

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
	:	:
WASHINGTON MUTUAL, INC., <u>et al.</u> , <sup>1</sup>	:	Case No. 08-12229 (MFW)
	:	:
Debtors.	:	(Jointly Administered)
	:	:
	:	Ref. Nos. 974, 1017, 1036, 1219, 1220, 1237, 1259
	:	:
	:	:

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**REPLY BRIEF OF JPMORGAN CHASE BANK, N.A. IN FURTHER SUPPORT  
OF MOTION FOR RECONSIDERATION OF OPINION AND ORDER  
GRANTING DEBTORS' MOTION FOR RULE 2004 DISCOVERY**

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Dated: July 22, 2009  
Wilmington, Delaware

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<sup>1</sup> Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.



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JPMorgan Chase, National Association (“JPMC”) submits this Reply in Further Support of its Motion for Reconsideration of the Opinion and Order Granting Debtors’ Motion for Rule 2004 Discovery (the “Rule 2004 Motion”).<sup>2</sup> In their Objection to the motion for reconsideration (“Debtors’ Objection”), Debtors conceded that nearly all of their requests for Rule 2004 discovery are improper given the counterclaims (“Debtors’ Counterclaims”) they filed in the adversary proceeding entitled *JPMorgan Chase Bank, National Association v. Washington Mutual, Inc., et al.*, Adversary No. 09-50551 (the “JPMC Adversary Proceeding”), and asked this Court to enter a revised order permitting Debtors to conduct Rule 2004 discovery relating solely to potential business tort claims.

This Court should reject Debtors’ revised request for Rule 2004 discovery because the potential business tort claims identified by Debtors are plainly “related” to the pending JPMC Adversary Proceeding and cannot, as a matter of law, be asserted by Debtors. Instead, consistent with an effort to promote efficient resolution of all the claims in the pending adversary proceedings, the Court should order Debtors to proceed forthwith in conducting coordinated discovery in these matters, subject to the safeguards and protections of the Federal Rules of Civil Procedure as incorporated by the Bankruptcy Rules.

The Court should also reject Debtors’ attempt to unilaterally reform this Court’s Rule 2004 Order. Rather than waiting for the Court’s ruling on the parties’ requests to revise the Rule 2004 Order, Debtors issued a subpoena one day after filing their Objection that “commanded” JPMC to comply with their revised request for Rule

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<sup>2</sup> The Court’s Opinion was entered on June 24, 2009 as Docket No. 1219 (the “Rule 2004 Opinion”) and the Order was entered the same day as Docket No. 1220 (the “Rule 2004 Order”).

2004 discovery. Debtors did so without the Court's permission, as required by Rule 2004(a). *See* Fed. R. Bankr. Proc. 2004(a).

### **FURTHER BACKGROUND**

As previously explained, Debtors filed the Rule 2004 Motion on May 1, 2009.<sup>3</sup> The Motion was argued before the Court on May 20, 2009. In granting the Debtors' Rule 2004 Motion, the Court found that the requested discovery was permissible because it was not sufficiently related to either the JPMC Adversary Proceeding or to the action entitled *Washington Mutual, Inc., et al. v. Federal Deposit Insurance Corporation*, pending in the United States District Court for the District of Columbia (the "D.C. Action").<sup>4</sup> (Rule 2004 Opinion at 15, 17; *see* Rule 2004 Order at 1.) On June 26, 2009, JPMC moved for reconsideration of the Rule 2004 Opinion and Order ("JPMC's Reconsideration Motion") on the ground that the Court did not address whether the requested discovery was related to the Debtors' Counterclaims, which were filed nine days after the Court heard argument on the Rule 2004 Motion. (*See* JPMC's Recons. Mem. at 5-7.)

More recently, on July 1, 2009, Debtors filed their Objection to the Reconsideration Motion, conceding that it was now improper for them to seek Rule 2004

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<sup>3</sup> The Rule 2004 Motion sought documents and depositions on four subjects: (1) "potential business tort claims against JPM based on allegations in the Texas action"; (2) "potential fraudulent transfer claims against JPM arising from the approximately \$6.5 billion of capital contributions made by WMI to WMB since December 2007"; (3) "potential turnover claims against JPM related to (i) approximately \$177 million owed by WMB under outstanding promissory notes held by non-debtor subsidiaries of WMI, and (ii) approximately \$22.5 million in intercompany receivables owed to WMI by WMB"; and (4) "potential preferential transfer claims against JPM arising from approximately \$152 million transferred to WMB or third parties on behalf of WMB in the one-year period preceeding [sic] the filing of the Debtors' chapter 11 petitions." (Rule 2004 Opinion at 6-7.) The "Texas action" refers to the action currently pending in the Southern District of Texas, *American National Insurance Co. v. JPMorgan Chase & Co.*, No. 3:09-CV-000044 (the "Texas Action").

<sup>4</sup> On July 13, 2009, JPMC was formally added as a party to the D.C. Action.

discovery in connection with nearly all of the potential claims identified in the Rule 2004 Motion because they were “related” to Debtors’ Counterclaims. (*See* Debtors’ Obj. at 3, 6.) However, Debtors argued that their discovery requests concerning potential “business tort claims” (the “Business Tort Requests”) were unrelated to the Counterclaims and, therefore, permissible subjects of examination under Rule 2004.

Specifically, Debtors asserted that the Business Tort Requests concern conduct that allegedly occurred *before* Debtors filed for bankruptcy while the Counterclaims “only” concern events occurring “at the time of the transaction” by which JPMC acquired WMB’s assets from the FDIC (the “P&A Transaction”). (Debtors’ Obj. at 3.) Debtors attached to their Objection a revised “First Request for Production of Documents” (the “Revised 2004 Request”), which included requests purporting to relate solely to potential Business Tort claims. (Debtors’ Obj., Exhibit B.<sup>5</sup>) Debtors also asked the Court to enter a “proposed order” modifying the Court’s Rule 2004 Order and authorizing Debtors to conduct the “requested Business Tort discovery.” (*See* Debtors’ Obj. at 8-9.)

