Attn: Contracts Manager
One Dell Way, Mail Stop RR3-40
Round Rock, TX 78682

With a copy as follows for notices of breach or termination and all notices pursuant to Section 11.4 (Disclosure of Confidential Information):

Dell Marketing, LP
Attn: Legal/Commercial Contracts
One Dell Way, Mail Stop RR1-33
Round Rock, TX 78682

Such addresses may be changed by notice given by one Party to the other pursuant to this Section 21.2 or by other form of notice agreed to by the Parties.

21.3 Governing Law; Jurisdiction. This Agreement shall in all respects be governed by and construed exclusively in accordance with the laws of the State of New York, without regard to the principles of conflicts of law.

21.4 Dispute Resolution. All disputes or claims arising under this Agreement ("Disputes") shall be resolved as set forth in this Section 21.4.

(a) Informal Resolution. In the event of a Dispute, a Party shall notify the other Party of the Dispute with as much detail as possible. The Relationship Management Team (as defined in Exhibit K (Governance)) shall use good faith efforts to resolve the Dispute within ten (10) Business Days after receipt of a Dispute notice. If the Relationship Management Team is unable to resolve the Dispute or agree upon the appropriate corrective action to be taken within such ten (10) Business Days, then either Party may initiate arbitration proceedings as set forth below. Pending resolution of the Dispute, both Parties will continue without delay to carry out all their respective responsibilities under this Agreement.

(b) Arbitration. If the Parties hereto are unable to resolve a Dispute pursuant to the informal procedure set forth above, all Disputes shall be resolved by one arbitrator who is a member of the American Arbitration Association (AAA), in accordance with its then prevailing Commercial Arbitration Rules (Expedited Procedures), as modified by this Agreement. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitration shall be held in Seattle, Washington, or at such other place as may be mutually agreed upon.

(c) Injunctive Relief. Nothing contained in this Section shall limit or delay the right of either Party to seek injunctive relief from a court of competent jurisdiction, whether or not such Party has pursued informal resolution or arbitration in accordance with this Section.

21.5 WAIVER OF RIGHT TO JURY TRIAL. SUPPLIER, AS A CONDITION TO TRANSACTING BUSINESS WITH CUSTOMER, HEREBY WAIVES AND RELINQUISHES ANY RIGHT TO A JURY TRIAL IT MAY NOW OR HEREAFTER HAVE IN ANY DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT.

21.6 Entire Agreement. The Exhibits attached hereto are hereby incorporated into and form a part of this Agreement. This Agreement constitutes the entire agreement between Customer and Supplier with respect to the subject matter of this Agreement, superseding all drafts, all prior or contemporaneous agreements, and all promises or representations, written or oral.

21.7 Third Party Beneficiaries. This Agreement inures to the benefit of Customer's Affiliates, subsidiaries, and successors-in-interest, all of which shall have the right to place Orders and receive Products and Services under the same terms and conditions as Customer; submission of an Order referring to this Agreement shall constitute a binding agreement by such Affiliate.

21.8 Waiver. The non-enforcement of any provision of this Agreement, or failure to insist on strict compliance with any of the terms, covenants, or conditions hereof, shall not be deemed a waiver of any right granted under this Agreement nor shall any waiver of any right granted hereunder on one occasion be deemed a waiver at any other time.

21.9 Severability. In the event that any clause of this Agreement is found by a court validly asserting jurisdiction to be unenforceable, that clause will be considered void to the extent it is contrary to the applicable law, but such a finding shall not affect the validity of any other clause of the Agreement, and the rest of the Agreement shall remain in full force and effect.

21.10 Captions. The section captions in this Agreement are for convenience of reference only and shall not affect the interpretation of this Agreement.

21.11 Execution by Counterparts. This Agreement may be executed by facsimile and in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same Agreement.

21.12 Order of Precedence. To the extent the terms and conditions of this Agreement conflict with the terms and conditions of the Statement of Work or other Exhibit or Schedule, the terms and conditions of this Agreement shall control.

21.13 Non-Exclusivity; No Minimums. Notwithstanding anything contained herein to the contrary, the Parties hereto agree that nothing contained in this Agreement shall be construed as creating an exclusive relationship between the Parties. Nothing in this Agreement shall prevent Customer from entering into the same or a similar relationship with others. Additionally, nothing herein, including without limitation any forecast provided by Customer to Supplier, shall be construed as creating a minimum commitment for business on the part of Customer to Supplier.

21.14 Divestiture; Acquisition. If Customer sells or otherwise transfers control of any of its sites or portion thereof, Supplier agrees that, upon prior written notice to Supplier describing the transaction in reasonable detail, Supplier shall continue to provide Products and Services with respect to the divested site as provided in this Agreement for a period of up to six (6) months at no additional charge. Thereafter, continued provision of the Products and Services by Supplier to the divested site shall be subject to such terms and conditions as Supplier and the new owner shall agree in writing.

21.15 Export. Each Party shall comply with all relevant United States export laws and regulations (collectively, "Export Controls"). Upon written request from Customer, Supplier shall promptly provide Customer all information in Supplier's possession regarding restrictions relating to exporting any Product or Software that is on the Technology Standards List. If applicable, Supplier shall provide Customer with all applicable ECCNs for the Products or applicable Software, a description of the technology contained within the Products or applicable Software that is subject to Export Controls, and copies of relevant export licenses obtained by Supplier or information reasonably sufficient to substantiate that no license is required or, if a license is required, that is necessary to allow Customer to obtain such license.

The Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date set forth below.

Washington Mutual, Inc.

By: _____
(signature)

Printed Name: Thomas W. Casey

Title: EVP + CFO

Date: 8/13/07

Dell Marketing, LP

By: _____
(signature)

Printed Name: William Rodrigues

Title: VP Large Business

Date: August 3, 2007

Appendix A

Definitions.