During a meet-and-confer session on July 6, 2009, JPMC offered to consider Debtors’ revised discovery requests as a properly served first request for documents to JPMC in the pending adversary proceedings and to respond, subject to objections interposed.<sup>6</sup> JPMC merely requested that if there were additional documents

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<sup>5</sup> Subsequently, on July 2, 2009, Debtors submitted a “Notice of Corrected Exhibits” that included a black-lined version of the Revised 2004 Request that was previously omitted from Debtors’ Objection.

<sup>6</sup> Debtors assert that, “[h]ad JPMC conferred with the Debtors in advance of filing the Reconsideration Motion, this could have been addressed through stipulation.” (Debtors’ Obj. at 6.) The parties, however, have conferred on several occasions about this discovery. As explained herein, JPMC expressly offered to treat the Revised 2004 Request as Debtors’ first request for documents and information in connection with the pending adversary proceedings. Debtors have rejected that proposal, insisting on moving forward with their self-ordered Rule 2004 discovery.

Debtors intend to seek from JPMC, that Debtors further supplement their revised requests by July 9, 2009, or shortly thereafter, to ensure the parties pursue that discovery in the efficient and coordinated manner that the rules contemplate. JPMC also cautioned that it would object to future requests as needlessly duplicative where they could have been propounded at this time and require collection of documents from the same custodians targeted by Debtors' revised requests.

Debtors rejected this approach. On July 2, 2009, while JPMC's Reconsideration Motion and Debtors' request for the Court to modify the Rule 2004 Order were still *sub judice*, Debtors served on JPMC a "Subpoena for Rule 2004 Examination" ("Debtors' Subpoena" or "Subpoena"), which attached the Revised 2004 Request. (*See* Exhibit A.) Debtors' Subpoena "command[ed]" JPMC to comply with the Revised 2004 Request by August 1, 2009. (*Id.*)

### **ARGUMENT**

#### **I. DEBTORS' REQUEST FOR RULE 2004 DISCOVERY IN CONNECTION WITH POTENTIAL BUSINESS TORT CLAIMS IS RELATED TO JPMC'S PENDING ADVERSARY PROCEEDING**

Rule 2004 discovery is improper when another pending proceeding is "related" to the requested discovery and discovery is sought from one "affected" by that proceeding. *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 29 (Bankr. N.D.N.Y. 1996) ("Discovery of evidence related to the pending proceeding must be accomplished in accord with more restrictive provisions."). As this Court observed, "the relevant inquiry is whether the Rule 2004 examination will lead to discovery of evidence related to the pending proceeding or whether the requested examination seeks to discover evidence unrelated to the pending proceeding." (Rule 2004 Opinion at 12.) The Business Tort Requests are plainly barred under this standard.

Debtors assert that the evidence produced in response to the Business Tort Requests “will not relate” to Debtors’ “state law constructive fraudulent transfer counterclaim” (*i.e.*, the “Tenth Counterclaim”) asserted in the JPMC Adversary Proceeding. (Debtors’ Obj. at 7.) In fact, Debtors’ Business Tort Requests will lead to the discovery of evidence directly related to Debtors’ Tenth Counterclaim and the supporting allegations. (Rule 2004 Opinion at 12.) Both relate to evidence concerning JPMC’s alleged communications with the FDIC prior to the receivership, its alleged negotiations with the FDIC concerning the terms of the P&A Transaction, and JPMC’s motive for allegedly seeking to purchase WMB’s assets prior to the receivership. (*See* Counterclaims ¶¶ 69, 157 (alleging that “[p]rior to the Receivership Date, the FDIC determined that it would accept JPMorgan Chase’s bid for WMB’s assets” and that JPMC obtained this result in bad faith); *accord* Debtors’ Revised Requests at ¶ 15 (seeking discovery concerning “any agreement or arrangement” between JPMC and the FDIC “on or prior to” the date of the receivership).)

Specifically, in the Tenth Counterclaim, Debtors allege that the P&A Transaction was a fraudulent transfer, in which JPMC allegedly “did not acquire WMB’s assets in good faith.” (Counterclaims ¶ 157; *see id.* ¶¶ 153-161.) In support, Debtors allege that JPMC’s lack of good faith was reflected, *inter alia*, in JPMC’s alleged pre-existing agreement with the FDIC to purchase WMB’s assets upon the FDIC’s appointment as receiver for the bank and in the alleged communications between JPMC and the FDIC prior to the receivership whereby they reached this agreement. (*Id.* ¶¶ 68-70.<sup>7</sup>) Relatedly, the Business Tort Requests seek evidence concerning (1) “JPMC’s

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<sup>7</sup> Debtors appear to assert that any allegations in their Counterclaims that are not listed under the heading of the “Tenth Counterclaim” are not relevant to the Rule 2004 relatedness inquiry. However, Debtors have failed to point to *any* authority in support of this proposition, which would



interest in any potential Transaction in *the spring and summer of 2008* [preceding the receivership and the P&A Transaction in late September 2008], including any communications with the FDIC” (Debtors’ Revised Requests ¶ 8 (emphasis added)); and (2) “any agreement or arrangement between JPMC and any Governmental Unit concerning any potential Transaction . . . on *or prior to* September 25, 2008, including but not limited to any agreement or arrangement with the . . . FDIC” (*id.* ¶ 15 (emphasis added)). Accordingly, because the Business Tort Requests “will lead to the discovery of evidence related to the pending” JPMC Adversary Proceeding (Rule 2004 Opinion at 12), Debtors’ Revised 2004 Request should be rejected.