This Appendix A is incorporated into the Agreement to which it is attached. Terms that are capitalized in this Agreement (including the Exhibits to this Agreement) shall be defined as set forth in the Agreement, or as follows:

"**Affiliate**" means any current or future entity that directly or indirectly controls, is controlled by, or is under common control of a Party that is located in the United States. "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies by one person or entity or group of related persons or entities acting in concert whether through the ownership of voting securities, by contract, or otherwise obtaining effective management control.

"**Authorized Service Provider**" shall have the meaning given it in Exhibit B-1 (Statement of Work).

"**Benchmarking Factors**" shall have the meaning given it in Section 5.1(d).

"**Benchmark Target**" shall have the meaning given it in Section 5.1(d)(iii).

"**Business Days**" means Monday through Friday, excluding legal holidays recognized in the United States.

"**Customer Representative**" means an Enterprise Spend Management Manager, or such other person designated by written notice, who is authorized by Customer to act on Customer's behalf in business transactions under this Agreement. Further, the Customer Representative has overall responsibility for managing and coordinating the performance of Customer's obligations hereunder.

"**Delivery**" in all its tenses shall have the meaning given it in Section 3.1.

"**Disengaged Services**" shall have the meaning set forth in Section 19.1.

"**Disengagement**" means the implementation of the Disengagement Plan.

"**Disengagement Period**" means the period of time taken to complete Disengagement in accordance with the Disengagement Plan.

"**Disengagement Plan**" means the plan to be developed, provided, and updated by Supplier for approval by Customer as set forth in Section 19.

"**Disputes**" shall have the meaning set forth in Section 21.4.

"**End of Life**" means the last day of production for a Product.

"**eProcurement**" means an internet-based online order processing system using, at Customer's option, Ariba, SAP, Oracle, PeopleSoft, cXML, or xCBL, or such other system as mutually agreed upon by the Parties that may be utilized by Customer to place Orders, receive Products and Services and invoices, or obtain quotations and Order confirmations from Supplier, as described in this Agreement and its Exhibits.

"**Fees**" in all its tenses shall have the meaning given it in Section 5.1.

"**Image**" means Customer's required base operating system and application software suites with Customer customized settings, profiles and scripts, to be installed on Products as set forth in the Statement of Work.

"**New Pricing**" shall have the meaning given it in Section 5.1(d)(iv).

"**Order**" including any tense thereof means a request for Products or Services, including Purchase Orders, to be supplied under this Agreement, which upon acceptance by Supplier will become an enforceable contract for the sale (or provision with respect to evaluation units) of Products or Services subject to all terms and conditions of this Agreement.

"**Order Receipt**" shall have the meaning set forth in Section 2.1.

"**Performance Credits**" shall have the meaning set forth in Section 8.6.

"**Products**" means all desktop or laptop computers and associated peripherals (e.g., keyboard, mouse, port replicator, monitors, and so forth) that Customer may Order under this Agreement, including custom (made-to-order) hardware, but excludes S&P Products (as defined in Section 4.6).

"Purchase Order" means Customer's Order document setting forth specific Products to be ordered and Services to be rendered.

"**Requester**" means an employee of Customer who is granted authority by the Customer Representative to act on behalf of Customer in placing Orders and directing any changes to such Orders. The Customer Representative will confirm for Supplier, upon request, whether a particular individual is indeed a Requester. The Customer Representative may also be a Requester.

"S&P Products" shall have the meaning set forth in Section 4.6.

"**Service Levels**" mean the service levels and key performance indicators described in Exhibit F (Service Levels and Key Performance Indicators).

"**Services**" means any services rendered by Supplier to Customer pursuant to this Agreement, including but not limited to: (i) customer service and support, program management, and reporting services, and all other services that are incidental to fulfilling Orders or Supplier's other obligations under this Agreement or the Statement of Work; (ii) warehousing, inventory management, fulfillment, Delivery, and distribution services as necessary to fulfill Supplier's obligations under this Agreement or the SOW; and (iii) Warranty Services.

"**Software**" means, collectively, the Supplier-Owned Software and the Third-Party Software, but shall not include Customer's Image.

"**Specifications**" means, with respect to any Product, all user documentation that accompanies such Product, and any and all other documentation, specifications, or special instructions applicable to the Product, including, without limitation, the Minimum Product Specifications set forth in Attachment 1 to Exhibit A (Product Description and Pricing Schedule) and, with respect to Services, all specifications specifically described in the Agreement and any applicable Order.

"Statement of Work" or "SOW" means that statement of work attached to this Agreement as Exhibit B-1 (Statement of Work), which shall include a detailed schedule for performance of the Services and Delivery of the Products.

"**Supplier-Owned Software**" means the software owned by Supplier, along with its applicable documentation that is provided to Customer under this Agreement for use on or in conjunction with any Products.

"**Technology Standards List**" means a standards list maintained by Customer containing, among other things, all Products certified for use in the Customer environment.

"**Third-Party Software**" means any software, other than Supplier-Owned Software or S&P Products that are not contemplated for purchase by Customer pursuant to Exhibit A (Product Description and Pricing Schedule) (along with its accompanying documentation), that is provided to Customer under this Agreement for use on or in conjunction with any Products.

"**Tools**" means all right, title and interest in and to all techniques, methods, processes, algorithms, data schemas, software components and application programs created by Supplier or its licensors prior to the Effective Date of this Agreement, or, if after the Effective Date, without reliance on, or inclusion of, any Confidential Information of Customer that are used in the process of developing and implementing the

Proprietary Products, including the patent rights, copyrights, trademarks, trade names and other proprietary rights inherent therein and appurtenant thereto.

"Warranty Period" shall have the meaning set forth in Section 9.2.

"**Warranty Service**" means all on-site/off-site service, repairs, maintenance, parts and labor and other activities undertaken by Customer or an Authorized Service Provider that are necessary in order to comply with the Product warranties and other obligations set forth in Section 9 of this Agreement.

EXHIBIT C

(Email 1, dated December 9, 2008)

"Urband, Robert"
<urbandr@sullcrom.com>
12/10/2008 12:22 PM

To <matthew.curro@weil.com>
cc
bcc
Subject RE: Dell

I received the information on the last few machines (the latitudes and optiplex). They are in new condition and have the original packaging.

-Rob

-----Original Message-----
From: matthew.curro@weil.com [mailto:matthew.curro@weil.com]
Sent: Tuesday, December 09, 2008 5:26 PM
To: Urband, Robert
Subject: RE: Dell

Thanks Rob.

I'll take as much information as you can get.

Matthew L. Curro
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212)-310-8142 (phone)
(212) 310-8007 (fax)

"Urband, Robert" <urbandr@sullcrom.com>

12/09/2008 08:12 PM

To <matthew.curro@weil.com>
cc
Subject RE: Dell

Matt,

I have confirmed with the business folks that 12 of the 20 "F5 3600s" are still in their boxes, unopened. The remainder had been opened, but are now ready to be returned to Dell. The 3600s represent the bulk of the value in the invoices ($280,000+ of the invoices). I am following up regarding the remaining equipment.

Regards,
Rob
-----Original Message-----
From: Urband, Robert
Sent: Tuesday, December 09, 2008 4:08 PM
To: 'matthew.curro@weil.com'
Subject: RE: Dell

Matt,

Left you a message. The preliminary answer I heard form JPM is that they believe the equipment is still new. However, this is only preliminary as the appropriate business person who would be able to confirm was not available. I'm hoping to hear tonight and will let you know as soon as I do.

-Rob
-----Original Message-----
From: matthew.curro@weil.com [mailto:matthew.curro@weil.com]
Sent: Tuesday, December 09, 2008 3:23 PM
To: Urband, Robert
Subject: Dell

Rob - Any word on the Dell equipment? Can you confirm that it is still in the original boxes?

Thanks.

Matt

Matthew L. Curro
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212)-310-8142 (phone)
(212) 310-8007 (fax)

The information contained in this email message is intended only for use of the individual

"Urband, Robert"
<urbandr@sullcrom.com>
12/09/2008 08:12 PM

To <matthew.curro@weil.com>
cc
bcc
Subject RE: Dell

History: This message has been replied to and forwarded.

Matt,

I have confirmed with the business folks that 12 of the 20 "F5 3600s" are still in their boxes, unopened. The remainder had been opened, but are now ready to be returned to Dell. The 3600s represent the bulk of the value in the invoices ($280,000+ of the invoices). I am following up regarding the remaining equipment.

Regards,
Rob

-----Original Message-----
From: Urband, Robert
Sent: Tuesday, December 09, 2008 4:08 PM
To: 'matthew.curro@weil.com'
Subject: RE: Dell

Matt,

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-Rob

-----Original Message-----
From: matthew.curro@weil.com [mailto:matthew.curro@weil.com]
Sent: Tuesday, December 09, 2008 3:23 PM
To: Urband, Robert
Subject: Dell

Rob - Any word on the Dell equipment? Can you confirm that it is still in the original boxes?

Thanks.

Matt

Matthew L. Curro
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212)-310-8142 (phone)
(212) 310-8007 (fax)

EXHIBIT D

(Email 2, dated December 9, 2008)

"Urband, Robert"
<urbandr@sullcrom.com>
12/09/2008 08:43 PM

To <matthew.curro@weil.com>
cc
bcc
Subject RE: Dell

The 8 3600s were taken out of their boxes. They were installed briefly in the data center and were powered on. They were never used under "production loads". They are now in generic boxes.

-Rob

-----Original Message-----
From: matthew.curro@weil.com [mailto:matthew.curro@weil.com]
Sent: Tuesday, December 09, 2008 5:26 PM
To: Urband, Robert
Subject: RE: Dell

Thanks Rob.

I'll take as much information as you can get.

Matthew L. Curro
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212)-310-8142 (phone)
(212) 310-8007 (fax)

"Urband, Robert" <urbandr@sullcrom.com>

12/09/2008 08:12 PM

To <matthew.curro@weil.com>
cc
Subject RE: Dell

Matt,

I have confirmed with the business folks that 12 of the 20 "F5 3600s" are still in their boxes, unopened. The remainder had been opened, but are now ready to be returned to Dell. The 3600s represent the bulk of the value in the invoices ($280,000+ of the invoices). I am following up regarding the remaining equipment.

Regards,
Rob
-----Original Message-----
From: Urband, Robert
Sent: Tuesday, December 09, 2008 4:08 PM
To: 'matthew.curro@weil.com'
Subject: RE: Dell

Matt,

Left you a message. The preliminary answer I heard form JPM is that they believe the equipment is still new. However, this is only preliminary as the appropriate business person who would be able to confirm was not available. I'm hoping to hear tonight and will let you know as soon as I do.

-Rob
-----Original Message-----
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Sent: Tuesday, December 09, 2008 3:23 PM
To: Urband, Robert
Subject: Dell

Rob - Any word on the Dell equipment? Can you confirm that it is still in the original boxes?

Thanks.