Debtors seek to avoid this outcome by mischaracterizing the standard that the Court has already identified as the sole “relevant inquiry” in connection with the 2004 Motion. (Rule 2004 Opinion at 12.) Debtors argue that the Business Tort Requests and the JPMC Adversary Proceeding are not related because some evidence “relevant to the Tenth Counterclaim” will be different than the evidence relevant to the potential Business Tort claims, the “intent” of JPMC is not “an element” of the Tenth Counterclaim, and the scope of the “requested Business Tort discovery” will be “broader” than that sought in connection with the Tenth Counterclaim. (*See* Debtors’ Obj. at 7-8.) However, the standard for Rule 2004 discovery does not require the Court to grant Debtor’s 2004 Motion unless JPMC can establish that the Tenth Counterclaim and the potential Business Tort claims share some identical “element” of proof or that the scope of discovery in the JPMC Adversary Proceeding will be precisely as “broad” as that for the

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narrow considerably the “related evidence” standard applied by this Court in the Rule 2004 Opinion. In any event, the first paragraph of the Tenth Counterclaim expressly “repeat[s] and re-allege[s] each and every allegation contained in the preceding paragraphs 1-152,” thereby incorporating in the Tenth Counterclaim any allegations located elsewhere in the Counterclaims. (Counterclaims ¶ 153.)

potential Business Tort claims. Rather, the standard adopted by this Court asks only whether the proposed Rule 2004 examination “will lead to discovery of evidence related to the pending proceeding”? (Rule 2004 Opinion at 12.) Given the relatedness of the evidence implicated by the Business Tort Requests and Debtors’ Counterclaims, the answer to this question is clearly “yes.”

## **II. DEBTORS CANNOT OBTAIN RULE 2004 DISCOVERY FOR CLAIMS THAT ARE BARRED BY FIRREA**

Alternatively, Debtors should not be permitted discovery on the “potential business tort claims” they have identified (Debtors’ Obj. at 8) because, as set forth in JPMC’s motion to dismiss, such claims are plainly barred by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (“FIRREA”). *See In re Cinderella Clothing Indus., Inc.*, 93 B.R. 373, 377 (Bankr. E.D. Pa. 1988) (“The [Rule 2004] examination . . . must be limited to issues which the court . . . has the power to entertain.”); *see also Matter of Wilcher*, 56 B.R. 428, 435-36 (Bankr. N.D. Ill. 1985) (rejecting debtor’s request for Rule 2004 discovery where the court could not, as a matter of law, consider the claims underlying debtor’s request due to the doctrines of *res judicata* and collateral estoppel).

Without repeating in detail the arguments before the Court, Debtors’ potential Business Tort claims are unsustainable for the same reasons that Debtors’ Tenth Counterclaim should be dismissed, as set forth in the motion to dismiss papers before the Court. In short, the Business Tort claims relate to an alleged scheme by JPMC to “drive down WMB’s value so that it could purchase WMB’s assets at a fire-sale price” from the FDIC (Debtors’ Rule 2004 Motion at ¶ 17), which eventually “culminate[d] in the P&A Transaction” entered into by JPMC and the FDIC (Debtors’ Obj. at 8). These potential

claims fall directly within the plain language of 12 U.S.C. § 1821(d)(13)(D)(ii), barring claims that “relat[e] to any act or omission” of either the failed banking institution or the FDIC as receiver for that institution. The potential claims also fall squarely within the plain language of Section 1821(d)(13)(D)(i) because they will seek to avoid or rescind the transfer of “WMB’s assets” via the P&A Transaction and therefore require this Court to render “a determination of rights with respect to the assets of any depository institution for which the [FDIC] has been appointed receiver.” 12 U.S.C. § 1821(d)(13)(D)(i). The potential claims are also barred because they can *only* be asserted by Debtors against the FDIC, rather than JPMC, and through FIRREA’s “exclusive” claims process for resolving claims to a failed bank’s assets. *See FDIC v. Shain, Schaffer & Rafanello*, 944 F.2d 129, 132 (3d Cir. 1991) (“FIRREA’s claims procedure in section 1821(d) is exclusive.”).

### **III. JPMC IS READY TO PROCEED WITH COORDINATED DISCOVERY IN THE ADVERSARY PROCEEDINGS**

Debtors wrongly assert that JPMC’s Reconsideration Motion is an attempt to “deprive the Debtors . . . from uncovering pertinent information.” (Debtors’ Obj. at 8.) In truth, JPMC has consistently encouraged Debtors to commence discovery in the two adversary proceedings pending before this Court. Yet, over the previous three months, Debtors have opposed each of JPMC’s attempts to coordinate discovery in the pending adversary proceedings. For example, at the hearing before this Court on May 20, 2009, Debtors objected to JPMC’s suggestion that the Court consider entering a coordinated discovery plan. Most recently, on July 6, 2009, JPMC provided Debtors with a proposed discovery schedule (*see* Exhibit B) that would coordinate discovery in the adversary proceedings in order to ensure that the parties proceeded in the efficient and orderly

manner contemplated by the Federal Rules of Civil Procedure, as incorporated by the Federal Rules of Bankruptcy Procedure. JPMC also informed Debtors that it was prepared to treat the Revised Request as a properly served first request for documents to JPMC in the adversary proceedings and to respond accordingly, subject to objections interposed and after giving Debtors an opportunity to supplement their requests for documents. (*See* Exhibit B.)

Debtors rejected all of these proposals and, instead, have elected to press on with uncoordinated Rule 2004 discovery without authorization from this Court. If Debtors had not persistently opposed JPMC's attempts to prepare a coordinated discovery plan, the parties would already be several months into discovery. Because Debtors' piecemeal approach to discovery threatens the efficient and orderly resolution of these matters, this Court should not permit Debtors to further delay discovery in the pending adversary proceedings. The Court should deny Debtors' 2004 Motion and direct the parties to proceed forthwith in commencing with coordinated discovery in the pending adversary proceedings.

**IV. DEBTORS' ATTEMPT TO ENGAGE IN SELF-HELP DISCOVERY IS IMPROPER AND ENCROACHES ON THIS COURT'S EXCLUSIVE AUTHORITY UNDER RULE 2004**

Rule 2004 permits a party to "issue and sign a subpoena" only *after* the court has "order[ed] the examination of any entity" under the Rule. *See* Fed. R. Bankr. Proc. 2004(a)-(c); Local Rule 2004-1. On July 2, 2009, Debtors violated this provision by signing and issuing a subpoena that "command[ed]" JPMC to submit to a "Rule 2004 Examination" without this Court's authorization and only one day after Debtors had

admitted that the Rule 2004 Order needed to be revised by the Court.<sup>8</sup> (See Exhibit A.) The Debtors' Subpoena was plainly an improper attempt at "self-help" discovery and should be rejected by this Court. *In re White*, 42 B.R. 494, 501 (Bankr. E.D.N.Y. 1984) ("[S]elf-help . . . has no place in the effective system of discovery that the Federal courts strive to maintain."); *see, e.g., Davidson v. Citizens Gas & Coke Utility*, 238 F.R.D. 225, 227 n.1 (S.D. Ind. 2006) (noting that "Plaintiffs' counsel was sanctioned for employing a self-help discovery tactic while her motions seeking similar relief [related to discovery] were pending before the court"); *Flexsys Americas LP v. Kumho Tire U.S.A., Inc.*, No. 1:05-CV-156, 2006 WL 3526794, at \*2 n.2 (N.D. Ohio Dec. 6, 2006) ("The answer to improper discovery conduct (if any exists) is not self-help."); *Alicia Ocean Transport, S.A. v. Equity Steamship Agencies, Ltd.*, No. 84 Civ. 612, 1985 WL 405, at \*2 (S.D.N.Y. March 21, 1985) ("[S]elf-help is not a valid remedy for discovery defaults under the Federal Rules of Civil Procedure. The proper remedy is to seek judicial intervention."); *see also Washburn v. Morgado*, No. C 03-02973, 2005 WL 1030223, at \*2-\*4 (N.D. Cal. May 3, 2005) (declining to reconsider sanctions imposed by the court where the parties, *inter alia*, "engaged in self-help" by "extend[ing] discovery" without the court's permission); *Dultz v. Dontech, Inc.*, Nos. 94 C 3437, 95 C 413, 1996 WL 521178, at \*6 (N.D. Ill. Sept. 9, 1996) ("[T]he Plaintiff acted properly by not engaging in 'self help' in the present case. . . . [I]t was proper for the Plaintiff to seek these documents through formal discovery.").

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<sup>8</sup> Debtors clearly understood the "court order" requirement in Rule 2004(a): Debtors' Objection specifically asked the Court to sign a "proposed order" authorizing Debtors' Revised 2004 Request and noted that they were "prepared to limit their Rule 2004 discovery" going forward. (Debtors' Obj. at 2, 9 (emphasis added).)

In the Rule 2004 Opinion, this Court observed that “[t]he *primary concern* of courts is the use of Rule 2004 examinations to circumvent the safeguards and protections of the Federal Rules of Civil Procedure.” (Rule 2004 Opinion at 11-12 (emphasis added).) Debtors’ conduct was not only an attempt to “circumvent” the protections of the Rules of Civil Procedure but to evade the provisions of Rule 2004 itself. *See* Fed. R. Bankr. Proc. 2004(a). Although JPMC acknowledges that Debtors will certainly be able to make the same document requests either as part of the JPMC Adversary Proceeding or pursuant to an order of this Court under Rule 2004, it was clearly not for the Debtors to decide how to reform the Court’s order and to command JPMC to comply with that order. Debtors should be required to seek such discovery in accord with the guidelines provided by the Federal Rules of Civil Procedure, as incorporated by the Bankruptcy Rules, and Rule 2004.

### **CONCLUSION**

For the foregoing reasons, and for those set forth in its Opening Brief in support of the Reconsideration Motion, JPMC respectfully requests that the Court reconsider its Order granting the Debtors’ 2004 Motion and issue an Order denying that Motion in its revised form. The Court should also reject Debtors’ attempt to obtain Rule 2004 discovery from JPMC without authorization from the Court. *See* Fed. R. Bankr. Proc. 2004(a).

Dated: July 22, 2009  
Wilmington, Delaware

**LANDIS RATH & COBB LLP**



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# **EXHIBIT A**



# UNITED STATES BANKRUPTCY COURT

Southern

District of

New York

In re Washington Mutual, Inc., et al.

## SUBPOENA FOR RULE 2004 EXAMINATION

Case No.\* 08-12229 (MFW) (Bankr. D. Del.)

To: JP Morgan Chase Bank, N.A.  
One Chase Manhattan Plaza  
New York, NY 10005

Chapter 11

and its agent:  
CT Corporation NYC  
111 8th Avenue, 13th Floor  
New York, NY 10011

YOU ARE COMMANDED to appear and testify at an examination under Rule 2004, Federal Rules of Bankruptcy Procedure, at the place, date, and time specified below. A copy of the court order authorizing the examination is attached.

PLACE OF TESTIMONY

DATE AND TIME

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See attached schedule.

PLACE

Quinn Emanuel Urquhart Oliver & Hedges, LLP  
51 Madison Avenue  
New York NY 10010

DATE AND TIME

August 1, 2009 at 5:00 p.m.

ISSUING OFFICER SIGNATURE AND TITLE



DATE

7/2/09

ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER

Harrison Denman; address same as above; telephone no. (212) 849-7347

\* If the bankruptcy case is pending in a district other than the district in which the subpoena is issued, state the district under the case number.