Matt

Matthew L. Curro
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212)-310-8142 (phone)
(212) 310-8007 (fax)

The information contained in this email message is intended only for use of the individual

EXHIBIT E

(Credit Notice)

STREUSAND | LANDON, LLP
Attorneys

515 Congress Ave, Ste 2523
Austin, TX 78701
(512) 236 9900
(512) 236 9904 fax
www.streusandlandon.com

CREDIT NOTICE

Sabrina L. Streusand, Esq.
512.236.9901
streusand@streusandlandon.com

July 2, 2009

Via E-mail: matthew.curro@weil.com
and Facsimile: (212) 310-8007

Matthew Curro, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: *In re Washington Mutual, Inc., et al.*; Case No. 08-12229-MFW (Jointly Administered); in the United States Bankruptcy Court, District of Delaware

Dear Matt:

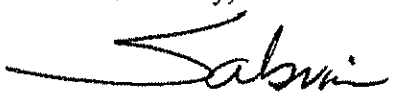
Pursuant to the *Stipulation, Agreement and Order for the Return of Certain Equipment to Dell Marketing, L.P. and the Allowance of an Administrative Expense Claim* (the "Stipulation"), and the *Order Approving Stipulation, Agreement and Order for the Return of Certain Equipment to Dell Marketing, L.P. and the Allowance of an Administrative Expense Claim* entered by the Delaware Bankruptcy Court on December 19, 2008 (the "Order"), we are providing you the Credit Notice.

The product ("Product") subject to the administrative claim set forth in the Stipulation was returned by Washington Mutual, Inc. to Dell Marketing, L.P. ("Dell") in March 2009. Although it had been represented by Washington Mutual to Dell that a majority, if not all, of the Product was still new, sealed, and in the box, upon the return of the Product it was determined that all of the Product had been used and licensed with F5 Software. The licenses were activated according to F5 between October 1, 2008 and October 14, 2008. All Product returned was used and had activated software licenses on it. The licenses are not transferable and F5 does not authorize the resale of the Product on the secondary market, which makes the Product unavailable to be sold to a different end-user. We previously provided you the end-user software license with F5. Please let me know if you need an additional copy of the Software License Agreement.

Therefore, because of the special nature of the F5 device and associated licensing the value of the Product at this point is essentially the bare metal chassis from the platforms, and there is no other value, other than scrap value, for the Product returned. The total amount of Dell's administrative claim under 11 U.S.C. §503(b)(9) is $413,607.61. Applying scrap value of $41,360.00 to that total amount, the net administrative claim to which Dell is entitled pursuant to the Stipulation is $372,247.61.

Please do not hesitate to call if you have any questions.

Sincerely,



Sabrina L. Streusand

SLS/djb

EXHIBIT F

Patterson v. TNA Entertainment, LLC,
Case No. 04-0192, 2006 WL 587696 (E.D. Wis. March 10, 2006)

HOnly the Westlaw citation is currently available.

United States District Court,
E.D. Wisconsin.
Albert PATTERSON, d/b/a World Wrestling Association, d/b/a Superstars of Wrestling, Inc., and d/b/a W.W.A. Superstars, Plaintiff,
v.
TNA ENTERTAINMENT, LLC, Defendant.
No. 04-C-0192.

March 10, 2006.

Charles D. Boutwell, Boutwell Law Office, Northbrook, IL, for Plaintiff.

Darryl L. Diesing, Andrew A. Jones, Whyte Hirschboeck Dudek SC, Milwaukee, WI, Douglas A. Donnell, Jennifer A. Puplava, Mika Meyers Beckett & Jones, Grand Rapids, MI, for Defendant.

DECISION AND ORDER ON DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT, TO RESCIND SETTLEMENT AGREEMENT, TO VACATE INJUNCTION, TO REINSTATE ACTION, AND FOR SANCTIONS

CALLAHAN, Magistrate J.

I. BACKGROUND

*1 On August 26, 2005, this court issued a decision and order in this action, granting in part and denying in part the defendant's ("TNA") motion for summary judgment. In that same decision the court advised the parties that a scheduling conference to discuss the further processing of the action would be conducted on September 8, 2005. That scheduling conference was cancelled on September 7, 2005, based upon the court's receipt of a letter from one of the defendant's lawyers advising that the parties had "agreed in principle" to settle the action and that the parties anticipated being able to submit a formal stipulation and order for dismissal of the action within the next 30 days. Not too long after his September 7, 2005, letter, that same lawyer wrote another letter to the court, this being on October 12, 2005, in which he asserted the following:

> As this Court will recall, the parties reported to the Court on or about September 7, 2005, that they had agreed in principle to resolve this matter. Unfortunately, I have now been informed that the tentative settlement initially reached by the parties has failed and that the parties are now unable to resolve their differences. Under these circumstances, TNA respectfully submits that a settlement conference or mediation, either before this Court or one of the other magistrate judges, would be appropriate and helpful. In the alternative, TNA expects that this Court will wish to reset this matter for a status conference to discuss further scheduling in this matter.

Taking up the suggestion of counsel, a status conference was held on November 7, 2005. Upon being satisfied that both parties did indeed wish to participate in mediation, this court referred the case to Magistrate Judge Aaron Goodstein for such mediation. Judge Goodstein scheduled the mediation for December 16, 2005. The mediation went forward on December 16 and resulted in the parties' agreeing to settle the case. Indeed, on that same day, counsel for the parties presented to this court an agreed-upon injunction and an agreed-upon order for dismissal, both of which the court signed on December 16, 2005. Judgment was entered by the Clerk of Court on December 19, 2005.

On January 19, 2006, the defendant filed a "Motion for Relief from Judgment, to Rescind Settlement Agreement, Vacate Injunction, Reinstate Action and for Sanctions."The defendant's motion also sought leave to file the motion and the accompanying submissions under seal. On January 30, 2006, the plaintiff ("Patterson") filed his brief (with accompanying submissions) in opposition to the motion. On February 6, 2006, TNA filed its reply. Thus, the defendant's motion is fully briefed and is ready for resolution. For the reasons which follow, the defendant's motion will be granted in part and denied in part.