**PROOF OF SERVICE**

<b>SERVED</b>	DATE	PLACE
SERVED ON (PRINT NAME)	MANNER OF SERVICE	
SERVED BY (PRINT NAME)	TITLE	

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____	SIGNATURE OF SERVER _____
DATE	
	ADDRESS OF SERVER _____

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006, made applicable in cases under the Bankruptcy Code by Rule 9016, Federal Rules of Bankruptcy Procedure:

**(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject

to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

**(d) DUTIES IN RESPONDING TO SUBPOENA.**

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) **CONTEMPT.** Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

## EXHIBIT B

### FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

#### DEFINITIONS

The following terms (whether or not capitalized) shall have the meanings set forth below:

1. "Adversary Proceeding" refers to *JPMorgan Chase Bank, National Association v. Washington Mutual, Inc., et al.*, Adversary Proceeding No. 09-50551 (Bankr. D. Del.).
2. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
3. "Any," "all" and "each" shall be construed broadly, and shall mean , any, all, and each as necessary to bring within the scope of the discovery request all responses that otherwise could be construed to be outside of its scope.
4. "Communication" means any oral, written or electronic transmission of information, fact, opinion, belief, idea, statement, inquiry or otherwise, including without limitation any letter, correspondence, memorandum, electronic-mail message, note or meeting log, conversation, meeting, discussion, telephone call, facsimile, telegram, telex, conference or message.
5. "Concerning" means comprising, consisting of, concerning, referring to, reflecting, regarding, supporting, evidencing, relating to, prepared in connection with, used in preparation for, or being in any way legally, logically or factually concerned with the matter or document described, referred to or discussed.
6. "Document" is used in its broadest sense and mean and include any written or graphic matter or other means of preserving thought or expression and all tangible things from which information can be processed or transcribed, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copy or otherwise, including but not limited to, correspondence, memoranda, notes, messages, letters,

telegrams, teletype, telefax, bulletins, meetings or other communications, interoffice and intraoffice telephone calls, diaries, chronological data, minutes, books, reports, studies, summaries, pamphlets, bulletins, printed matter, charts, ledgers, invoices, worksheets, receipts, returns, computer printouts, prospectuses, financial statements, schedules, affidavits, contracts, cancelled checks, statements, transcripts, statistics, surveys, magazine or newspaper articles, releases (and any and all drafts, alterations and modifications, changes and amendments of any of the foregoing), graphic or aural records or representations of any kind (including without limitation photographs, microfiche, microfilm, videotape, records and motion pictures) and electronic, mechanical or electric records or representations of any kind (including without limitation tapes, cassettes, discs and records).

7. "FDIC" means or refers to the Federal Deposit Insurance Corporation, as receiver for Washington Mutual Bank, Henderson Nevada and in its corporate capacity.

8. "Governmental Unit" has the meaning set forth at 11 U.S.C. § 101(27).

9. "Including" means including but not limited to the referenced subject.

10. "JPMC" means JPMorgan Chase Bank, National Association and JPMorgan Chase & Co., and any of their current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting or purporting to act on its behalf, any of its parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

11. "Texas Action" refers to *American Nat'l Ins. Co., et al., v. JPMorgan Chase & Co., et al.*, Case No. 3:09-cv-00044 (S.D. Tex.).

12. "Washington Mutual" means or refers to WMI and WMB, and any and all of their current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting or purporting to act on their behalf, any of their parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

13. "WMB" means or refers to Washington Mutual Bank, Henderson, Nevada, and any and all of its current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting or purporting to act on its behalf, any of its parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

14. "WMB fsb" means or refers to Washington Mutual Bank, fsb, Utah, and any and all of its current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting or purporting to act on its behalf, any of its parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

15. "WMI" means or refers to Washington Mutual, Inc. and WMI Investment Corp. (collectively, the "Debtors") and any and all of their current or former officers, directors, employees, shareholders, agents, staff, attorneys, accountants, outside consultants, representatives and other persons acting or purporting to act on their behalf, any of their parent corporations, holding companies, subsidiaries, affiliates, divisions, departments, predecessors and/or successors-in-interest.

16. "OTS" means or refers to the Office of Thrift Supervision.

17. "P&A Agreement" means or refers to the Purchase and Assumption Agreement, Whole Bank, among the Federal Deposit Insurance Corporation, as receiver of Washington Mutual Bank, Henderson, Nevada, the Federal Deposit Insurance Corporation and JPM, dated as of September 25, 2008.

18. "Petition Date" means or refers to September 26, 2008.

19. "Purchase Price" means the approximately \$1.9 billion JPMC paid to the FDIC for the assets of WMB.

20. "Transaction" means or refers to any means by which JPMorgan Chase might obtain, receive or succeed to Washington Mutual's businesses or properties, or any portion thereof, or any transaction preliminary, preparatory or incident thereto, including any stock

tender, stock purchase, asset purchase, assumption of deposit or other liabilities, merger, joint venture or partnership.

21. Any ambiguity in a discovery request shall be construed to bring within the scope of the discovery request all responses that otherwise could be construed to be outside of its scope.

### **INSTRUCTIONS**

Each response must be made in accordance with the following instructions:

1. The responsive documents should be produced in the manner prescribed by the Federal Rules of Civil Procedure, as made applicable herein by the Federal Rules of Bankruptcy Procedure, including producing the requested documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the requests, and identifying the name of the person from whose files the documents were produced.
2. You are to produce the original and all non-identical copies, including all drafts, of each document requested. If you are not able to produce the original of any document, please produce the best available copy and all non-identical copies, including drafts.
3. Each request herein extends to all documents and communications in the possession, custody or control of you or anyone acting on your behalf. A document is deemed to be in your possession, custody, or control if it is in your physical custody, or if it is in the physical custody of any other person and you: (1) own such document in whole or in part; (2) have a right, by contract, statute or otherwise, to use, inspect, examine or copy such document on any terms; (3) have an understanding, express or implied, that you may use, inspect, examine, or copy such document on any terms; or (4) as a practical matter, have been able to use, inspect, examine, or copy such document when you sought to do so. If any requested document was, but no longer is, in your control, state the disposition of each such document.
4. Any reference in these document requests to an individual or person include any and all agents, advisors, employees, representatives, attorneys, successors-in-interest, and all other persons or entities acting in his, her, or its behalf or under his, her or its control.