II. DISCUSSION

Simply stated, TNA claims that during the course of the mediation Patterson made certain factual assertions; that TNA relied on the truthfulness of such factual assertions in agreeing to the terms of the settlement, including the entry of the injunction; and that, as it now turns out, such factual assertions were not true. In other words, TNA claims that the settlement agreement was procured by fraud. Such being

the case, TNA urges this court to vacate the judgment pursuant to Fed.R.Civ.P. 60(b).

*2 Federal Rule of Civil Procedure 60(b) provides for relief from judgments. Though Rule 60(b) motions should be liberally construed, *Ervin v. Wilkinson*, 701 F.2d 59, 61 (7th Cir.1983), relief is "an extraordinary remedy and is granted only in exceptional circumstances." *Talano v. Northwestern Med. Faculty Found., Inc.*, 273 F.3d 757, 762 (7th Cir.2001).Rule 60(b)(3) lists "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party" as reasons for which a court may relieve a party from a final judgment or order.Fed.R.Civ.P. 60(b)(3). A party seeking to vacate a judgment on the grounds that fraud and misrepresentation were used to procure the settlement upon which that judgment was based, must establish the existence of such fraud by clear and convincing evidence. *See Ervin*, 701 F.2d at 61; *Di Vito v. Fid. & Deposit Co.*, 361 F.2d 936, 939 (7th Cir.1966).

Recall that this action is one for unfair competition, trade name and trademark infringement. Specifically, plaintiff Patterson alleged in his amended complaint that he had adopted the following names and marks in the arena of professional wrestling: World Wrestling Association; W.W.A. World Wrestling Association Superstars; W.W.A. Superstars; Superstar Wrestling; Superstars Wrestling; Superstars of Wrestling; Superstars of Pro Wrestling; W.W.A. Superstar Wrestling; W.W. A. Superstars Wrestling; W.W.A. Superstars of Wrestling; and W.W.A. Superstars of Pro Wrestling. He further alleged that the defendant had infringed on his right to use those names and marks.

As stated previously, the mediation resulted in the parties jointly presenting to this court a stipulation for dismissal of the action as well as an agreed-upon injunction. The terms of the injunction are as follows:

> The above-captioned parties have agreed to entry of an injunction, which the court has approved, as follows:
>
> Defendant TNA Entertainment, LLC shall be enjoined from using any of the following phrases in its promotional or advertising materials or in connection with any events sponsored or promoted by TNA Entertainment, LLC:
>
> WORLD WRESTLING ASSOCIATION, W.W.A. WORLD WRESTLING ASSOCIATION SUPERSTARS, W.W.A. SUPERSTARS, SUPERSTAR WRESTLING, SUPERSTARS WRESTLING, SUPERSTARS OF WRESTLING, SUPERSTARS OF PRO WRESTLING, W.W.A. SUPERSTAR WRESTLING, W.W.A. SUPERSTARS WRESTLING, W.W.A. SUPERSTARS OF WRESTLING, W.W.A. SUPERSTARS OF PRO WRESTLING, WORLD WRESTLING, WORLD WRESTLING SUPERSTARS, WRESTLING SUPERSTARS, and SUPERSTARS.
>
> Plaintiff, his agents, employees, partners, joint venturers, members, officers, directors, distributors, licensees, advertisers, promoters, successors and assigns (hereafter collectively "Plaintiff") agree that Plaintiff shall be barred and estopped from making any claim or demand against TNA Entertainment, LLC or its agents, employees, partners, joint venturers, members, offices, directors, distributors, licensees, advertisers, promoters, successors and assigns (hereafter collectively "TNA") relating to or arising out of TNA's use of any other words or phrases not included in the above list.

*3 The defendant claims that a serious stumbling block in the mediation arose when the plaintiff insisted that the injunction about which the parties were negotiating include the term "Superstars" within its parameters. The defendant was unwilling to agree to the inclusion of "Superstars" in the injunction. According to the defendant, the only reason that it ultimately agreed to include "Superstars" in the injunction was because the plaintiff represented to TNA (as well as to Judge Goodstein) that the plaintiff had already successfully prevented another competitor in another case from using the term "Superstars" either by itself or combined as "WWF Superstars." The affidavit of Mr. Kevin Day, who is the Chief Operating Officer of TNA and who was present at the mediation, avers as follows:

3. After several exchanges of proposals communicated to the other side through Magistrate Judge Goodstein, it appeared that settlement discussions had reached the point of impasse by early afternoon of December 16, 2005. At that point, all parties and their counsel met again in the courtroom

with Magistrate Judge Goodstein to discuss a possible resolution of the last issue regarding use of the term "Superstars." Both Mr. Donnell [defendant's counsel] and I stated the reasons we believed Mr. Patterson had no right to prevent TNA's use of the word "Superstars" or "TNA Superstars." In this meeting, Mr. Patterson and his counsel stated expressly and unequivocally that Plaintiff had litigated the very issue of another party's right to use the term "Superstars" and had obtained a decision in that litigation, preventing the party's use of that term. Plaintiff identified the litigation as a claim against Titan Sports, d/b/a World Wrestling Federation, or WWF. Plaintiff and his counsel expressly stated that Titan Sports/WWF had been prevented from using the term "Superstars" and "WWF Superstars" as a result of Plaintiff's litigation against Titan Sports/WWF. To support this claim that the issue had been decided in Plaintiff's favor, Plaintiff provided a document entitled "Cancellation" indicating that the mark "WWF Superstars" had been cancelled by the U.S. Patent and Trademark Office ("USPTO"). A copy of that document is attached to TNA's Brief as Exhibit 1. The document identified "Superstars of Wrestling (WWA Superstars), Inc.," which was Mr. Patterson's company, as the plaintiff, and Titan Sports, Inc. as the defendant.

4. During a subsequent breakout session that afternoon, I telephoned our in-house counsel in Texas and TNA's intellectual property attorney to determine if Plaintiff's representations regarding the Titan Sports litigation were accurate. Our attorneys attempted to obtain copies of the documents in the case referenced in the Cancellation, but discovered that those documents were not maintained online, and we were unable to see the litigation documents or verify the truth of Plaintiff's statement that he had prevented Titan Sports/WWF from using the term "Superstars" or "WWF Superstars."

*4 5. Though TNA has denied Plaintiff's right to prevent TNA from using the word "Superstars" or "TNA Superstars," in the present lawsuit Plaintiff's representations regarding his successful litigation against Titan Sports/WWA was the primary basis upon which I concluded to settle the litigation by agreeing, on behalf of TNA Entertainment, to not use the term "Superstars" in TNA's advertising and promotional materials. Had I known the true outcome of the litigation that Plaintiff orally represented to me, Mr. Donnell and Magistrate Judge Goodstein, I would not have agreed to a settlement that prohibited TNA from using the term "Superstars."

6. I first discovered the true outcome of the Titan Sports/WWF litigation at the end of December, 2005. After waiting for a response to our request for documents from the USPTO, we obtained key documents that show Mr. Patterson's company lost its claim that Titan Sports/WWF was not allowed to use the term "Superstars." I now understand that both a prior federal court order in 1993 and a ruling by the Trademark Trial and Appeal Board in 1999 held that Titan Sports/WWF *was* entitled to use the word "Superstars," but was not allowed to use the other protected marks of Plaintiff. See Exhibits 2 and 3 attached to TNA's Brief. I also discovered after the December 16, 2005 settlement conference that Mr. Patterson's own attorney had advised him that Titan Sports/WWF was allowed to use "Superstars" as a result of the 1993 district court decision. See Exhibit 3 to TNA's Brief.

7. I clearly recall Plaintiff's representations at the settlement conference regarding the Titan Sports litigation, and those representations were completely opposite from the holdings as shown in the exhibits to TNA's Brief. I relied on Plaintiff's misrepresentations in deciding to settle with an agreement prohibiting TNA's use of the word "Superstars."

(Def.'s Br., Ex 5 (Day Aff.) at ¶¶ 3-7.)

Interestingly, in the affidavit which accompanied his response Patterson does not deny that he made the statement attributed to him by the defendant. Instead, he avers that

[a]t the time of the settlement conference prior to reaching an agreement, I did not make any statements directly to the representatives of the defendant. All statements made [b]y me were to Magistrate Judge Goodstein in the presence of my counsel, Charles Drake Boutwell. During the settlement conference, I did not make any statement which I knew to be false and did not present any document to Magistrate Judge Goodstein which I knew to be false.

(Pl.'s Br., Ex. 3 (Patterson Aff.) at ¶ 6.) More substantively, as to the rationale behind Patterson's making the statements which are now relied upon by the defendant as the predicate for its fraud claim, Patterson avers as follows:

> 4. In preparing Fact 2 in Response to Defendant's Motion for Summary Judgment, I interpreted the documents in Exhibit 4 to mean that I was the petitioner referred to in the finding of Lynne Beresford made on December 31, 2002 since I was the petitioner in an opposition to the trademark WWF SUPERSTARS. Moreover, I understood that the notation TERMINATED dated March 30, 2000 referred to a termination of the mark. Based on my interpretation of the documents in Exhibit 4, I understood at the time of the settlement conference on December 16, 2005 that I had won my opposition to the trademark WWF SUPERSTARS since I understood the mark has been terminated March 30, 2000, since I understood that the mark has been cancelled on February 18, 2003, and since I understood that I was the petitioner referred to in the finding of Lynne Beresford on December 31, 2002. I was personally involved in the opposition to the mark WWF SUPERSTARS and was the petitioner in that opposition. I personally made all of the representations to Magistrate Judge Goodstein regarding the interpretations of the documents in Exhibit 4 as stated in Fact 2.

*5 (Patterson Aff. ¶ 4.)

"Fact 2," which Patterson refers to is Patterson's second proposed finding of fact submitted in this court along with his response to TNA's motion for summary judgment. Patterson's second proposed finding of fact states:

> On March 30, 2000 World Wrestling Federation Entertainment, Inc.'s registration of the mark WWF SUPERSTARS ... registration number 1,819,240 was cancelled on the petition of Albert Patterson with the finding of Lynne G. Beresford, Deputy Commissioner for Trademark Policy in relevant part that,
>
> "Whereas it appears from the records of this office that the petitioner *(Patterson)* is the owner of trademark registration 1819240 and has complied with the provisions of Section 7(e) of the Trademark Act of 1946 and the Examiner of Trademarks has recommended the cancellation thereof.

(Pl.'s Resp., Ex. A (emphasis in original) (for convenience, the citations are to Patterson's brief on the present motion and not to the original summary judgment documents).) However, the actual document referred to by Patterson in Fact 2 does not contain Patterson's name. Instead, the original document concerning the mark "WWF SUPERSTARS" and signed by Deputy Commissioner Beresford reads:

> Ex Parte Titan Sports, Inc.
>
> Whereas Titan Sports, Inc.
>
> has surrendered Trademark Registration No. 1819240 for cancellation and
>
> Whereas it appears from the records of this office that petitioner is the owner of Trademark Registration No. 1819240 and has complied with the provisions of Section 7(e) of the Trademark Act of 1946, and the Examiner of Trademarks has recommended the cancellation thereof;
>
> now, therefore, Registration No. 1819240 is hereby cancelled.