5. If any document is withheld under any claim of privilege, including without limitation, attorney-client privilege and attorney work product, you should provide the following information with respect to such document:

- (1) The date of the document;
- (2) The title of the document;
- (3) The name of its author(s) or preparer(s) and an identification by employment and title of each such person;
- (4) The name of each person who was sent or furnished with, received, viewed or has custody of the document or a copy thereof together with an identification by employment and title of each such person;
- (5) The request to which the document relates;
- (6) The title and description of the document sufficient to identify it without revealing the information for which privilege is claimed;
- (7) The claim of privilege under which it is withheld; and
- (8) A description of the subject matter of the document in sufficient detail to support your contention that the document is privileged;

6. If, after exercising due diligence to secure them, you cannot provide some or any of the requested documents, so state and provide all documents to the extent possible, specifying the reason for your inability to produce the remainder of the documents, and stating whatever information or knowledge you have concerning each document not produced.

7. If any requested document or other document potentially relevant to this action is subject to destruction under any document retention or destruction program, the document(s) should be exempted from any scheduled destruction and should not be destroyed until the conclusion of this action or unless otherwise permitted by the Court.

8. If any document responsive to these requests is known to have existed and cannot now be located, or has been destroyed or discarded, set forth a complete statement of the circumstances surrounding such loss or destruction, including:

- (1) a description of the document, including the date, a summary of its contents and the identity of its author and the person(s) to whom it was sent or shown;
- (2) the last known custodian;
- (3) whether the document is missing or lost or was destroyed or discarded;
- (4) the date of loss, destruction or discard;
- (5) the manner of destruction or discard;
- (6) the reason(s) for destruction or discard;
- (7) the person(s) authorizing or carrying out such destruction or discard; and
- (8) the efforts made to locate lost or misplaced documents.

9. If an objection is made to any request, state your objection and the ground or grounds with particularity in your written response. If an objection is made only to part of the request, identify that part in your written response and state your objection and the ground(s) therefor.

10. Each request shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. Any request propounded in the singular shall also be read as if propounded in the plural and vice versa. Any request propounded in the present tense shall also be read as if propounded in the past tense and vice versa.

11. This request is a continuing one. If, after producing the requested documents, you obtain or become aware of any further documents responsive to this request, you are required to produce such additional documents. Supplemental responses should be served within thirty (30) days after such information or documents become known to you.

12. Unless otherwise specified, the time period covered by these requests is from January 1, 2004 to the present and shall encompass all documents and information relating in



whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated or received prior to that date.

### **REQUESTS FOR PRODUCTION OF DOCUMENTS**

The Debtors request that JPMC produce the following documents in its possession, custody or control:

1. All documents concerning any agreement between JPMC and Washington Mutual concerning access to and/or disclosure of non-public, confidential or proprietary information in connection with any potential Transaction in 2008.
2. All documents concerning JPMC's disclosure of Washington Mutual's non-public, confidential or proprietary information to third parties, including but not limited to disclosure of such information to third parties to secure financing or raise capital in connection with any potential Transaction.
3. All documents concerning any communications with any Governmental Unit regarding non-public, confidential or proprietary information related to Washington Mutual, including but not limited to JPMC's receipt of non-public, confidential or proprietary information concerning Washington Mutual.
4. Documents sufficient to identify JPMC's company policies and procedures concerning the protection or disclosure of non-public, confidential or proprietary information.
5. All documents concerning JPMC's interest in any potential Transaction.
6. All documents concerning any attempt by JPMC to engage in any Transaction in the spring and summer of 2008, including but not limited to JPMC's bid to merge with, purchase, or acquire Washington Mutual in or about April 2008.
7. All documents concerning any communications between JPMC and Washington Mutual concerning JPMC's interest in any potential Transaction in the spring and summer of 2008.

8. All documents concerning any communications between JPMC and any third party, concerning JPMC's interest in any potential Transaction in the spring and summer of 2008, including any communications with the FDIC or any other Governmental Unit.

9. All documents concerning any due diligence performed by JPMC in connection with its interest in any potential Transaction in 2008.

10. All documents concerning any attempt by JPMC to engage in any potential Transaction in or about September 2008, including but not limited to any bid or offer by JPMC to merge with, invest in, or purchase Washington Mutual in or about September 2008.

11. All documents concerning capital contributions or investments received by JPMC in connection with any potential Transaction in or about September 2008.

12. All documents concerning any communications between JPMC and the media, including but not limited to The Wall Street Journal, any other print, on-line, broadcast, or cable news outlet, related to Washington Mutual, including but not limited to Washington Mutual's financial status, assets, and liabilities.

13. All documents concerning any communications between JPMC and any Governmental Unit concerning the seizure and/or sale of Washington Mutual, including but not limited to communications with the US Department of the Treasury, the FDIC, and/or the OTS.

14. All documents concerning actions considered or taken by any Governmental Unit concerning Washington Mutual, including but not limited to the seizure of WMB by the OTS and the appointment of FDIC as receiver.

15. All documents concerning any agreement or arrangement between JPMC and any Governmental Unit concerning any potential Transaction or Transaction on or prior to September 25, 2008, including but not limited to any agreement or arrangement with the OTS and/or FDIC.

16. All documents concerning any communications between JPMC and any Governmental Unit concerning any Transaction on September 25, 2008.

17. Documents sufficient to identify the names of all persons who negotiated on behalf of JPMC in connection with entering into the P&A Agreement.

18. Documents sufficient to show JPMC's weighted average cost of capital, including but not limited to JPMC's cost of debt, cost of equity, yield on outstanding debt and the weighted average cost of capital for any loan or other financing obtained by JPMC.

19. All documents concerning any investigations by federal, state or municipal government bodies of JPMC related to its acquisition of the assets of WMB.

20. All documents concerning any lawsuit or other legal action brought against JPMC related to its acquisition of the assets of WMB.

21. All documents concerning JPMC's placement of former JPMC employees at Washington Mutual, including but not limited to, the placement or employment of Stephen J. Rotella, Steve Fortunato, Taj Bindra, John Berens, Youyi Chen and Bill Murray.

22. All documents concerning the disclosure of any of Washington Mutual's non-public, confidential or proprietary information by former JPMC employees working at Washington Mutual, including but not limited to Stephen J. Rotella, Steve Fortunato, Taj Bindra, John Berens, Youyi Chen and Bill Murray.

23. To the extent not otherwise covered by these requests, all documents produced in the Texas Action that relate to Washington Mutual.

# **EXHIBIT B**

# SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000  
FACSIMILE: 1-212-558-3588  
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*125 Broad Street*  
*New York, NY 10004-2498*

LOS ANGELES • PALO ALTO • WASHINGTON, D.C.

FRANKFURT • LONDON • PARIS

BEIJING • HONG KONG • TOKYO

MELBOURNE • SYDNEY

July 6, 2009

Via E-mail and U.S. Mail

Michael B. Carlinsky  
Quinn Emanuel  
51 Madison Avenue, 22nd Floor  
New York, New York 10010

Adam P. Strochak  
Weil, Gotshal & Manges LLP  
1300 Eye Street, N.W.  
Washington, D.C. 20005

Re: *Washington Mutual, Inc. v. F.D.I.C.*,  
No. 1:09-cv-0533 (RMC) (D.D.C.)

*Washington Mutual, Inc. v. JPMorgan Chase Bank, N.A.*,  
Adv. Pro. No. 09-50934 (MFW)(Bankr. D. Del.)

*JPMorgan Chase Bank, N.A. v. Washington Mutual, Inc.*,  
Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del.)

Dear Mike and Adam:

I write on behalf of JPMorgan Chase Bank, National Association (“JPMC”) with regard to discovery in the above actions. In anticipation of our meet and confer scheduled for tomorrow, we enclose a revised scheduling order that, among other things, addresses a request your client made directly to JPMC regarding an extension of the Information Access Agreement dated November 21, 2009 (the “IAA Agreement”). We have conferred with counsel for the Federal Deposit Insurance Corporation regarding this schedule.

As you will see, the proposed scheduling order provides for document discovery to proceed in accordance with the IAA Agreement. With regard to your

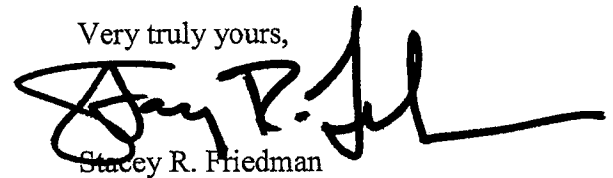
Michael B. Carlinsky  
Adam P. Stochak

-2-

client's request that the IAA Agreement be extended for other purposes, that request should have been directed to us given our earlier request that any amendment of the IAA Agreement should be part of a coordinated discovery plan. JPMC would nonetheless be amenable to extension of that agreement through December 1, 2009, provided that the IAA Agreement is amended to make clear that it applies only to, and will be used only for, information that the Parties agree is not relevant to or otherwise discoverable in the actions listed above, any action resulting from the withdraw of the reference, or any other litigation between the parties.

As for the revised discovery requests dated July 2, 2009 (the "Revised Requests"), as we suggested on last week's call, we are prepared to treat that as a properly served first request for documents to JPMC in the actions pending before Judge Walrath and to respond, subject to objections interposed. If, however, there are additional documents Debtors intend to seek from JPMC, you should further supplement the Revised Requests by July 9, 2009, to ensure the parties pursue that discovery in the efficient and coordinated manner that the rules contemplate. To the extent that Debtors stand on the Revised Requests as their first requests for documents from JPMC, JPMC intends to object to future requests that could have been propounded at this time that require collection or review of documents from the same custodians and sources reviewed in connection with the Revised Requests. Such efforts would result in needless duplication and expense and it is incumbent on all the parties to avoid this result. Likewise, with regard to depositions, the parties need to use best efforts to ensure that no witness is deposed more than once in any of the related proceedings. The enclosed proposed scheduling order addresses both of these points.

Very truly yours,



Stacey R. Friedman

(Enclosure)

cc: Thomas R. Califano  
John J. Clarke  
David Clarke, Jr.  
(DLA Piper LLP)

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

<i>In re</i>	x	
	:	CHAPTER 11
	:	
WASHINGTON MUTUAL, INC., <i>et al.</i> , <sup>1</sup>	:	Case No. 08-12229 (MFW)
<i>Debtors</i>	:	
	:	Jointly Administered
	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
<i>Plaintiff,</i>	:	
v.	:	
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	Adv. Proc. No. 09-50551 (MFW)
<i>Defendants for all claims,</i>	:	
-and-	:	
FEDERAL DEPOSIT INSURANCE CORPORATION,	:	
<i>Additional Defendant</i>	:	
<i>for Interpleader Claim</i>	:	
	x	

(Caption continued on next page)

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<sup>1</sup> Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (a) Washington Mutual, Inc. (3725); and (b) WMI Investment Corp. (5395). Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.