(Pl.'s Resp., Ex. A.)

As is clear from the actual document, trademark registration No. 1819240 was not cancelled upon Patterson's petition, but rather was cancelled upon the petition of Titan Sports, Inc., the owner of the mark and parent company of World Wrestling Federation Entertainment, Inc. Furthermore, TNA has submitted documents from an earlier case in the Eastern District of Wisconsin in which Titan Sports, Inc. was the defendant and Louis Jones, Trustee, and World Wrestling Association, successor to United Wrestling Association d/b/a/ U.W.A. Superstar Wrestling were the plaintiffs. In that case United States District Judge Thomas J. Curran entered an order enjoining Titan Sports, Inc. from using certain names in connection with wrestling activities, but specifically stated that "[t]his judgment does not preclude any party from using the term 'Superstars." ' (Def.'s Br., Ex. 3.) Indeed, Patterson's petition in the Trademark office to cancel Titan Sports' "WWF SUPERSTARS" mark

was later dismissed based in part on Judge Curran's ruling. (Def.'s Br., Ex. 2.)

What is clear from all of this, and indeed does not appear to be disputed at this point by Patterson, is that Titan Sports, Inc. was not prevented from using the terms "Superstars" and "WWF Superstars" as the result of litigation by Patterson. Patterson's representations to the contrary, during mediation and in his second proposed finding of fact, were therefore false (or, perhaps to use a less volatile word, inaccurate).

*6 Falsity alone, however, does not establish fraud. In order to establish that the settlement was procured by fraud, TNA would have to show by clear and convincing evidence: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth and (8) his right to rely thereon. *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 865 (7th Cir.1974). In the case at hand, doing so would be difficult. First of all, Patterson is a layman. It is not obvious that he knew that his representations regarding the outcome of previous litigation were false. It may be that Patterson knew that he won a case against Titan Sports, but did not remember exactly what the injunction provided for, and did not understand the intricacies of proceedings before the Trademark Office. Furthermore, the alteration in the quotation in Patterson's proposed finding of facts might have been the result of Patterson's attorney trying to clarify something that he was himself mistaken about. And finally, it is not clear that TNA had a right to rely on Patterson's lay representations regarding the outcome of previous litigation. That is to say, it is not clear that TNA's reliance on Patterson's representations was reasonable.

It is unnecessary to delve into these factual inquiries, however, because I am convinced, in any event, that the judgment should be set aside. Rule 60(b) provides several circumstances, other than fraud, that justify setting aside a judgment. A judgment may be set aside because of "mistake, inadvertence, surprise, or excusable neglect," or more generally, for "any other reason justifying relief from the operation of the judgment."Fed.R.Civ.P. 60(b)(1) and (6). The district courts have broad discretion in deciding whether to grant relief under Rule 60(b). *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat.*, 902 F.2d 1275, 1277 (7th Cir.1990) ("Relief from judgment under Rule 60(b) may be granted at the broad discretion of the trial judge, and the court's determination may only be reversed upon an abuse of that discretion."(citation omitted)).

Setting aside the judgment in the present action is justified on multiple grounds. First, although fraud requires intentional conduct, Rule 60(b)(3) also covers "misrepresentation," and courts have held that this "applies to both intentional and unintentional misrepresentations." *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir.1995). Moreover, if Patterson did not intentionally misrepresent the outcome of earlier litigation, then he was mistaken about it, and because of Patterson's representations, TNA shared in the mistake. Mutual mistake of material fact can be the basis for setting aside a settlement and judgment under Rule 60(b)(1).*See Brown v. County of Genesee*, 872 F.2d 169, 174 (6th Cir.1989). Here, I have little difficulty finding that the parties' mistake was material to TNA's entering into the settlement agreement. Indeed, it appears that it was the main motivating factor.

*7 In the end, in my opinion there are ample reasons justifying relief from the operation of the judgment entered in this case. Whether it was intentional or not, Patterson misrepresented information that was crucial to TNA's decision to allow an injunction prohibiting it from using the word "superstars" to be entered against it. TNA assures the court that using that word is an important part of its advertising and promotional efforts, and the court has no reason to doubt such claim. In my view, it would not serve the interests of justice to allow that injunction to stand when it was clearly the product of Patterson's misrepresentation and the parties' mutual mistake concerning the outcome of the previous litigation.

For all of the forgoing reasons, TNA's motion to set aside this court's injunction, order of dismissal, and judgment will be granted. TNA's motion for sanctions in the form of attorney's fees and costs will, however, be denied. While Patterson's misrepresentations could and should have been avoided by him, it is not as if the matter was totally out of TNA's control. Going into the mediation, one of the main points of contention between the parties was the use of the

word "superstars." Moreover, TNA was on notice through the materials that Patterson had previously filed along with his response to TNA's summary judgment motion that Patterson claimed to have won litigation concerning the use of similar words by Titan Sports, Inc. Perhaps had TNA looked more deeply into the matter prior to the mediation, Patterson's misrepresentations at the mediation would have been rendered benign.

NOW THEREFORE IT IS ORDERED that this court's injunction and order of dismissal entered on December 16, 2005 as well as the judgment entered on December 19, 2005 be and hereby are VACATED;

IT IS FURTHER ORDERED that the defendant's motion for sanctions be and hereby is DENIED;

IT IS FURTHER ORDERED that a scheduling conference will be conducted on Tuesday, March 21, 2006 at 9:00 a.m. in Room 253 of the U.S. Courthouse, 517 E. Wisconsin Avenue, Milwaukee, WI 53202.