_____	X	
WASHINGTON MUTUAL, INC. AND	:	
WMI INVESTMENT CORP.,	:	
	:	
<i>Plaintiffs,</i>	:	
	:	Adv. Proc. No. 09-50934 (MFW)
v.	:	
JPMORGAN CHASE BANK, NATIONAL	:	
ASSOCIATION,	:	
	:	
<i>Defendant.</i>	:	
_____	X	

**[PROPOSED] SCHEDULING ORDER**

To promote the efficient and expeditious disposition of the adversary proceedings, the following schedule shall apply to the above-captioned adversary proceedings.

**IT IS HEREBY ORDERED** that:

1.     **Discovery Planning Conference:** The discovery planning conference described in Fed. R. Civ. P. 26(f), made applicable by Fed. R. Bankr. P. 7026, shall take place no later than fourteen (14) days after entry of this Order.
  
2.     **Initial Disclosures:** The parties agree to waive the requirement of initial disclosures.
  
3.     **Confidential Information and Papers Filed Under Seal:** Within fourteen (14) days from entry of this Order, counsel shall present to the Court a protective order specifying terms and conditions for the disclosure of confidential information.
  
4.     **Discovery:** All discovery in the above captioned actions or this proceeding shall proceed in accordance with applicable Federal Rules of Bankruptcy



Procedure. Federal Rules of Civil Procedure, and Local Rules, except as otherwise ordered by the Court or as specified below:

- (a) Debtors' discovery requests dated July 2, 2009, as supplemented by July 9, 2009, shall be deemed Debtors' first request for documents to JPMorgan Chase Bank, National Association ("JPMC").
- (b) All documents available to Debtors pursuant to the Information Access Agreement with JPMC, dated as of November 21, 2008 (the "JPMC Agreement"), shall be made available to Debtors under the same terms and conditions set forth in the JPMC Agreement, for the purpose of document discovery in this action.
- (c) All documents available to Debtors pursuant to the Information Access Agreement with Federal Deposit Insurance Corporation, dated as of November 19, 2008 (the "FDIC Agreement"), shall be made available to Debtors under the same terms and conditions set forth in the FDIC Agreement, for the purpose of document discovery in this action.
- (d) All discovery in this action shall be coordinated with discovery in the action pending in the District Court for the District of Columbia, captioned *Washington Mutual, Inc. v. F.D.I.C.*, No. 1:09-cv-0533 (RMC) (D.D.C.) (the "D.C. Action") or in any litigation arising from the withdraw of the reference for the above-caption matters.
- (e) Parties shall use their best efforts to ensure that any witness deposed in the above-caption actions, in the D.C. action and in any litigation arising from the withdraw of the reference for the above-caption matters (the "Related Proceedings") is deposed once in connection with the Related Proceedings.
- (f) In accordance with Federal Rule of Evidence 502(d), the parties agree that disclosure to any party of the information that otherwise is subject to a legally recognized privilege or immunity from discovery shall not be construed as a waiver of any such privilege or immunity. If a party receives or is provided access to information that is either (i) subject to a good faith claim of privilege or (ii) upon reasonable review appear to be subject to a legally recognized privilege, the receiving party shall provide immediate notice to providing party, shall not review the

apparently privileged information, and shall return any materials containing privileged information.

5. **Expert Reports**: Affirmative expert reports shall be served on or before January 22, 2010. Rebuttal expert reports, if any, shall be served on or before February 22, 2010. All expert discovery shall be completed by March 22, 2010.

6. **Dispositive Motions**: All dispositive motions shall be filed and served no later than April 23, 2010 and shall be subject to Rule 7007-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware. Any briefs in opposition to such dispositive motions shall be served and filed no later than May 21, 2010. Reply briefs in further support of such motions, if any, shall be served and filed no later than June 18, 2010.

7. **Applications by Motion**: Except as provided in this Scheduling Order or for matters relating to scheduling, any application to the Court shall be by written motion filed via electronic means (CM/ECF).

8. **Pretrial Conference**: On August 18, 2010, beginning at 9:30 a.m., the Court will hold a Pretrial Conference, at which the parties shall submit a Joint Pretrial Memorandum that satisfies the pretrial disclosure requirements of Fed. R. Civ. P. 26(a)(3). On June 23, 2010, plaintiff shall forward to defendants a draft of the Joint Pretrial Memorandum containing the information plaintiff proposes to include in the draft. That same day, both parties shall exchange exhibit lists, witness lists, deposition designations, and, for issues on which a party bears the burden of proof, issues of fact and law to be litigated. On July 21, 2010, defendants shall, provide to plaintiff any comments on plaintiff's draft Joint Pretrial Memorandum, as well as the information defendants

propose to include in the proposed Joint Pretrial Memorandum. On August 4, 2010, both parties shall exchange objections to exhibit lists, objections to deposition designations, and deposition counter-designations.

Counsel for plaintiff shall be responsible for the assembly and timely filing and submission of the Joint Pretrial Memorandum to the Court. All counsel are expected to make a diligent effort to ensure that the Joint Pretrial Memorandum is complete in all respects, and that all unresolved issues are fully, completely, and adequately disclosed therein.

9. **Motions in Limine**: Opening briefs on motions *in limine* shall be served and filed on or before September 1, 2010. Answering briefs shall be served and filed on or before September 15, 2010. Reply briefs shall be served and filed on or before September 29, 2010. Opening and answering briefs shall not exceed five (5) pages and reply briefs shall not exceed three (3) pages.

10. **Trial**: At the time of the Pretrial Conference, this matter shall be scheduled for trial as soon as practicable thereafter subject to the Court's calendar.

Dated: July \_\_, 2009  
Wilmington, Delaware

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MARY F. WALRATH  
UNITED STATES BANKRUPTCY JUDGE