SO ORDERED.

E.D.Wis.,2006.
Patterson v. TNA Entertainment, LLC.
Not Reported in F.Supp.2d, 2006 WL 587696 (E.D.Wis.)

END OF DOCUMENT

EXHIBIT G

(Declaration of Carl C. Carl)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**

DECLARATION OF CARL C. CARL IN SUPPORT OF MOTION OF DEBTORS PURSUANT TO RULE 9024 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE FOR RECONSIDERATION OF THE ORDER APPROVING THAT CERTAIN STIPULATION BY AND BETWEEN THE DEBTORS AND DELL MARKETING, L.P., DATED AS OF DECEMBER 17, 2008

I, Carl C. Carl, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I currently hold the position of First Vice President and Senior Counsel with Washington Mutual, Inc. ("WMI," and together with WMI Investment Corp., the "Debtors"). Unless otherwise stated in this Declaration, I have personal knowledge of the facts set forth herein.

2. I submit this Declaration in support of the Debtors' motion (the "Motion for Reconsideration") pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure for reconsideration of the order, dated December 19, 2008 (the "Order"), approving that certain

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

Stipulation by and between the Debtors and Dell Marketing, L.P. ("Dell"), dated as of December 17, 2008 (the "Stipulation").

3. On September 25, 2008, the Director of the Office of Thrift Supervision appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for Washington Mutual Bank ("WMB") and advised that the receiver was immediately taking possession of WMB. Immediately after its appointment as receiver, the FDIC sold (the "Sale Transaction") substantially all the assets of WMB, including the stock of WMB's wholly-owned subsidiary, Washington Mutual Bank fsb, to JPMorgan Chase Bank, N.A. ("JPMC").

4. Prior to the Sale Transaction, I was employed by WMB for a period of approximately three (3) years and held the position of First Vice President and Senior Counsel with WMB. In that regard, I was primarily responsible for drafting and negotiating key supplier agreements, as well as supporting the ongoing operations of WMB.

5. At the time of the execution of the Dell Agreement (as defined below), it was the policy and procedure within the IP/Technology/Contracts group of the WMB legal department to, in general, have WMI as the signatory to all enterprise-wide vendor contracts. This practice enabled WMI and all its subsidiaries, including WMB and its subsidiaries, to utilize and benefit from the master terms and conditions negotiated by WMI without having to enter into multiple separate agreements between each subsidiary and the applicable vendor. But it was generally not the intent of WMI to guarantee the obligations of its subsidiaries with respect to enterprise-wide supplier agreements absent express guarantee language being included in such agreement.

The Dell Agreement

6. WMI and Dell are parties to that certain U.S. Purchase Agreement for Products and Services (Direct and Reseller), dated as of August 3, 2007 (the "Dell Agreement"), pursuant to which WMI and its subsidiaries, including WMB, ordered certain computer equipment and related goods from Dell on a prepetition basis.

7. I was the attorney primarily responsible for negotiating and drafting the Dell Agreement.

8. The Dell Agreement contained certain terms and conditions pursuant to which WMI and its subsidiaries could purchase various computer and other technology related equipment. The structure of the Dell Agreement was such that all WMI affiliates and subsidiaries could place orders pursuant to the terms and conditions set forth in the Dell Agreement.

9. Specifically, Section 21.7 of the Dell Agreement provides:

> This Agreement inures to the benefit of Customer's Affiliates, subsidiaries, and successors-in-interest, all of which shall have the right to place Orders and receive Products and Services under the same terms and conditions as Customer; *submission of an Order referring to this Agreement shall constitute a binding agreement by such Affiliate.*

(See Dell Agreement § 21.7.) (emphasis added)

10. Section 21.7 was intended to allow subsidiaries and Affiliates (as defined in the Dell Agreement) of WMI, including WMB, to order computer and related goods pursuant to the Dell Agreement. The second clause of Section 21.7 (italicized above), however, was intended to ensure that, in the event an Affiliate or subsidiary did place an order, such Affiliate or subsidiary, and not WMI, would be liable on account of such order. WMI never intended to, nor did it, provide any guarantees under the Dell Agreement ensuring payment for orders placed by Affiliates or subsidiaries.

Dated: July 9, 2009

By: _____
Carl C. Carl

EXHIBIT H

(Proposed Order)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**

ORDER GRANTING DEBTORS' MOTION TO RECONSIDER ORDER APPROVING THAT CERTAIN STIPULATION, AGREEMENT AND ORDER BY AND BETWEEN THE DEBTORS AND DELL MARKETING, L.P.

Upon the motion, dated July 8, 2009 (the "Motion"),[2] of Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (together, the "Debtors"), for entry of an order, pursuant to section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9024, which incorporates Rule 60 of the Federal Rules of Civil Procedure, reconsidering the Order, dated December 19, 2009 [Dkt. No. 474] (the "Order"), approving that certain Stipulation, Agreement and Order for the Return of Certain Equipment to Dell Marketing, L.P. and the Allowance of an Administrative Expense Claim, dated December 17, 2008 (the "Stipulation"), all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

[2] Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Motion.

28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the parties listed therein, and it appearing that no other or further notice need be provided; and the Court having determined that the relief sought in the Motion is in the best interests of the Debtors, their creditors, and all parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefore, it is

ORDERED that the Motion is granted; and it further

ORDERED that, pursuant to Bankruptcy Rule 9024, the Order is vacated and the Stipulation, and all terms and provisions contained therein, shall be of no further force or effect; and it is further

ORDERED that Dell shall be granted leave to re-file its Admin Claim Motion; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of the Agreement and this Order.

Dated: August ____, 2009
Wilmington, Delaware

THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE