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
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	Adversary Proceeding No. 09-50934 (MFW)
Plaintiffs and Counterclaim Defendants,	:	**APPENDIX IN SUPPORT OF DEFENDANT JPMORGAN CHASE BANK, NATIONAL ASSOCIATION'S ANSWERING BRIEF TO DEBTORS' MOTION TO DISMISS AMENDED COUNTERCLAIMS**
v.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Defendant and Counterclaimant.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Cross-Claimant,	:	
v.	:	
FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Washington Mutual Bank, Henderson, Nevada,	:	
Cross-Claim Defendant.	:	

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

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In re	:	Chapter 11
WASHINGTON MUTUAL, INC., *et al.*,[1]	:	Case No. 08-12229 (MFW)
Debtors.	:	Jointly Administered
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	Adversary Proceeding No. 09-50934 (MFW)
Plaintiffs and Counterclaim Defendants,	:	**DECLARATION OF STACEY R. FRIEDMAN**
v.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Defendant and Counterclaimant.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Cross-Claimant,	:	
v.	:	
FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Washington Mutual Bank, Henderson, Nevada,	:	
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[1] The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395). The Debtors continue to share the principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.

I, STACEY R. FRIEDMAN, declare under penalty of perjury as follows:

1. I am a member of the bar of the State of New York and a member of the law firm of Sullivan & Cromwell LLP. I am counsel for Defendant JPMorgan Chase Bank, National Association ("JPMC") in this action and I have been admitted *pro hac vice* to appear on behalf of JPMC in these proceedings. I submit this declaration in support of JPMC's Answering Brief to Debtors' Motion to Dismiss Amended Counterclaims.

2. Attached hereto as Exhibit A is a true and correct copy of the Proof of Claim of JPMorgan Chase Bank, National Association, filed in *In re Washington Mutual, Inc. et al.*, No. 08-12229 (MFW) (Bankr. D. Del.), on March 30, 2009.

3. Attached hereto as Exhibit B is a true and correct copy of the Proof of Claim of the FDIC, filed in *In re Washington Mutual, Inc. et al.*, No. 08-12229 (MFW) (Bankr. D. Del.), on March 30, 2009.

4. Attached hereto as Exhibit C is a true and correct copy of the Proof of Claim of Washington Mutual Bondholders, filed in *In re Washington Mutual, Inc. et al.*, No. 08-12229 (MFW) (Bankr. D. Del.), on March 31, 2009

5. Attached hereto as Exhibit D is a true and correct copy of the Complaint filed in *Washington Mutual, Inc. et al.* v. *JPMorgan Chase Bank, N.A.*, Adv. No. 09-50934 (MFW) (Bankr. D. Del.), on April 27, 2009.

6. Attached hereto as Exhibit E is a true and correct copy of the Debtors' Answer and Counterclaims in Response to the Complaint of JPMorgan

Chase Bank, N.A. filed in *JPMorgan Chase Bank, N.A.* v. *Washington Mutual, Inc. et al.,* Adv. No. 09-50551 (MFW) (Bankr. D. Del.), on May 29, 2009.

7. Attached hereto as Exhibit F is a true and correct copy of the Transcript of Hearing Before the Honorable Mary F. Walrath in *Washington Mutual, Inc. et al.* v. *JPMorgan Chase Bank, N.A.*, Adv. No. 09-50934 (MFW) (Bankr. D. Del.), dated June 24, 2009.

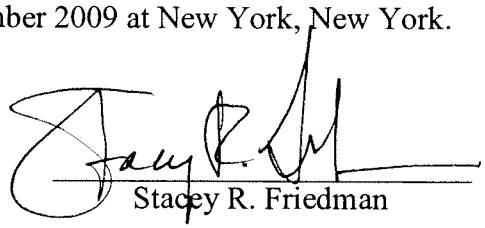
8. Attached hereto as Exhibit G is a true and correct copy of the JPMorgan Chase Bank, N.A.'s Statement in Support of Appeal Under the Collateral Order Doctrine Or, in the Alternative, Brief in Support of its Motion for Leave to Appeal filed in *Washington Mutual, Inc. et al.* v. *JPMorgan Chase Bank, N.A.*, Adv. No. 09-50934 (MFW) (Bankr. D. Del.), on July 10, 2009

9. Attached hereto as Exhibit H is a true and correct copy of the Transcript of Proceedings Before the Honorable Brendan L. Shannon in *Washington Mutual, Inc. et al.* v. *JPMorgan Chase Bank, N.A.*, Adv. No. 09-50934 (MFW) (Bankr. D. Del.), dated July 27, 2009.

10. Attached hereto as Exhibit I is a true and correct copy of the Answer and Amended Counterclaims/Cross-Claim of JPMorgan Chase Bank, National Association filed in *Washington Mutual, Inc. et al.* v. *JPMorgan Chase Bank, N.A.*, Adv. No. 09-50934 (MFW) (Bankr. D. Del.), on August 10, 2009.

11. Attached hereto as Exhibit J is a true and correct copy of the Transcript of Omnibus Hearing Before Honorable Mary F. Walrath in *In re Washington Mutual, Inc.*, Case No. 08-12229 (MFW) (Bankr. D. Del.), dated August 24, 2009.

I hereby declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of September 2009 at New York, New York.



Stacey R. Friedman

United States Bankruptcy Court District of Delaware	**PROOF OF CLAIM**

Name of Debtor *(check only one)*:
☒ Washington Mutual, Inc. 08-12229 (MFW) ☐ WMI Investment Corp. 08-12228 (MFW)

Name and address of Creditor (and name and address where notices should be sent if different from Creditor):

JPMorgan Chase Bank, National Association
c/o Hydee R. Feldstein
Sullivan & Cromwell LLP
1888 Century Park East
Los Angeles, California 90067-1725
310.712.6600
feldsteinh@sullcrom.com

With a copy to:

JPMorgan Chase Bank, National Association
c/o Kevin G. Mruk
10 South Dearborn, Mail Code IL1-0080
Chicago, Illinois 60603-2003
312.732.7105
kevin.g.mruk@jpmchase.com

☐ **Check this box to indicate that this claim amends a previously filed claim.**

Court Claim Number: _____
(If known)

Filed on: _____

Your Claim Is Scheduled as Follows:

COPY

Name and address where payment should be sent (if different from above):

JPMorgan Chase Bank, National Association
c/o Joseph A. Giampapa
1111 Polaris Parkway, 4P0265
Columbus, Ohio 43271-0152
614.248.6056
joseph.a.giampapa@jpmchase.com

☐ **Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.**

☐ **Check this box if you are the debtor or trustee in this case.**

You have a claim scheduled against the Debtor listed above in the amount and priority set forth above. (This scheduled amount may be an amendment to a previously scheduled amount.) If you agree that you have a claim against the Debtor listed above and in the amount and priority set forth above and you have no other claim against that Debtor, you do not need to file this proof of claim form, EXCEPT AS FOLLOWS: If the amount shown is DISPUTED, UNLIQUIDATED or CONTINGENT, a proof of claim MUST be filed in order to receive any distribution in respect of your claim. If you have already filed a proof of claim in accordance with the attached instructions, you need not file again.

1. Type of Claim:
☒ Claim existing as of the date case was filed. **Amount of Claim as of Date Case Filed:** $ See Attachment A.
If all or part of your claim is secured, complete Item 4 below; however, if all of your claim is unsecured, do not complete item 4.
If all or part of your claim is entitled to priority (other than under 11 U.S.C. § 507(a)(2)), complete Item 5.
☐ Check this box if claim is filed by a governmental unit.
☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of interest or additional charges.

2. Basis for Claim: See Attachment A.
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: Federal Tax ID Number 3725

3a. Debtor may have scheduled account as: _____
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.) See Attachment A.
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.
Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☒ Other
Describe: See Attachment A.
Value of Property: $ See Attachment A. Annual Interest Rate ____ %
Amount of arrearage and other charges as of time case filed included in secured claim, if any:
$ See Attachment A. Basis for perfection: See Attachment A.
Amount of Secured Claim: $ See Attachment A. **Amount of Unsecured:** $ See Attachment A.

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.
Specify the priority of the claim:
☐ Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).
☐ Wages, salaries or commissions (up to $10,950), earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier under 11 U.S.C. § 507(a)(4).
☐ Contributions to an employee benefit plan under 11 U.S.C. § 507(a)(5).
☐ Up to $2,425 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use under 11 U.S.C. § 507(a)(7).
☐ Taxes or penalties owed to governmental units under 11 U.S.C. § 507(a)(8).
☐ Other – Specify applicable paragraph of 11 U.S.C. § 507(a)(____).
Amount entitled to priority:
$_____

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. *(See definition of "redacted" on reverse side.)* **DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.**
If the documents are not available, please explain:

FOR COURT USE ONLY

RECEIVED
MAR 30 2009
KURTZMAN CARSON CONSULTANTS

Date:
March 30, 2009

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

Donald H. McCree III, Managing Director
JPMorgan Chase Bank, National Association
270 N. Park Ave., Floor 46
New York, New York 10017-2104; 212-270-4360

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

ATTACHMENT A

Intercompany Deposit Accounts

On September 26, 2008 (the "Petition Date"), Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment") filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). References herein to the "Debtor" or "Debtors" are intended to refer to WMI and WMI Investment Corp. as debtors and debtors-in-possession in their pending Chapter 11 cases. Prior to the Petition Date, on September 25, 2008, the Director of the Office of Thrift Supervision (the "OTS") appointed the Federal Deposit Insurance Corporation (the "FDIC") as receiver (the "Receiver") for Washington Mutual Bank, Henderson, Nevada, a federal savings banking association ("WMB"), a subsidiary of the Debtors, and advised that the Receiver was immediately taking possession of WMB. On September 25, 2008, the FDIC, as Receiver and in its corporate capacity, also entered into a Purchase and Assumption Agreement Whole Bank (the "P&A Agreement") with JPMorgan Chase Bank, National Association ("JPMCB"), whereby JPMCB acquired substantially all of the assets of WMB's banking operations, including one of its subsidiaries, Washington Mutual Bank fsb ("WMBfsb" and collectively with WMB, the "Affiliated Banks"), and assumed the deposit liabilities and certain other liabilities of WMB's banking operations. The Affiliated Banks also had a number of direct and indirect subsidiaries that are now subsidiaries of or have been merged into JPMCB or one of its subsidiaries or affiliates. JPMCB asserts its claims herein on behalf of itself and its subsidiaries and affiliates. JPMCB believes that its claims are against WMI rather than WMI Investment, but because the intercompany relationships between the Debtors are not clear and because these are jointly administered cases, JPMCB files its claims against both Debtors out of an abundance of caution.

Although JPMCB purchased the assets of WMB, the Debtors have wrongfully refused to acknowledge that purchase in material respects, and have interfered with JPMCB's ability to use and enjoy the benefits of its purchase of those assets. On March 20, 2009, the Debtors jointly filed a complaint before the United States District Court for the District of Columbia (the "District Court") placing at issue a number of the claims and assets JPMCB acquired from the FDIC under the P&A Agreement (the "District Court Action"). On March 24, 2009, JPMCB filed its Complaint commencing Adversary Proceeding No. 09-50551-MFW (the "Adversary Proceeding") before the Bankruptcy Court seeking, among other things, declaratory relief regarding a number of the assets at issue in the District Court Action and to interplead any amounts that may be due from JPMCB to the Debtors. On March 30, 2009, JPMCB moved to intervene in the District Court Action.

JPMCB is submitting this and certain other proofs of claim to preserve JPMCB's right to distributions from the estate for (a) any amounts awarded as monetary damages to JPMCB in the District Court Action or the Adversary Proceeding; (b) the amounts paid or contributed by WMB or its subsidiaries on or prior to the Petition Date for the acquisition, creation or maintenance of various identified assets, including the assets at issue in the Adversary Proceeding; and (c) the amounts paid or contributed by JPMCB after the Petition Date on account of the assets at issue in the Adversary Proceeding or otherwise for costs and expenses arising on account of or relating to such estates, including without limitation, payments to or for

the benefit of participants in the pension, 401(k) and other benefit plans at issue. This claim, together with certain of the other claims of JPMCB that are filed in these Chapter 11 cases, is filed as (1) a secured claim under section 506(a) to the extent of any liabilities of JPMCB or any of its subsidiaries or affiliates to the Debtors or to the extent JPMCB or any of its subsidiaries or affiliates is secured, possesses a lien, or is entitled to a lien under contract, applicable non-bankruptcy law, or equity; (2) an administrative claim under section 503(b) for amounts paid by JPMCB or its subsidiaries, or damages to JPMCB resulting from acts or omissions of the Debtors, on or after the Petition Date; (3) a priority claim to the extent specified in each individual proof of claim; and (4) a general unsecured claim to the extent it is not deemed to be entitled to secured, priority or administrative status.

JPMCB believes that with respect to the assets at issue in the District Court Action or the Adversary Proceeding, ownership will be determined by the District Court or the Bankruptcy Court in those actions, as applicable. JPMCB hereby reserves all of its rights and remedies against the Debtors, including the right to continue the District Court Action and the Adversary Proceeding, to commence other actions or proceedings, to seek allowance and payment of administrative claims and amounts by application, motion or other appropriate proceeding before the Bankruptcy Court at any time, to request and seek adequate protection of JPMCB's interest in property, to seek relief from and request the lifting of the stay at any time, whether to permit the exercise of its rights of setoff, recoupment or other remedies or otherwise.

On the Petition Date, WMI claimed a total purported deposit liability of approximately $4,358,492,498 (the "Intercompany Amounts") identified on the books of the Affiliated Banks and associated with twenty-nine different account numbers in the name of WMI or one of its non-bank subsidiaries (the "Accounts"). According to WMI, the Intercompany Amounts represented deposits maintained by WMI and its non-banking subsidiaries at the Affiliated Banks, all as non-interest bearing demand deposit accounts. With the exception of signature cards for several of the smaller Accounts, JPMC has not located and believes there do not exist pre-petition any deposit account agreements, signature cards or any other documentation for the Accounts as deposit accounts.

On or about October 15, 2008, JPMCB and the Debtors entered into a stipulation with respect to the Accounts (the "Account Stipulation") that was filed with the Bankruptcy Court for approval. The Account Stipulation was ultimately withdrawn following objections filed by certain creditors of the Receivership and the FDIC and was never entered by the Bankruptcy Court. Pursuant to the Account Stipulation, and before it was withdrawn, JPMCB and the Debtors executed customary deposit account agreements regarding the Accounts on or about October 21, 2008 that provided, among other things, customary rights of setoff, recoupment and banker's liens to secure JPMCB's rights to recover claims JPMCB may have against the Debtors or their subsidiaries and affiliates from the funds in the Accounts. After the execution of the customary account agreement documents, JPMCB acceded to a request of the Debtors and the Official Committee of Unsecured Creditors (the "Committee") to agree to the accrual of interest on the Intercompany Amounts as a sign of good faith in the event that it were ultimately determined that any of the Intercompany Amounts were in fact deposit accounts, without prejudice to its rights. Similarly, JPMCB agreed to release $292 million of the Intercompany Amounts attributable to the Accounts of the non-debtor subsidiaries of WMI, without prejudice to its rights.

JPMCB agreed to those requests from the Debtors in good faith and on the understanding that the parties were working diligently to resolve open questions and issues with respect to the Intercompany Amounts. It did so in reliance on the Debtors' execution of account documentation for the Accounts that protected the interests of JPMCB, and on the understanding that the Debtors would respect those rights. However, on or about December 19, 2008, after obtaining from JPMCB the benefit of these concessions, the Debtors advised JPMCB that the execution of those deposit account agreements, was only in anticipation of the proposed Account Stipulation and, since that stipulation had never been approved, the execution and delivery of the agreements was in error, unauthorized and considered by the Debtors to be null, void and without legal effect. While JPMCB does not dispute that the Account Stipulation was never ordered, to the extent that such documentation is not effective, it should be ineffective for all parties and for all purposes, including the effectiveness of any post-petition book entries reflecting any portion of the Intercompany Amounts or Accounts as deposit liabilities and the release of any funds to the Debtors or their non-Debtor affiliates.

Deposit Liabilities

JPMCB still has not discovered any pre-petition deposit account agreements, signature cards or other customary documentation for the Accounts as deposit accounts except for the few accounts described above, but to the extent the Intercompany Amounts in the Accounts assumed by JPMCB under the P&A are in fact deposit liabilities, WMI and its subsidiaries are expressly or otherwise bound by the standard terms and conditions for deposits at the Affiliated Bank. These Accounts were established by WMI or one of its non-bank subsidiaries at the Affiliated Banks pursuant to WMI's Internal Corporate Demand Deposit Account Establishment and Usage Policy (the "On-Us Policy"). According to that policy, WMB had the right to use the Intercompany Amounts for, among other things, processing and clearing transactions between WMB and WMI or their respective subsidiaries, customers, vendors, or investors, again raising the question of whether the Intercompany Amounts represented a continuing deposit liability or should be characterized as a capital contribution, a liquidity reserve or other form of intercompany advance to the Affiliated Banks.

WMI and the Affiliated Banks maintained a detailed, forty-page policy, named the Master Business Account Disclosures and Regulations (the "MBA Policy"), that operated as a contract setting forth the terms and conditions governing all deposit accounts established at the Affiliated Banks. The MBA Policy contained, among other things, a self-executing clause that made the terms of the policy binding upon all depositors, even those who did not expressly give permission, through consent implied by the opening and continued use of the deposit account. The MBA Policy and its terms and conditions apply to and govern any accounts that are in fact deposit accounts at the Affiliated Banks, including the Accounts to the extent any are deposit accounts. The MBA Policy expressly grants the Affiliated Banks a right to offset any and all claims against all deposit account liabilities. Specifically, the MBA Policy provides, "you agree we have the right to offset any account or asset of yours then held by us, by our sister bank, or any subsidiary of ours or our sister bank." Said differently, to the extent the Accounts and the Intercompany Amounts contained therein are deposit liabilities of the Affiliated Banks, the MBA Policy created a broad contractual right of setoff against the Accounts and the Intercompany Amounts for the benefit of the Affiliated Banks and their subsidiaries. Whether pursuant to the

MBA Policy or otherwise, under applicable law, JPMCB has a security interest in, lien rights against and rights of set off and recoupment against the Intercompany Amounts.

JPMCB's Express Security Interest

WMI entered into at least two security agreements with WMB, copies of which are attached hereto (the "Security Agreements"). Pursuant to the Security Agreements, WMI granted a security interest in and lien upon at least two accounts to WMB—Account No. 177-8911206 and Account No. 314-197966-3.

JPMCB believes that its secured claims against Account No. 177-8911206 exceed the balance therein. With respect to Account No. 314-197966-3, JPMCB is entitled to recover any amounts WMI may owe under that certain Indemnification and Collateral Account Pledge and Security Agreement, dated March 1, 2006 (the "Indemnification Agreement"), between WMI and WMB, pursuant to which WMI agreed to indemnify WMB and its subsidiaries for certain liabilities of Long Beach Mortgage Company, a Delaware corporation ("Long Beach"). At the time the parties entered into the Indemnification Agreement, Long Beach became a wholly owned subsidiary of WMB in a series of reorganization transactions. As a condition to its receipt of regulatory approval of the reorganization transactions, WMI indemnified WMB for certain future Long Beach liabilities and secured its indemnification obligations by establishing a blocked deposit account (the "Pledged Account") with WMB. WMI granted WMB a security interest in the Pledged Account and all deposits credited thereto, which JPMCB believes do not exceed $750,000.

The September $3.67 Billion Book Entry Transfer for Account No. 44100000064234

WMI has asserted that JPMCB is liable for a WMI deposit account allegedly maintained at WMB as of the Petition Date and identified as Account No. 44100000064234. It appears that neither WMBfsb nor JPMCB ever received cash or other funds at any time from or after the establishment of that account. Accordingly, even if that account were a deposit account, JPMCB is not liable therefor and is entitled to recover and recoup the full balance claimed for WMI's failure to deposit funds.

The Debtor has been receiving monthly statements reflecting the account due to its agreement to the terms of the Account Stipulation and the deposit agreements that provide JPMCB on behalf of itself and its affiliates and subsidiaries with broad post-petition lien rights and rights of set off and recoupment resulted in the entry of the $3.67 Billion Book Entry Transfer as a deposit liability on the books and records of JPMCB. Having executed the standard deposit agreements with JPMCB necessary to have this account reflected as a deposit at JPMCB, WMI should be estopped from taking the position that these account agreements were a mistake and not binding on it or from enjoying the benefit of having the Accounts reflected as deposit liabilities free of the lien and setoff rights created by those very same agreements. To the extent that any post-petition book entry is considered as relevant to the status of the purported deposit, any such resulting deposit should similarly be considered subject to the depository institution's rights, including post-petition contractual and statutory rights of setoff, that accompany the post-petition deposit.

The Tax Refunds in the Accounts

A substantial portion of the Intercompany Amounts were, at the time of the Receivership and the Petition Date, in fact the property of the Affiliated Banks, representing tax payments made by the Affiliated Banks either as (i) accelerated payments of amounts previously claimed by WMI against the Affiliated Banks purportedly for taxes paid in prior years by WMI on behalf of the Affiliated Banks; or (ii) amounts transferred to WMI in payment of estimated or actual 2008 taxes. JPMCB believes those payments totaled at least $922 million between August 19 and September 19, 2008.

In addition, after the Petition Date, an amount equal to at least $248 million of tax refunds due to WMB—the rights to which were purchased by JPMCB as assets of WMB (the "Tax Refunds Received")—were paid to WMI. An amount equal to at least approximately $234 million of the Tax Refunds Received are included in the balance of the Intercompany Amounts and the Accounts and should be paid over to JPMCB as the lawful owner of those funds.

The Tax Refunds Received should not have been, and at various times were not in fact, recorded in any way as a deposit liability. The Tax Refunds Received were and are property of JPMCB purchased under the P&A Agreement.

The following documents, all of which are attached to the Declaratory Relief Complaint are submitted in support of this claim:

- Exhibit A: List of the Accounts provided to JPMCB by WMI shortly after the Petition Date.
- Exhibit B: Account Stipulation, dated October 15, 2008, by and between JPMCB and the Debtors.
- Exhibit C: Deposit Account Agreements, dated on or about October 21, 2008, executed by Debtors for the Accounts.
- Exhibit D: WMI's Internal Corporate Demand Deposit Account Establishment and Usage Policy (the "On-Us Policy").
- Exhibit E: WaMu's Master Business Account Disclosures and Regulations (the "MBA Policy").
- Exhibit F: Security Agreement for Account No. 177-8911206.
- Exhibit G: General Ledger Journal Entry for $3.67 Billion Book Entry Transfer.
- Exhibit H: On-Us Elevation Reports for August, September and October of 2008.
- Exhibit I: Tax related support.

- Exhibit J: Form of Indemnification and Collateral Account Pledge and Security Agreement, dated March 1, 2006.

Assertion of this proof of claim, and any election, exercise or grant of any rights or remedies referred to, implied by or set forth in this claim does not, and is not intended to, preclude the election, exercise or grant of any other rights or remedies that may now or subsequently exist in law, in equity, by statute or otherwise. The identification or enumeration of JPMCB's rights and remedies set forth in this claim is not intended to be and should not be deemed to be exhaustive or to preclude JPMCB from asserting specific claims or counterclaims for as-yet unliquidated, unmatured or contingent claims currently known or unknown, including without limitation, indemnification, contribution, and/or reimbursement from the Debtors for any claims of third parties that may be asserted against JPMCB.

JPMCB reserves all rights to amend, augment, supplement, reduce or withdraw, in whole or in part, this proof of claim, including, without limitation, to: cure a defect in the original claim, correct the claim amount or priority status, include additional supporting documents, describe the claim in greater detail, add additional claims presently unknown to JPMCB that, if known, could have affected this claim or resulted in the assertion of additional damages. In addition, nothing herein shall be deemed to waive or otherwise affect the rights of any other person, including without limitation, the FDIC, to make claims similar to or parallel with this claim.

In some instances, supporting documents identified herein as relating to claims have not been submitted herewith because (i) the specific documents identified are voluminous and either believed to already be in the Debtors' possession, or of such quantity that their submission herewith would be administratively impracticable, (ii) such documents are subject to confidentiality restrictions or some other agreement or restriction binding on JPMCB that prevents their lawful inclusion in a filing of this nature without additional steps being taken to assure they are provided under seal or otherwise in compliance with law and any agreements binding on JPMCB, and (iii) of JPMCB's limited familiarity at this point in time with the extensive books and records of WMB acquired from the FDIC and time constraints resulting from the claims deadline. In each such case, JPMCB includes herein a detailed reference, and in some cases a description and summary, of documents identified to date by JPMCB on which the claim is based. Any party in interest seeking additional access to or copies of such documents or other related information may contact Cecelia Rodine at JPMorgan Chase & Co., Legal & Compliance Department, 1 Chase Manhattan Plaza, 25th Floor, Mail Code: NY1-A425, New York, New York 10081 with respect thereto.

Nothing in this claim describing or in any way relating to property in which the Debtors now or hereafter may assert an interest shall be construed or deemed in any way as evidence that such assets are property of the estate or an admission that the Debtors have any rights in such property. This claim is submitted to assert and preserve this claim in the Debtors' pending bankruptcy cases, and neither the submission of this claim, nor any provision hereof or statement herein shall be construed or deemed to be evidence that JPMCB or any other person has waived or intends to waive any rights or claims afforded it under the P&A Agreement, any other agreement with persons other than the Debtors, or as may otherwise be available under applicable law, including, without limitation, the Bankruptcy Code.

B 10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT District of Delaware	PROOF OF CLAIM
Name of Debtor: Washington Mutual, Inc.	Case Number: 08-12229 (Jointly Administered)

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):
Federal Deposit Insurance Corporation

Name and address where notices should be sent:
DLA Piper LLP (US), 1251 Avenue of the Americas,
New York, New York 10020-1104, Attn: Thomas R. Califano

Telephone number:
(212) 335-4500

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number: _____ (*If known*)

Filed on: _____

Name and address where payment should be sent (if different from above):
Federal Deposit Insurance Corporation,
1601 Bryant Street, Dallas, Texas 75201, Attn: Robert C. Schoppe, Receiver in Charge

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $SEE ATTACHED

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

2. Basis for Claim: SEE ATTACHED
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: _____

3a. Debtor may have scheduled account as: _____
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other
Describe:

Value of Property:$_____ **Annual Interest Rate**___**%**

Amount of arrearage and other charges as of time case filed included in secured claim, if any: $_____ **Basis for perfection:** _____

Amount of Secured Claim: $_____ **Amount Unsecured: $**_____

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (*See instruction 7 and definition of "redacted" on reverse side.*)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ Up to $2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☑ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(9).

Amount entitled to priority:

$SEE ATTACHED

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

Date: 03/26/2009

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

Robert C. Schoppe - Federal Deposit Insurance Corporation, 1601 Bryant Street, Dallas, Texas 75201

FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Addendum to Proof of Claim
The Federal Deposit Insurance Corporation, as
Receiver for Washington Mutual Bank, Henderson, Nevada

A. Introduction

1. This proof of claim is submitted pursuant to 11 U.S.C. § 501 and Bankruptcy Rule 3001 by the Federal Deposit Insurance Corporation, as receiver for Washington Mutual Bank, Henderson, Nevada (the "FDIC-Receiver"). The FDIC-Receiver was appointed receiver of Washington Mutual Bank ("WMB") by the Office of Thrift Supervision (the "OTS") on September 25, 2008, by order number 2008-36. On September 26, 2008, WMI and Washington Mutual Investment Corp. (together, the "Debtors") commenced these voluntary cases under chapter 11 of the Bankruptcy Code.

2. Pursuant to 12 U.S.C. § 1821(d)(2), the FDIC-Receiver succeeds by operation of law to the rights, titles, powers, and privileges, including legal claims, of WMB, and of any stockholder, member, accountholder, depositor, officer or director of WMB. The FDIC-Receiver is entitled to a superpriority with respect to the portion of its claims relating to the avoidance and recovery of fraudulent transfers that are subject to 12 U.S.C. § 1821(d)(17). In addition, some of the FDIC-Receiver's claims are entitled to administrative priority under 11 U.S.C. § 507, including priority under 11 U.S.C. § 507(a)(9) for commitments to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution.

3. In its capacity as receiver, the Federal Deposit Insurance Corporation acts to protect insured depositors and creditors of failed depository institutions. The claims set forth herein arise, in part, out of WMI's actions by and through its agents to direct WMB for the benefit of WMI and at the expense of WMB. In addition to the specific bases for the FDIC-Receiver's claims discussed below, the Debtors are liable to WMB under various theories including, without limitation, subrogation, unjust enrichment and quasi contract, because WMB

provided money, goods or valuable services to or on behalf of the Debtors for which WMB is entitled to be repaid.

4. Immediately after its appointment, the FDIC-Receiver sold substantially all of the assets of WMB, including the stock of WMB's thrift subsidiary, Washington Mutual Bank fsb ("WMBfsb"), to JPMorgan Chase Bank, N.A. ("JPMC") pursuant to a Purchase and Assumption Agreement Whole Bank dated as of September 25, 2008 (the "P&A Agreement").[1] Certain of the claims asserted herein may have been sold to JPMC under the P&A Agreement and, to that extent, are asserted by the FDIC-Receiver in accordance with the P&A Agreement. Nothing in this proof of claim (i) alters in any respect the terms of the P&A Agreement or the schedules or exhibits thereto or (ii) should be construed as reflecting the FDIC-Receiver's interpretation of the P&A Agreement, including without limitation the assets or rights related to claims that may have been sold, or that JPMC may claim to have been sold, pursuant to the P&A Agreement.

B. Tax-Related Claims

5. The FDIC-Receiver asserts claims arising from consolidated tax returns filed by WMI on behalf of, among others, WMB. All federal and state tax related refunds that have been paid to WMI already or that may be paid in the future based on consolidated tax returns, are due and owing in substantial part to WMB, and not WMI. A tax refund resulting from offsetting losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year inures to the benefit of that member, in this instance, WMB.

6. Any such amounts received by WMI are or will be held in trust for WMB and are not property of the Debtors' estate as a matter of law. To the extent the Debtors have received any such tax refunds, or might receive any such refunds in the future, the funds should be turned

[1] Publicly available at http://www.fdic.gov/about/freedom/popular.html.

over immediately to the FDIC-Receiver. The FDIC-Receiver reserves all rights relating to its claim for turnover of such assets.

7. Without limiting the foregoing, based on investigation to date the FDIC-Receiver believes that the tax refunds or tax overpayments to which WMB is entitled from tax authorities, or from the Debtors to the extent that payments of such amounts have been or will be made to the Debtors, amount to no less than $4,269,507,909.00, as summarized in the following table.

Category	Amount (all years)
Federal Tax Litigation Items	$228,830,412
State Claims for Litig. Items	$29,081,702
Federal Audit Cycle Items	$670,255,737
State Claims for Fed. Audits	$275,242,708
Federal Overpayments	$40,000,000
State Overpayments	$89,867,260
Federal Loss Carryback Claims	$1,906,654,329
State Loss Carryback Claims	$2,464,064
Miscellaneous	$173,825,241
Federal Refunds Held by WMI	$241,798,079
State Refunds Held by WMI	$94,668,862
Amounts Due from WMI to WMB for Intercompany Taxes	$516,819,516

8. WMI and other members of the consolidated group were parties to a Tax Sharing Agreement dated as of August 31, 1999 (the "Tax Sharing Agreement"). The provisions of the Tax Sharing Agreement do not alter WMB's entitlement to the tax refunds. To the extent that the Debtors assert that the Tax Sharing Agreement somehow empowers them to withhold tax

refunds that are WMB's property, the Tax Sharing Agreement would constitute an unsafe and unsound banking practice. Further, pursuant to the Internal Revenue Code, regulations promulgated thereunder, and state tax laws, as applicable, WMB has an independent right to pursue, contest, compromise, or settle any tax related adjustment or deficiency relating to WMB. To the extent that WMI attempts to interpose the Tax Sharing Agreement to prevent the FDIC-Receiver, or JPMC in accordance with the provisions of the P&A Agreement, from exercising such rights on behalf of WMB or WMBfsb, such an interpretation of the Tax Sharing Agreement would be burdensome to the receivership. The FDIC-Receiver reserves its right to repudiate the Tax Sharing Agreement pursuant to 12 U.S.C. § 1821(e) for these and any other reasons that it deems appropriate in its sole discretion as provided for under that statute.

9. The FDIC-Receiver specifically reserves the right to litigate, prosecute, dispute, contest, compromise or settle any purported right of set off or offset claimed by the Debtors relating to tax refunds in the proper venue under title 12 of the United States Code. Such claims and defenses are not subject to the jurisdiction of the Bankruptcy Court but are, rather, independent property rights and claims that are subject to the exclusive jurisdiction provided for under title 12.

C. Trust Preferred Securities

10. In February 2006, Washington Mutual Preferred Funding LLC ("WMPF"), a Delaware limited liability company, was formed as an indirect subsidiary of WMB to facilitate core capital financing transactions for WMB through the issuance of "trust" preferred securities to investors by certain special purpose entities ("SPEs"). WMPF's assets were limited to direct or indirect interests in mortgages or mortgage-related assets, cash and other permitted assets. These assets were held in certain Delaware statutory trusts. WMPF issued preferred securities,

which were held by and were the sole asset of the SPEs and which were senior in priority to the common stock in WMPF, which was held indirectly by WMB.

11. The following series of trust preferred securities were issued by SPE subsidiaries of WMPF using this structure. The Debtors have asserted that these series of trust preferred securities have a liquidation preference of approximately $4 billion.

a. Washington Mutual Preferred (Cayman) I Ltd. 7.25% Perpetual Noncumulative Preferred Securities, Series A-1;

b. Washington Mutual Preferred (Cayman) I Ltd. 7.25% Perpetual Noncumulative Preferred Securities, Series A-2;

c. Washington Mutual Preferred Funding Trust (Delaware) Fixed-to-Floating Rated Perpetual Noncumulative Trust Securities;

d. Washington Mutual Preferred Funding Trust II (Delaware) Fixed-to-Floating Rated Perpetual Noncumulative Trust Securities;

e. Washington Mutual Preferred Funding Trust III (Delaware) Fixed-to-Floating Rated Perpetual Noncumulative Trust Securities;

f. Washington Mutual Preferred Funding Trust IV (Delaware) Fixed-to-Floating Rated Perpetual Noncumulative Trust Securities.

12. The following series of WMPF preferred securities were issued in connection with the offerings of the trust preferred securities and were designed to include mirror-image terms for the purpose of funding payments to investors in the trust preferred securities:

a. Washington Mutual Preferred Funding LLC 7.25% Perpetual Noncumulative Preferred Securities, Series 2006-A;

b. Washington Mutual Preferred Funding LLC 7.25% Perpetual Noncumulative Preferred Securities, Series 2006-B;

c. Washington Mutual Preferred Funding LLC Fixed-to-Floating Rate Perpetual Noncumulative Preferred Securities, Series 2006-C;

d. Washington Mutual Preferred Funding LLC Fixed-to-Floating Rate Perpetual Noncumulative Preferred Securities, Series 2007-A;

e. Washington Mutual Preferred Funding LLC Fixed-to-Floating Rate Perpetual Noncumulative Preferred Securities, Series 2007-B.

13. The trust preferred securities were sold to investors subject to a "conditional exchange" feature under which the trust preferred securities would be exchanged into shares of preferred stock of WMI (or depositary shares relating thereto) if certain regulatory events occurred. As a condition to authorizing WMI to treat the trust preferred securities as core capital of WMI's principal thrift subsidiary, WMB, the OTS required WMI to provide a written commitment to the OTS that if there was a "conditional exchange," any resulting interest that WMI obtained in the trust preferred securities or, indirectly, in the WMPF preferred securities that funded those securities, would be contributed to WMB. WMI provided that commitment to the OTS in a letter dated February 23, 2006. A copy of the commitment letter is attached as Exhibit 1.

14. On September 25, 2008, WMI entered into an Assignment Agreement with WMB (the "Assignment Agreement"). A copy of the Assignment Agreement is attached as Exhibit 2. Under the Assignment Agreement, and effective upon its execution, WMI transferred to WMB, without recourse, all of its right, title and interest in and to all of the trust preferred securities, the WMPF preferred securities and the SPE subsidiaries of WMPF.

15. Also on September 25, 2008, the OTS notified WMI that an "exchange event" occurred, triggering the "conditional exchange" feature of the trust preferred securities. Thereafter, a "conditional exchange" occurred automatically on September 26, 2008, at 8 a.m. Eastern time, when WMI issued a press release announcing the exchange event.

16. Pursuant to 11 U.S.C. § 365(o), WMI was deemed to have assumed and was required to cure any defects under the February 23, 2006 capital maintenance commitment and the Assignment Agreement as a condition to filing its petition under chapter 11 of the Bankruptcy Code. The FDIC-Receiver demands that the Debtors immediately take all steps, or

authorize third parties to take such steps, that may be necessary to complete the transfer of the trust preferred securities, and any right, title or interest that the Debtors may claim in or to the WMPF preferred securities or the SPE subsidiaries of WMPF, to JPMC as purchaser of the trust preferred securities and related assets from the FDIC-Receiver under the P&A Agreement. The FDIC-Receiver reserves all of its rights in the event that WMI fails to take such immediate actions, including without limitation seeking the conversion of WMI's chapter 11 case to a liquidation under chapter 7 of the Bankruptcy Code.

17. In the alternative, and without waiving or limiting the foregoing, the FDIC-Receiver reserves its rights to effect the transfer of ownership of the trust preferred securities in the ownership registers of the SPE subsidiaries of WMPF as an action that does not affect the property of the debtors' estates and therefore is not subject to the automatic stay provided under section 362(a) of the Bankruptcy Code.

18. In the alternative, and without waiving or limiting the foregoing, the FDIC-Receiver demands that the Debtors turnover to JPMC, without recourse, all of the trust preferred securities and any right, title or interest that the Debtors may claim in or to the WMPF preferred securities or the SPE subsidiaries of WMPF, because any such interests are held by the Debtors in trust for WMB.

19. In the alternative, and without waiving or limiting the foregoing, the FDIC-Receiver asserts an administrative claim under 11 U.S.C. § 507(a)(9) for the full value of the trust preferred securities or for payment of the full amount of any liquidation preference accompanying such trust preferred securities, together with the value of any right, title or interest that the Debtors may claim in or to the WMPF preferred securities or the SPE subsidiaries of WMPF.

20. The FDIC-Receiver specifically reserves the right to litigate, prosecute, dispute, contest, compromise or settle any purported rights with respect to the trust preferred securities, the WMPF preferred securities and the SPE subsidiaries of WMPF in the proper venue under title 12 of the United States Code.

D. Intercompany Amounts

21. In asserting claims against the FDIC-Receiver for certain intercompany notes and other intercompany amounts, the Debtors have not taken into account amounts that are due and payable by those entities under the system of intercompany settlement of accounts that was in place prior to the receivership. While reserving all of its rights to dispute the Debtors' intercompany claims in the appropriate forum, the FDIC-Receiver also is entitled to payment of amounts owed by the Debtors and their non-debtor subsidiaries with respect to such claims, or in the alternative, to set-off such amounts owed to the FDIC-Receiver against amounts claimed by WMI pursuant to section 553 of the Bankruptcy Code.

22. Based on the investigation to date and subject to amendment based on further investigations, the FDIC-Receiver asserts claims against the Debtors and their non-debtor subsidiaries for intercompany amounts in the aggregate amount of $310,761,288.47. Of this total, $273,616,108 reflects a general ledger entry in WMB's favor relating to the change in accounting for pension contributions in excess of pension expenses prior to the implementation of Statement of Financial Accounting Standards No. 158. The other intercompany amounts owed by the Debtors or their non-debtor subsidiaries are:

Obligor/Description	Amount
Ahmanson Obligation Corp. (general ledger account 49328)	$6,676.78
Washington Mutual Inc. (Payroll) (general ledger account 28462)	$17,369,814.37

Obligor/Description	Amount
Washington Mutual 1031 Exchange (Payroll) (general ledger account 28497)	$37,024.10
Ahmanson Residential Development (general ledger account 28058)	$214.50
Sutter Bay Corp. (general ledger account 28088)	$56.12
Washington Mutual Finance Group LLC (general ledger account 28108)	$49,754.56
Washington Mutual 1031 Exchange (general ledger account 28040)	$55,508.19
Washington Mutual Inc. (general ledger account 28162)	$17,829.35
Washington Mutual Inc. (Clearing Account) (general ledger account 28162)	$3,239,907.00
Washington Mutual Inc. (Sept. Mgmt Fees) (general ledger account 28162)	$14,530,007.97
Washington Mutual Inc. (Stock Option Amort.) (general ledger account 28162)	$28,557.64
Washington Mutual Inc. (Rent for Admin. Bldg.) (general ledger account 28162)	$58,652.00
Washington Mutual Inc. (Clearing Account) (general ledger account 49896)	$1,751,137.89

E. Deposit Accounts

23. The Debtors have asserted that as of the petition date, the Debtors and certain of WMI's non-debtor subsidiaries had funds on deposit with WMB in the approximate amount of $707,000,000 and that WMI had funds on deposit with WMBfsb of $3,668,000,000. Since the petition date an additional $234,687,816 has been received in these accounts as payment of tax refunds that are, in all or substantial part, the property of WMB, for the reasons discussed above. Without conceding that the funds at issue are in fact deposits, the funds are collectively referred to herein as the "Deposit Funds."

24. Based on public filings by JPMC and the Debtors, there appear to be significant doubts as to whether satisfactory account documentation exists with respect to some or all of the funds at issue. Pending further investigation, the FDIC-Receiver therefore reserves all of its rights under 12 U.S.C. § 1823(e) and under 12 U.S.C. § 1821(d)(9) to defeat any claim asserted by the Debtors with respect to the Deposit Funds.

25. Separately, the FDIC-Receiver expressly reserves all of its rights with respect to the Deposit Funds under section 9.5 of the P&A Agreement, under which the FDIC-Receiver may, in its discretion, determine that all or any portion of any deposit balance assumed by JPMC pursuant to the P&A Agreement does not constitute a "Deposit" or otherwise, in its discretion, determine that it is in the best interest of the FDIC-Receiver or Corporation to withhold all or any portion of any deposit, and may direct JPMC to withhold all or any portion of any such deposit balance.

26. The FDIC-Receiver further asserts that to the extent any of the Deposit Accounts is subject to a security interest and lien in favor of WMB, the FDIC-Receiver is entitled to enforce the terms thereof with respect to funds in such an account. Upon information and belief, WMI entered into at least one specific security agreement with WMB with respect to funds in account number 177-8911206.

27. Separately, and in the alternative, the FDIC-Receiver reserves all of its rights of setoff under 11 U.S.C. § 553, 12 U.S.C. § 1821(d) or federal or state law with respect to the Deposit Funds.

28. The FDIC-Receiver specifically reserves the right to litigate, prosecute, dispute, contest, compromise or settle any purported rights with respect to the Deposit Funds in the proper venue under title 12 of the United States Code.

F. Capital Maintenance Obligations

29. The FDIC-Receiver's claims arise in part from WMI's obligation to maintain and guarantee the appropriate capital levels of WMB pursuant to applicable capital and liquidity requirements including, but not limited to the statutory and regulatory provisions set forth in 12 U.S.C. § 1831o, 12 U.S.C. § 1464(s) and regulations promulgated thereunder.

30. Events since the closing of WMB have raised questions about whether WMI, WMB or their directors or officers were accounting and reserving for anticipated losses appropriately, thereby resulting in an overstatement of WMB's capital. The FDIC-Receiver has only recently begun its investigation into these facts, but it notes that in connection with its acquisition of WMB, JPMC announced that it would write down approximately $31 billion of WMB's loan portfolio based on JPMC's assessment of remaining credit losses in that portfolio. Only months earlier, WMI's chief financial officer had predicted substantially lower write-downs by WMB for non-performing assets of between $12 billion and $19 billion over the next several years.

31. WMI's failure to sufficiently maintain the appropriate capitalization of WMB damaged WMB in an unliquidated amount. The capital maintenance claims may be subject to priority under 11 U.S.C. § 507(a)(9), if applicable.

G. Fraudulent Transfers/Dividends

32. Although its investigation only recently has commenced, the FDIC-Receiver may avoid and recover fraudulent transfers within five years before the receivership under federal and state law. See 12 U.S.C. § 1821(d)(17); R.C.W. §§ 19.40.011, et seq.; 6 Del. C. §§ 1301, et seq. The FDIC-Receiver reserves all rights to recover property transferred, or the value of such property from the initial transferee, the institution-affiliated party, or the person for whose

benefit the transfer was made, or from any immediate or mediate transferee of any such initial transferee. The FDIC-Receiver's rights under section 1821(d)(17) are superior to any rights of a trustee or any other party (other than any party which is a federal agency) under title 11 or the Debtors in these bankruptcy cases. See 12 U.S.C. § 1821(d)(17).

33. Similarly, to the extent the FDIC-Receiver's claims relate to unlawful dividends paid, or other unlawful distributions made by WMB to its stockholders, or, as successor by merger to New American Capital, Inc. ("NACI"), by NACI to its stockholders, the FDIC-Receiver reserves the right to recover such amounts as provided for under the Washington Business Corporation Act, title 23B of the Revised Code of Washington, or in the case of NACI under the Delaware General Corporation Law, 8 Del C. §§ 101, et seq.

34. The Debtors have asserted claims for recovery of various allegedly fraudulent transfers against the FDIC-Receiver in the amount of at least $10.5 billion. In support of those claims, the Debtors have alleged, inter alia, that "WMI or WMB may have been insolvent at the time" of the challenged transfers and that if "WMB was insolvent, had unreasonably small capital, and/or was unable to pay its own debt obligations as they matured, WMI did not receive any value in exchange" for certain transfers.

35. If WMB or NACI was insolvent during some or all of the period within five years prior to the FDIC-Receiver's appointment on September 25, 2008, then the FDIC-Receiver may have claims for actual or constructive fraudulent transfers against WMI as the initial transferee, the institution-affiliated party, the person for whose benefit a transfer was made, or from any immediate or mediate transferee of any such initial transferee, for transfers of at least $15,041,000,000 in the form of cash dividends between September 2003 and September 2008.

Of these dividends, $7.2 billion were distributed to WMI in 2006 and $5.49 billion were distributed to WMI in 2007.[2]

H. Litigation

36. WMB is or was a plaintiff or the successor in interest to a plaintiff in certain litigation prior to the receivership or, if it was not a named plaintiff, was the real party in interest in such litigation being prosecuted by WMI. Without limiting the foregoing, this litigation includes American Savings Bank FA v. United States, No. 92-872C (Fed. Court of Claims), Anchor Savings Bank FSB v. United States, No. 95-39C (Federal Court of Claims) and Washington Mutual Inc. v. Internal Revenue Service (W.D. Wash.).[3]

37. The FDIC-Receiver succeeded to WMB's interests in such litigation and is the rightful recipient of any recoveries therein. To the extent that WMI has received or may in the future receive any proceeds from such litigation, any such payments are held in trust for WMB and are not property of the Debtors' estate. The FDIC-Receiver demands the turnover of all such amounts by the Debtors or the right to receive such payments directly from the defendant(s). In the alternative, the FDIC-Receiver asserts a claim for any and all recoveries in such litigation.

[2] WMB paid dividends on its common and preferred stock of as much as $17.1 billion during the five year period. During that time, WMB's stock was held by NACI, a wholly-owned subsidiary of WMI that, upon information and belief, WMI dominated and controlled. WMB succeeded by merger to assets and liabilities of NACI as the result of a reorganization that WMI caused to occur in late 2007. The FDIC-Receiver is continuing its investigation into whether the NACI reorganization itself resulted in fraudulent transfers as to which WMI is liable to the FDIC-Receiver and reserves the right to supplement this claim to provide additional detail with respect to such claims.

[3] The last of these cases was listed in the Debtors' statement of financial affairs dated December 19, 2008 without a docket number. It was not listed in the subsequent version of the Debtors' statement of financial affairs. Upon information and belief, the action concerns tax issues relating to Winstar claims.

I. Insurance Proceeds

38. Prior to the receivership, WMI and/or WMB purchased insurance for which WMB was, at least in part, a named insured or an intended beneficiary. Such insurance includes, without limitation: the 2007/2008 Lloyd's of London Washington Mutual Financial Institution Blended Program, Policy No. 509/QA015407 and various policies of excess insurance relating thereto (the "2007/08 Blended Tower"); the 2008/09 Aon Financial Institutions Bond, Electronic and Computer Crime, Bankers Professional Liability, Employment Practices Liability and Fiduciary Liability Policy, Policy No. B0823FD0806211 and various policies of excess insurance relating thereto (the "2008/09 Blended Tower"); and the 2008/2009 XL Specialty Insurance Company Management Liability and Company Reimbursement Insurance Policy, Policy No. ELU104380-08 and National Union Policy No. 463-3347 (the "D&O Policies").

39. To the extent that covered loss within the meaning of the relevant insurance policies has been suffered by WMB, the FDIC-Receiver is entitled to all proceeds paid under applicable insurance coverage for such loss. Without limiting the foregoing, the FDIC-Receiver claims any proceeds under the applicable insurance policies for insured wrongful acts that caused harm in any respect to WMB.

40. To the extent that proofs of loss have been or may be filed with respect to such matters with the relevant insurer, the FDIC-Receiver hereby claims any payments in respect of such loss, which are not property of the Debtors' estate and, to the extent paid to the Debtors, are held in trust for the FDIC-Receiver as the rightful recipient thereof. This includes, without limitation, proofs of loss submitted to the insurers under the 2007/08 Blended Tower on or about July 18, 2008 (C.I.P. Mortgage Company), September 17, 2008 (Encino, California), September 18, 2008 (Campbell Pruneyard, California) and October 3, 2008 (Newport Beach,

California). The amount of loss claimed and other details are known to the Debtors; those details are omitted from this proof of claim for reasons of confidentiality.

41. The FDIC-Receiver reserves the right to tender to the insurers any insured matter that has been or may be asserted against the receivership notwithstanding any claim that proceeds under such insurance policies are, in whole or in part, property of the Debtors' estate.

42. The FDIC-Receiver also has succeeded to rights, claims and causes of action by WMB against directors, officers, and professionals and others who provided services to WMB. The FDIC-Receiver reserves all of its rights and remedies in and to any insurance policies potentially covering the FDIC-Receiver's claims against such persons and entities including policies pursuant to which the Debtors or WMB are insureds or additional insureds.

J. Other Matters Subject to the P&A Agreement

43. The FDIC-Receiver asserts a protective unliquidated claim for matters as to which (i) JPMC may assert a claim against the Debtors as the successor in interest to WMB and the FDIC-Receiver under the P&A Agreement and (ii) the Debtors may object to such a claim due to JPMC's lack of standing.

44. Without limiting the foregoing, the matters as to which the FDIC-Receiver asserts this protective claim include:

a. Claims relating to employee or retiree benefit plans, trusts or insurance policies, including Rabbi trusts, BOLI/COLI policies and retirement or welfare plans, to the extent such plans, trusts or policies are or should be the property or responsibility of WMB;

b. Claims relating to litigation proceeds as to which (i) JPMC claims an entitlement as successor to WMB and (ii) the FDIC-Receiver agrees that

JPMC has succeeded to WMB's interests under the terms of the P&A Agreement;

c. Claims relating to WMB assets as to which (i) JPMC claims an entitlement as successor to WMB and (ii) the FDIC-Receiver agrees that JPMC has succeeded to WMB's interests under the terms of the P&A Agreement.

K. Other Unliquidated Claims

45. The FDIC-Receiver has or may have claims based upon breaches of fiduciary duties owed by the directors and officers of WMI to WMB and the liability of WMI in connection therewith. Such directors and officers may have failed to meet their lawful obligations and act in the best interests of WMB including, but not limited to, directing and/or authorizing the various upstream dividend and other avoidable transfers, failing to adequately maintain WMB's capital or liquidity, failing to establish or maintain adequate internal controls, failing to engage in suitable risk management, implementing substandard practices for loan underwriting and asset purchases and sales for WMB and otherwise taking or omitting to take actions that would serve WMB's interests.

46. Further, according to the Debtors, before the petition date approximately sixty WMB employees were officers of WMI. All of WMB's directors also were directors of WMI, and the boards of directors of WMB and WMI regularly met in joint session. To the extent that such officers or directors (or any other persons as to whom WMI owes a duty of indemnification or advancement) assert claims against the FDIC-Receiver for indemnification or advancement, the FDIC-Receiver asserts a claim for reimbursement of such amounts against WMI.

47. The FDIC-Receiver also asserts an unliquidated claim for indemnity or contribution to the extent that WMB is entitled to assert such claims against WMI with respect to any pending or future litigation in which WMB or the FDIC-Receiver is or may be a named defendant.

48. To the extent any governmental authority obtains or enters an order directing restitution for the criminal or otherwise wrongful acts of the officers or directors of WMB, such orders are for the benefit of the FDIC-Receiver as successor to WMB. If WMI receives any payment in respect of such an order, it shall hold such amounts in trust for WMB, and the FDIC-Receiver demands that such funds be turned over to the receivership estate.

L. Reservation of Rights

49. Neither this proof of claim nor any subsequent appearance, pleading, claim, document, suit, motion nor any other writing or conduct, shall constitute a waiver by the FDIC-Receiver of any: (a) right of the FDIC-Receiver to assert a defense of sovereign immunity; (b) right to have any and all final orders entered only after appropriate administrative procedures and/or de novo review by a United States district court; (c) right to elect a trial by jury in any matters so triable; (d) right to have the reference of this matter withdrawn by the United States district court in any matter or proceeding subject to mandatory or discretionary withdrawal; or (e) other rights, claims, actions, defenses, setoffs, recoupments or other matters to which the FDIC-Receiver is entitled under any agreements, at law or in equity or under the United States Constitution. All of the above rights are expressly reserved and preserved without exception and with no purpose of conceding jurisdiction in any way by this filing or by any other participation in this matter. The FDIC-Receiver expressly reserves all rights to assert the preemption of the Bankruptcy Court's jurisdiction and the exclusive jurisdiction provided under title 12.

50. The identification or enumeration of the FDIC-Receiver's rights and remedies set forth in this proof of claim is not intended to be exhaustive. In addition, the FDIC-Receiver's investigation and review of the books and records of WMB is ongoing, and the FDIC-Receiver and its professional advisers have not yet had a sufficient opportunity to evaluate and determine all claims that the FDIC-Receiver may have against the Debtors. The FDIC-Receiver reserves the right to further amend, revise or supplement this proof of claim in any respect, and to file such additional claims and requests for payment. Without limiting the foregoing, the FDIC-Receiver reserves the right to assert specific claims or counterclaims for as-yet unliquidated, unmatured or contingent claims currently known or unknown, including without limitation, claims for indemnification, contribution, subrogation or reimbursement from the Debtors for any claims of third parties that may be asserted against the FDIC-Receiver or payments made by or on behalf of the FDIC-Receiver for which the Debtors are responsible.

51. The FDIC-Receiver further reserves the right to amend or supplement this proof of claim, including, without limitation, to: cure a defect in the original claim, correct the claim amount or priority status, include additional supporting documents, describe the claim in greater detail, or add additional claims presently unknown to the FDIC-Receiver that, if known, could have affected this claim or resulted in the assertion of additional damages. In addition, nothing herein shall be deemed to waive or otherwise affect the rights of any other person, including without limitation, JPMC, to make claims similar to or parallel with this claim.

52. The FDIC-Receiver reserves all rights to setoff against the Debtors any interests that are subject to setoff under section 553 of the Bankruptcy Code. Accordingly, the FDIC-Receiver asserts and reserves all of its rights, if any, to setoff any sums due to the Debtors against sums due the FDIC-Receiver from the Debtors or their non-debtor subsidiaries.

53. Nothing in this proof of claim describing or in any way relating to property in which the Debtors now or hereafter may assert an interest shall be construed or deemed in any way as evidence that such assets are property of the estate or an admission that the Debtors have any rights in such property. This claim is submitted to assert and preserve the rights of the FDIC-Receiver in the Debtors' pending bankruptcy cases, and neither the submission of this proof of claim nor any provision in it shall be construed or deemed as evidence that FDIC-Receiver has waived or intends to waive any rights or claims afforded it under applicable law. Without limiting the foregoing, the FDIC-Receiver reserves any rights at law or equity that it has or may have against any other entity, person or persons, including without limitation the insiders, directors or officers of the Debtors, of WMB or of their affiliated entities, or any of their insurers or indemnitors.

54. This proof of claim is not intended to be, and shall not be construed as: (a) an election of remedies; (b) waiver of any right to the determination or any issue or matter by a jury; (c) a waiver of any defaults; or (d) a waiver or limitation of any rights at law or equity, remedies, claims or interests of the FDIC-Receiver.

55. Copies of various documents in support of this proof of claim are not attached because of the size of such documents and because the relevant provisions are described herein. In addition, many if not all of those documents are in the Debtors' possession or are matters of public record.

M. Notices

56. All notices and requests for documents to the FDIC-Receiver relating to this proof of claim shall be served upon:

Tom Reeves
Counsel - Legal Division
Federal Deposit Insurance Company
Room VS-D-7608
3501 Fairfax Drive
Arlington, VA 22226-3500
treeves@fdic.gov

Thomas R. Califano
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 335-4500
thomas.califano@dlapiper.com

57. The claims herein include (1) claims to funds that may be held by third parties, (2) claims to funds that are held by the Debtors or subject to express or equitable trust, (3) general unsecured claims, and (4) administrative and priority claims. Based on the state of the records currently available to the FDIC-Receiver, on the fact that many records were not available to the FDIC-Receiver at the time of preparation and filing of this proof of claim, and on information derived from various records reviewed, it is possible that certain assets which the Debtors assert to own in their schedules or otherwise, may in fact be owned by the FDIC-Receiver, and may not be property of the Debtors' estate. The FDIC-Receiver is investigating the circumstances as thoroughly and expeditiously as possible. The FDIC-Receiver hereby asserts its claim to such assets and will submit more specific claims as soon as information is made available in order to evaluate, ascertain and determine specific ownership interests.

[INTENTIONALLY LEFT BLANK]

Dated: March 26, 2009

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Washington Mutual Bank, Henderson, Nevada

By: _____

~~Robert~~ Schoppe
Receiver-in-Charge

B 10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT District of Delaware	PROOF OF CLAIM

Name of Debtor: Washington Mutual, Inc.	Case Number: 08-12229 (MFW)

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):
Morgan Stanley & Co. Incorporated, and the other creditors listed on the Attachment hereto

Name and address where notices should be sent:
Morgan Stanley & Co. Incorporated, and other Washington Mutual Bondholders
c/o Philip D. Anker, Esq., Wilmer Cutler Pickering Hale and Dorr LLP
399 Park Avenue
New York, NY 10022
Telephone number:
(212) 230-8890

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number:

COPY

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $ Approximately $1,600,000,000 plus interest thereon and all other amounts described in the Attachment.

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☑ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

2. Basis for Claim: See Attachment
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: _____

3a. Debtor may have scheduled account as: _____
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☑ Other
Describe: See Attachment

Value of Property:$_____ **Annual Interest Rate**___%

Amount of arrearage and other charges as of time case filed included in secured claim,

if any: $_____ **Basis for perfection:** _____

Amount of Secured Claim: $_____ **Amount Unsecured: $**_____

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (*See instruction 7 and definition of "redacted" on reverse side.*)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ Up to $2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☑ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(2,9).

Amount entitled to priority:

$ See Attachment

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

Date: 03/31/2009

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

Philip D. Anker /rm
Philip D. Anker, Attorney in Fact

FOR COURT USE ONLY

RECEIVED
MAR 31 2009
KURTZMANCARSONCONSULTANTS

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Attachment to Proof of Claim of Bank Bondholders
Washington Mutual, Inc.
Case No.: 08-12229 (MFW)

The Claimants

1. This Proof of Claim is submitted by the entities specified below (collectively, the "Bank Bondholders"),[1] which currently hold, in the aggregate, approximately $1.6 billion in principal amount outstanding of Senior Notes (the "Senior Notes") issued by Washington Mutual Bank, Henderson, Nevada, a federally chartered savings association (the "Bank" or "WMB"). The amount of the claims asserted in this Proof of Claim (the "Bank Bondholder Claims") includes the full principal balance of the Senior Notes held or to be acquired by the Bank Bondholders, plus all unpaid interest and all other amounts due on the Senior Notes held by the Bank Bondholders, and any and all other amounts payable or recoverable by or from the debtor, Washington Mutual, Inc. (the "Debtor" or "WMI").[2] This Proof of Claim is submitted pursuant to 11 U.S.C. § 501 and Rule 3001 of the Federal Rules of Bankruptcy Procedure.

2. Because the Bank Bondholders have suffered direct injury, the Bank Bondholders have standing to bring the Bank Bondholder Claims. Alternatively, the Bank Bondholders have standing to assert the Bank Bondholder Claims, derivatively, on behalf of the Bank. *See, e.g.*, *Hindes v. FDIC*, 137 F.3d 148, 171 (3d Cir. 1998); *Branch v. FDIC*, 825 F. Supp. 384, 404-05 (D. Mass. 1993); *Suess v. United States*, 33 Fed. Cl. 89, 96-97 (Fed. Cl. 1995).

Background

3. WMI was a holding company that owned the Bank and, through the Bank, its subsidiary, Washington Mutual Bank fsb, Park City, Utah ("WMBfsb"). WMI was the Bank's holding company for purposes of applicable laws and regulations governing such holding

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[1] The Bank Bondholders are Morgan Stanley & Co. Incorporated; QVT Fund LP; Quintessence Fund L.P.; Deutsche Bank AG, London Branch, by its investment advisor QVT Financial LP; Windmill Master Fund LP; Juggernaut Fund, L.P.; Cetus Capital, LLC; Anchorage Capital Master Offshore, Ltd.; Anchorage Advisors, LLC; Fir Tree Mortgage Opportunity Master Fund, L.P.; Fir Tree Capital Opportunity Master Fund, L.P.; Fir Tree Value Master Fund, L.P.; Marathon Credit Opportunity Master Fund, Ltd.; Marathon Credit Master Fund, Ltd.; Marathon Special Opportunity Master Fund, Ltd.; Corporate Debt Opportunities Fund, Ltd.; Altma Fund Sicav P.L.C. In Respect Of Russell Sub-Fund; The Governor and Company of the Bank of Ireland; Bank of Scotland plc; Silver Point Capital Fund, LP; Silver Point Capital Offshore Fund, Ltd., York Capital Management, L.P.; York Select, L.P.; York Credit Opportunities Fund, L.P.; York Select Master Fund, L.P.; York Investment Master Fund, L.P.; York Credit Opportunities Master Fund, L.P.; Permal York Ltd.; Lyxor/York Fund Limited; and HFR ED Select Fund IV Master Trust.

These individual Bank Bondholders are together filing this Proof of Claim as a matter of convenience and fee-sharing only. No Bank Bondholder acts for, or purports to represent or speak on behalf of, any other Bank Bondholder or any other holder of WMB Senior Notes.

[2] Based on information presently available to the Bank Bondholders, certain purported deposits and assets at issue may be claimed to be the property of either WMI or WMI Investment Corp. Accordingly, the Bank Bondholders have filed a Proof of Claim in the bankruptcy cases of both WMI and WMI Investment Corp. As set forth in the text of this Proof of Claim, the Bank Bondholders do so without conceding that any such purported deposits or other assets, in fact, belong to either WMI Investment Corp. or WMI, rather than to WMB.

companies. WMI Investment Corp. is an affiliate of WMI and a debtor whose bankruptcy case is jointly administered under WMI's Bankruptcy Case Number.

4. On September 25, 2008, the Bank was closed by the Office of Thrift Supervision ("OTS"), and the Federal Deposit Insurance Corporation ("FDIC") was appointed as the receiver of the Bank.

5. Immediately after its appointment as Receiver, the FDIC sold substantially all of the assets of WMB, including the stock of WMBfsb, to JPMorgan Chase Bank ("JPM") pursuant to the Purchase and Assumption Agreement, dated as of September 25, 2008.

6. The following day, on September 26, 2008, the Debtor filed a petition for relief under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. § 101, *et seq.*) (the "Bankruptcy Code"). This Proof of Claim is submitted in Case Nos. 08-12229 (MFW) and 08-12228 (MFW), currently pending in the United States Bankruptcy Court of the District of Delaware.

The Bank Bondholder Claims

7. The Debtor is liable to the Bank Bondholders for the full principal balance of the Senior Notes held by such Bank Bondholders, together with all unpaid interest and all other amounts due thereon, and all other amounts payable or recoverable by or from the Debtor, including without limitation on the bases specified below. The Bank Bondholder Claims asserted in this Proof of Claim are, subject to the caveats set forth in this paragraph and elsewhere in this Proof of Claim, general unsecured claims. However, as a matter of structural seniority and under applicable law, the Bank Bondholders and other holders of the Senior Notes issued by the Bank are entitled to payment in full ahead of any payment on any and all senior or unsecured notes issued by the Debtor. In addition, while the Bank Bondholders dispute that the Debtor or its estate has any valid claims against the Bank Bondholders or the Bank (or its estate in receivership), to the extent any such claims are allowed, the Bank Bondholder Claims are secured by right of setoff under Sections 506(a) and 553 of the Bankruptcy Code. Moreover, to the extent that any of the claims asserted herein arise out of actions taken or benefits obtained by WMI and its bankruptcy estate post-petition, such as—by way of example only—through the post-petition filing by WMI of tax returns and the post-petition obtaining of tax refunds attributable to WMB's operations, activities, and losses, the claims asserted herein are entitled to administrative priority under Sections 503(b) and 507(a)(2) of the Bankruptcy Code. Finally, the assertion of creditor claims in this Proof of Claim is wholly without prejudice to the right of the Bank receivership estate or the Bank Bondholders to assert that any or all cash or other property in the possession of WMI is, in fact, the property of the Bank and to recover such cash or other property.

8. Corporate Veil Piercing, Alter Ego and Similar Principles.

Although the Senior Notes were issued by the Bank, the Debtor is liable for repayment of all amounts due on those instruments under principles of veil piercing, alter ego, mere instrumentality, domination, and the like. While these bankruptcy cases and the Bank's

receivership proceeding are still in the early stages and the Bank Bondholders have not yet been able to take discovery, it is evident that WMI, a holding company, was the alter ego of the Bank, that the Bank was the mere instrumentality of WMI, and that WMI and the Bank shared a common identity. The Bank's corporate veil should be pierced, such that the Debtor is liable on the Senior Notes.

Based upon the documentation available to date to the Bank Bondholders, it is clear that WMI dominated not only the Bank's finances, but also its business practices, and defrauded the Bank and its creditors, including the Bank Bondholders. WMI was supposed to act as a "source of strength" for the Bank; it did not. Rather, WMI undercapitalized the Bank and siphoned billions of dollars from the Bank, while making repeated misstatements regarding the financial health of the Bank, thereby defrauding the creditors of the Bank, including the Bank Bondholders. WMI was the contract party for the Bank in many third-party contractual arrangements, and WMI operated a consolidated cash management system with the Bank, largely obliterating any distinction of financial activity, asset ownership, and liability responsibility. WMI's control over the Bank was so complete as to warrant piercing the corporate veil and allowing the Bank Bondholder Claims to run directly against WMI.

The following are just a few examples—taken without the benefit of any discovery—of WMI's domination of the Bank, the lack of any meaningful distinction between WMI and the Bank in their operations and finances, and the defrauding by WMI of the Bank and its creditors:

- WMI purports to have deposit accounts with WMB, yet published reports indicate that neither JPM nor WMI can locate any documentation establishing most of those accounts. (Motion of the Debtors Seeking Approval of Stipulation and Agreement Concerning Deposit Accounts at JPMorgan Chase Bank, N.A., Ex. A., Stipulation, Docket No. 74; FDIC's Statement, Response and Limited Objection, Docket No. 104, at ¶¶ 8-9;).[3]

- There is confusion as to which entity did business with which vendor. (Oct. 30, 2008 Section 341 Meeting Tr. at 73-74). Indeed, at the Section 341 meeting in this case, one group of creditors indicated that it believed it was a creditor of the Bank but that group had been listed as a creditor of WMI on WMI's Schedules of Assets and Liabilities. (Oct. 30, 2008 Section 341 Meeting Tr. at 106). Although the vast majority of services provided by trade creditors were allegedly being provided to the Bank, generally trade creditors had contracts with WMI. (Jan. 8, 2009 Section 341 Mtg. Tr. at 94-95).

- Payments were apparently made by WMI, WMB, or WMBfsb on behalf of another entity. In fact, according to WMI itself, its liabilities to its unsecured, nonpriority creditors are "largely derived" from the information provided by representatives of WMB and JPM. (Second Amended Schedule of Assets and Liabilities for WMI, Feb. 24, 2009, Docket No. 709, at 2-3, 6).

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3 Unless otherwise indicated, all citations are to the docket of WMI's bankruptcy case, No. 08-12229.

- The Bank and WMI filed consolidated tax returns. The tax relationship between the Bank and WMI has been characterized as "complicated" by the president of WMI and remained unresolved at the time of the Section 341 Meeting for WMI. (Jan. 8, 2009 Section 341 Mtg. Tr. at 99). WMI served as the accountant for the consolidated returns for WMI and the Bank. (Oct. 30, 2008 Section 341 Meeting Tr. at 52-53).

- Historically, WMI and the Bank were run together on the same information and accounting systems. JPM, which purchased most of the assets of WMB (but which did not purchase any claims of WMB against its shareholder, WMI), has stated that under the consolidated cash management system of WMI and its affiliates and subsidiaries, "external receipts and payments were accounted for on a consolidated basis and internal receipts or payments were done in whole or in part by book or journal entry as 'due to/from' accounts on the general ledger or other books of account." (JPM Complaint, *JPMorgan Chase Bank, Nat'l Ass'n v. Washington Mutual, Inc.*, Adv. Proc. No. 09-50551, at ¶ 37). Representatives from WMI have indicated that there had been "great difficult[y]" in separating out the organizations. (Oct. 30, 2008 Section 341 Meeting Tr. at 69).

- JPM has also stated that prior to WMB's receivership, "WMI and WMB had identical and overlapping directors and held joint meetings of the Boards of Directors of both entities on a combined basis, resulting in effect in a single Board of Directors with identical directors that met on the same topics at the same time and made decisions for both entities collectively." (JPM Complaint, *JPMorgan Chase Bank, Nat'l Ass'n v. Washington Mutual, Inc.*, Adv. Proc. No. 09-50551, at ¶ 36).

- Prior to the commencement of the Bank receivership, the Bank managed all payroll, including payroll for WMI's employees. (Oct. 30, 2008 Section 341 Mtg. Tr. at 102-03).

- The pension plan that covers the vast majority of Bank employees was sponsored by WMI, even though the vast majority of the affected employees were employed by the Bank. (Jan. 28, 2009 Section 341 Mtg. Tr. at 110).

9. Substantive Consolidation.

WMI's domination of WMB and its intertwining of WMB's assets and liabilities with its own appear so substantial as to warrant substantive consolidation, at least to the extent that the assets of the Debtor and its estate should be made available to satisfy the claims of the Bank's creditors, including the Bank Bondholders. Accordingly, the Bank Bondholders may assert a direct claim against the Debtor's bankruptcy estate.

Based upon the documentation presently available the Bank Bondholders, the Bank's and WMI's affairs, assets, and liabilities appear to be hopelessly intertwined, such that any segregation of those assets and liabilities would be arbitrary and harmful to all creditors. In addition to those facts set forth in paragraph 8 above, the following—again, all of which have been uncovered without any formal discovery—are indicative of WMI's entanglement of its own identity with that of the Bank:

- In a pleading recently filed with the Bankruptcy Court, JPM has made clear that "[e]ven after nearly four months of concerted effort, beyond the day-to-day banking operations, there has been little tangible progress in separating WMB from its former parent beyond identifying the larger issues between the parties." (JPM Objection to Bar Date, Docket No. 578, at 2). WMI's President also has indicated that JPM still needs to clarify, to the extent possible, which assets are WMI's and which are WMB's. (Jan. 8, 2009 Section 341 Mtg. Tr. at 108-09).

- JPM has indicated that its effort to separate the Bank from WMI "has been even further complicated by the fact that the books and records of WMB, its parent companies and their respective predecessors in interest were largely maintained on a combined basis by the same personnel." (JPM Objection to Bar Date, Docket No. 578, at 7).

- WMI's restructuring officer has confirmed that WMI continues to have a problem "in figuring out what belongs to the Bank and what belongs to the holding company." (Jan. 8, 2009 Section 341 Mtg. Tr. at 86).

10. Fraudulent Transfer.

Before the Bank was forced into receivership, the Debtor caused the Bank to transfer billions of dollars in cash and other assets to the Debtor, an insider of the Bank. These transfers are avoidable and recoverable by or for the benefit of creditors of the Bank, including the Bank Bondholders, under applicable law, including without limitation the Uniform Fraudulent Transfer Act in effect in the state of Washington, Washington Revised Code § 19.40.051, *et seq.*, and/or in other jurisdictions. The transfers are avoidable because (a) they were made with actual intent to hinder, delay or defraud a creditor of the Bank, including without limitation the Bank Bondholder (Wash. Rev. Code § 19.40.041(a)(1)); (b) they were made for less than reasonably equivalent value when the Bank was engaged or about to engage in a business for which the remaining assets of the Bank were unreasonably small, and/or when the Bank intended to incur, or believed or reasonably should have believed it would incur, debts beyond its ability to pay as they came due, including without limitation the Senior Notes (Wash. Rev. Code § 19.40.041(a)(2)); and/or (c) they were made for less than reasonably equivalent value and the Bank was insolvent (or rendered insolvent) or were made to WMI, an insider of the Bank, for an antecedent debt at a time when WMI had reasonable cause to believe the Bank was insolvent (Wash. Rev. Code § 19.40.051). WMI caused these transfers—involving billions of dollars of Bank assets—to be made to itself. The transfers left the Bank unable to continue in business and led to its closure and placement into receivership, damaging all creditors of the Bank, including the Bank Bondholders.

There may also be claims to avoid such fraudulent transfers, and recover the transfers or their value from WMI, under the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d)(17).

The Bank Bondholders have not had the opportunity to take discovery yet and, therefore, have not yet uncovered all the cash and other property WMI caused to be stripped from the Bank and fraudulently transferred to WMI. But, based on the limited information available to the Bank Bondholders to date, the transfers that may be avoided and recovered from WMI and its estate in bankruptcy include without limitation the following:

- Upstreaming of Billions of Dollars in Purported Dividends. Between the first quarter of 2006 and September 25, 2008, the date the Bank was forced into receivership, more than $6 billion—net of any transfers during that period from WMI to the Bank—was transferred from the Bank to WMI, largely in the form of purported dividends.[4] Indeed, between the first quarter of 2006 and the first half of 2007, the Bank raised approximately $9.5 billion worth of capital through senior and subordinated debt offerings, including through the issuance of the Senior Notes held by the Bank Bondholders;[5] WMI caused the Bank to transfer most of these proceeds to WMI as purported dividends.[6] All such dividends, together with any other dividends transferred during at least the four-year period preceding the commencement of the Bank's receivership, may be avoided and recovered from WMI by or for the benefit of the Bank's creditors. The Bank Bondholders assert a claim for the amount of all such dividends.

- Stripping of Billions of Dollars in Purported Deposits. As of the fourth quarter of 2007, WMI reported having $4.9 billion worth of deposits, the vast majority of which was at the Bank. (Washington Mutual Bank, Annual Report (Form 10-K), at 129 (March 21, 2008)). Yet, by the time of the receivership, WMI reported that it held only $0.7 billion at the Bank, while it held approximately $3.7 billion at WMBfsb. (Motion of the Debtors Seeking Approval of Stipulation and Agreement Concerning Deposit Accounts at JPMorgan Chase Bank, N.A., Docket No. 74, at ¶ 8). Thus, in the year prior to the commencement of the Bank receivership, WMI caused approximately $4 billion to be withdrawn from the Bank and transferred to WMI (which then apparently re-deposited the funds at WMBfsb). To the extent that the

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4 *See* Washington Mutual Bank, Quarterly Report (Form 10-Q) (May 12, 2006); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Aug. 14, 2006); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Nov. 14, 2006); Washington Mutual Bank, Annual Report (Form 10-K) (April 2, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (May 15, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Aug. 14, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Nov. 14, 2007); Washington Mutual Bank, Annual Report (Form 10-K) (March 21, 2008); Washington Mutual Bank, Quarterly Report (Form 10-Q) (May 15, 2008); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Aug. 14, 2008).

5 *See* Washington Mutual Bank, Annual Report (Form 10-K), at 3 (April 2, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q), at 34 (Aug. 14, 2007).

6 *See* Washington Mutual Bank, Quarterly Report (Form 10-Q) (May 12, 2006); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Aug. 14, 2006); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Nov. 14, 2006); Washington Mutual Bank, Annual Report (Form 10-K) (April 2, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (May 15, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Aug. 14, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Nov. 14, 2007); Washington Mutual Bank, Annual Report (Form 10-K) (March 21, 2008).

funds so transferred genuinely represented deposits, the transfers of the funds from the Bank constituted transfers of funds of the Bank to an insider of the Bank (WMI, the Bank's parent) for antecedent debt when the Bank was insolvent and when WMI had reasonable cause to believe the Bank was insolvent. To the extent that the funds so transferred are instead properly treated as capital—given WMI's gross undercapitalization of the Bank, its failure to act as a source of strength for the Bank, (as it was required to do under applicable law and as it represented it would do), and the apparent lack of any documentation of any such deposits—the transfers constituted transfers of funds belonging to the Bank for less than reasonably equivalent value when the Bank was insolvent (or when it was rendered insolvent by the transfers), when the Bank was engaged or about to engage in a business for which the remaining assets of the Bank were unreasonably small, and/or when the Bank intended to incur, or believed or reasonably should have believed it would incur, debts beyond its ability to pay as they came due. In either event, the transfers are avoidable and recoverable from WMI by or for the benefit of the Banks' creditors. The Bank Bondholders assert a claim for the amount of all such purported deposits.

11. Improper Claim to Purported Deposits.

According to WMI's own reports, approximately $4 billion that was supposedly on deposit at WMB was subsequently transferred to WMBfsb by WMI. (Motion of the Debtors Seeking Approval of Stipulation and Agreement Concerning Deposit Accounts at JPMorgan Chase Bank, N.A., Docket No. 74, at ¶ 8). However, JPM "has not discovered any pre-petition deposit account agreements, signature cards or other documentation" evidencing that the funds in question belonged to WMI and were, in fact, held on deposit. (JPM Complaint, *JPMorgan Chase Bank, Nat'l Ass'n v. Washington Mutual, Inc.*, Adv. Proc. No. 09-50551, at ¶ 100; *see id.* at ¶ 95). Even the Debtor has admitted that a "fog of uncertainty" surrounds the purported deposits. (Motion of the Debtors Seeking Approval of Stipulation and Agreement Concerning Deposit Accounts at JPMorgan Chase Bank, N.A., Docket No. 74, at ¶ 17). Moreover, as discussed in paragraph 12 below, it appears that WMI undercapitalized WMB. Consequently, the purported deposits are properly viewed, or should be treated, as capital contributions for which WMB and WMB's receivership estate have sole ownership. To the extent that WMI purports to have exercised or will exercise control or dominion over these funds, it is liable under the law of conversion and similar doctrines. The Bank Bondholders assert a claim for the amount of all such purported deposits.

12. Undercapitalization of, Failure to Support, and Looting of the Bank.

WMI was a holding company. Under applicable law, it was obligated to maintain and guarantee the appropriate capital levels of the Bank pursuant to applicable capital and liquidity requirements including, but not limited to, the statutory and regulatory provisions set forth in 12 U.S.C. § 1831o, 12 U.S.C. § 1464(s) and 12 C.F.R. § 225.4. In addition, WMI was obligated to maintain appropriate capital and liquidity levels under enforceable and implied capital maintenance agreements, and internal procedures adopted by WMI for the benefit of the Bank. Indeed, WMI publicly represented that "we always manage ourselves at the holding company to the same kind of standards as if we were a

[Federal Reserve] regulated bank holding company." (Statement by Kerry Killinger, CEO, Q3 2006 Washington Mutual Earnings Conference Call, Oct. 18, 2006). As further evidence that it purported to manage itself to the same standards as bank holding companies, WMI also publicly disclosed certain capital ratios that would have otherwise remained non-public, explaining that: "The Parent [WMI] is not required by the OTS to report its capital ratios, and as the Parent is not a bank holding company it is not required by the Federal Reserve Board to report its capital ratios. Nevertheless, capital ratios are integral to the Company's capital management process and the provision of such metrics facilitate peer comparison with Federal Reserve Board-regulated bank holding companies." (Washington Mutual Inc., Annual Report (Form 10-K), at 72 (Feb. 29, 2008)). Under the Federal Reserve's Regulation Y, such a bank holding company must "serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner." 12 C.F.R. § 225.4(a)(1).

WMI did nothing of the kind. It inadequately capitalized WMB and looted the Bank. As described in paragraphs 10 and 11 above, it stripped billions of dollars in purported deposits—which should have been, and properly are viewed as, capital contributions—from the Bank in the year prior to the commencement of the receivership. And, as also discussed in paragraph 10, in the period starting in the first quarter of 2006 continuing through the commencement of the receivership, WMI, on a net basis, took some $6 billion out of the Bank in purported dividends. In short, WMI moved billions of dollars from the Bank that, instead, should have remained at WMB to strengthen its capital base and provide liquidity, as required by law and as WMI represented would occur. Indeed, these transfers, directed by WMI, from the Bank occurred at times during which WMI and its management were assuring public investors, including the Bank Bondholders, that the depositor base at the Bank was stable and that the Bank had access to nearly $50 billion of liquidity, all despite the hidden reality that the Bank's financial condition was severely deteriorating.

Moreover, it appears that WMB's capital and liquidity levels may have been of significant concern to the OTS, as evidenced by a number of supervisory and enforcement measures the OTS took.[7] Based on the information available to them, the Bank Bondholders understand that the OTS issued an overall composite CAMELS downgrade to WMB on February 27, 2008. Also, on or about June 30, 2008, the OTS initiated discussions with WMB and WMB about a Memorandum of Understanding; on September 7, 2008, the OTS, WMI and WMB entered into such a Memorandum of Understanding. On September 18, 2009, the OTS issued an overall CAMELS rating downgrade for WMB. While the rationale for the downgrade in CAMELS ratings and the substance of the Memoranda of Understanding are not public, such actions against institutions like WMB and WMI are often taken to address an insured depository institution's inability to maintain proper levels of capital and liquidity, and holding companies are often required to agree to support the institution's efforts to maintain the specified capital levels.

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7 OTS Fact Sheet, dated September 25, 2008, *available at* http://files.ots.treas.gov/730021.pdf.

WMI is liable to the Bank Bondholders for all damages caused by its failure to adequately capitalize and to maintain the strength of the Bank, and its looting of the Bank, including all principal, interest and other amounts owed on the Senior Notes. The Bank Bondholders assert a claim for all such damages. To the extent that WMI failed to meet its commitments to maintain WMB's capital and liquidity levels in accordance with relevant statutory and regulatory provisions and OTS enforcement agreements, this claim is or may be entitled to priority claim status under Section 507(a)(9) of the Bankruptcy Code.

There may also be additional claims against the Debtor based on violations of Sections 23A and Section 23B of the Federal Reserve Act ("Sections 23A and 23B"), 12 U.S.C. §§ 371c, 371c-1, and the statute's implementing Regulation W, 12 C.F.R. Part 223. Sections 23A and 23B are in place to ensure that an insured institution and its affiliates, including its holding company, do not engage in transactions that are not on terms and conditions that are consistent with safe and sound banking practices. Transactions between WMB and WMI would have been subject to the general restrictions set forth in Sections 23A and 23B by operation of OTS regulations at 12 C.F.R. § 536.41(b). To the extent that WMI engaged, and caused WMB to engage, in transactions with each other in violation of any of these provisions, WMI is liable for all losses, damages, or other amounts relating thereto. The Bank Bondholders assert a claim for all such losses, damages and other amounts.

13. Misrepresentations and Material Omissions.

The Bank issued the Senior Notes starting in the first quarter of 2006 and continuing through the first half of 2007. During this time period, and continuing thereafter, WMI made material false and misleading statements, or omitted material facts necessary in order to make the statements made not misleading, regarding the Bank, its operations, and its financial condition. WMI and its officers and employees repeatedly misrepresented that the Bank was doing well financially and that its credit and loan underwriting policies and operations were conservative and minimized risk to investors, including holders of Senior Notes. As WMI knew at the time, those statements were false and misleading. WMI knowingly failed to disclose the true facts. In connection with their purchase of the Senior Notes, the Bank Bondholders (and the market for the Senior Notes) relied on these misrepresentations and material omissions. As a result, the Debtor is liable to the Bank Bondholders for all resulting damages, including without limitation all unpaid principal, interest and other amounts due under the Senior Notes, under the federal securities laws and/or other applicable law.

Based on the information currently available to the Bank Bondholders—all of which has been obtained without the benefit of discovery—the following presents a non-exhaustive list of examples of the misstatements and material omissions made by WMI which caused injury to the Bank Bondholders:

- "As [Kerry Killinger, CEO] said, most of our businesses are doing extremely well despite the difficult interest rate environment." (Statement by Tom Casey, EVP and CFO, Q2 2006 Washington Mutual Inc. Earnings Conference Call, July 19, 2006).

- "On the credit front, we're in very good shape . . . If anything, I can be accused of being too conservative. And perhaps we could have maximized our profitability even more by taking on more credit risk through this period of very benign credit. But we want to stay ahead of the curve, be a little more conservative." (Statement by Kerry Killinger, CEO, at the Goldman Sachs Financial Services CEO Conference, December 13, 2006).

- Washington Mutual's loan portfolio represents "strong underwriting," "conservative lending standards," "rigorous credit standards," and "a disciplined credit culture." (Statements by multiple WMI officers at WMI's annual Investor Day conference, September 6 & 7, 2006).

- Question from Merrill Lynch: "Is there a long-term guidance that we should be thinking about where tangible equity can go for the parent?" Response: "I think what we are finding is as we move more towards a Basel II international capital standard we will certainly take that into consideration and, frankly, we always manage ourselves at the holding company to the same kind of standards as if we were a [Federal Reserve] regulated bank holding company." (Statement by Kerry Killinger, CEO, Q3 2006 Washington Mutual Inc. Earnings Conference Call, Oct. 18, 2006).

- In discussing dividends: "[T]he primary factor with our regulators is the maintaining appropriate levels of capital and of course continuing to operate in a safe and sound manner. All those indications are positive from a regulatory capital standpoint. We are in excellent shape. Again, I think, as you think about dividends, again, it is a whole combination of liquidity, the capital that we have, and as I implied there, relative to regulatory guidelines we are in excellent shape, as well as the earnings outlook for the company." (Statement by Kerry Killinger, CEO, Q3 2007 Washington Mutual Inc. Earnings Conference Call, Oct. 17, 2007).

- "My comments today will focus on four key areas . . . . Third, solid operating revenues and substantial capital cushion above our targeted tangible capital ratio of 5.5% and disciplined expense management across all of our businesses are expected to provide us the financial flexibility to manage through this period of expected elevated credit costs. Fourth, we have sufficient liquidity to fund our business operations." (Statement by Tom Casey, EVP and CFO, Q4 2007 Washington Mutual Inc. Earnings Conference Call, Jan. 17, 2008).

- "We continue to maintain a strong liquidity position in addition to strong tangible capital ratio of 6.67%. At year end we had $3.7 billion of capital in excess of our targeted tangible equity to tangible asset capital ratio of 5.5%. In addition, we exceeded all the well capitalized banking ratios by a meaningful margin. Our funding comes in large part from retail deposits generated in our stores from our core customers. We have $144 billion in retail deposits, which account for 49% of our total funding. The remaining wholesale funding is diversified with staggered maturity profile. At year end we had approximately $69 billion in available excess

liquidity." (Statement by Tom Casey, EVP and CFO, Q4 2007 Washington Mutual Inc. Earnings Conference Call, Jan. 17, 2008).

- "Effective capital management goes hand in hand with maintaining strong liquidity position. We have maintained a very strong liquidity position throughout this period of market stress and we further enhanced that position this past quarter. Retail deposits now comprise 53% of our funding, up from 49% at year end. We have a diversified wholesale funding strategy with staggered maturities and have approximately $50 billion in excess liquidity. Finally, we fund all our business through our banking operations and do not rely on commercial paper. With this issue of common stock liquidity at the holding company is very solid." (Statement by Tom Casey, CFO, Q1 2008 Washington Mutual Inc. Earnings Conference Call, April 15, 2008).

- "I want to begin my remarks today by emphasizing to all of you, that in the face of the unprecedented housing and mortgage market conditions we are experiencing, we are continuing to execute on a comprehensive plan, designed to ensure that have strong capital and liquidity and appropriately sized expense base and a growing profitable retail franchise." (Statement by Kerry Killinger, CEO, Q2 2008 Washington Mutual Inc. Earnings Conference Call, July 22, 2008).

- "[I]t is important to note that our capital position remains significantly in excess of 5.5% targeted level. It's after tangible equity to tangible asset ratio, at the end of the second quarter increased to 7.79% from 6.4% at the end of the first quarter. This is $7 billion above our targeted level. From a regulatory capital perspective our tier 1 risk based ration remained strong at 8.44%, which is 244 basis points above well capitalized. In addition, we continue to focus on maintaining strong levels of liquidity. We ended the second quarter with over $40 billion of readily available liquidity." (Statement by Kerry Killinger, CEO, Q2 2008 Washington Mutual Inc. Earnings Conference Call, July 22, 2008).

- "Now, there seems to be a great deal of speculation whether WaMu will need to raise capital. Let me answer that by walking you through the details of how we expect to manage through this difficult credit environment. First, we currently have substantial capital, plus loan loss reserves sufficient to handle the upper end of our current loss expectation and second, our ongoing pretax and preprovision income, and balance sheet reduction will provide additional cushion for future credit losses. . . . So given our current strong capital, existing reserve through loan losses, ongoing operating earnings and planned balance sheet shrinkage, we are in a strong position to work our way through this difficult credit cycle without the need for additional capital." (Statement by Tom Casey, CFO, Q2 2008 Washington Mutual Inc. Earnings Conference Call, July 22, 2008).

- Question: "[Y]our capital ratios at the subsidiary thrift didn't increase the way the company's did[.] I was wondering if you were planning to increase those?" Response: "[W]ith regard to down streaming capital to the bank we continue to monitor that. We did move some down to the bank level as part of the equity rate and

we will continue to evaluate that. We will probably put some additional capital down to the bank this quarter. We are maintaining good liquidity at the holding company through 2010 through 2011." (Statement by Tom Casey, CFO, Q2 2008 Washington Mutual Inc. Earnings Conference Call, July 22, 2008).

14. Conditional Exchange of REIT Trust Preferred Securities.

On March 7, 2006, WMI and affiliates closed the sale of a number of classes of trust preferred securities. Upon information and belief, at least some of these issues were so-called "REIT preferred" securities, where assets of the Bank were transferred to a special purpose entity ("SPE"). The SPE in turn issued preferred securities to investors, the proceeds of which (the "Bank Proceeds") were supposed to be used to compensate the Bank for the assets transferred. The Bank Bondholders have obtained to date only limited information about the transactions involving the REIT preferred securities and reserve all rights to supplement, amend and modify this Proof of Claim to assert additional claims relating to those transactions. Based on the information available to date, the Bank Bondholders assert the following claims:

- It appears that WMI caused the Bank to upstream some or all of the Bank Proceeds to WMI as purported dividends.[8] Any such transfer may be avoided and recovered from WMI, under fraudulent transfer or other law, by or on behalf of the Bank's creditors. The Bank Bondholders assert a claim for all such amounts.

- Moreover, upon the occurrence of an "Exchange Event,"[9] and if the OTS so directed, each of the relevant trust preferred securities were to be automatically exchanged for depository shares of WMI preferred stock. On September 25, 2008, the same day that the OTS closed the Bank and the FDIC was appointed receiver, the OTS concluded that an Exchange Event had occurred and directed the conditional exchange. As a result of the conditional exchange, the assets held in the SPE traveled with the trust preferred securities to WMI, were exchanged into WMI preferred stock, and should have been contributed—after the sale to JPM had been completed—down to the Bank from WMI. To the extent they have not been, and/or to the extent that any assets of the Bank were obtained by the Debtor in connection with the conditional exchange, the Bank Bondholders assert a claim therefor, and for all related amounts and damages. (WMI Monthly Operating Report, Feb. 2, 2009, at note 1).

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[8] *See* Washington Mutual Bank, Quarterly Report (Form 10-Q) (May 12, 2006); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Aug. 14, 2006); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Nov. 14, 2006); Washington Mutual Bank, Annual Report (Form 10-K) (April 2, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (May 15, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Aug. 14, 2007); Washington Mutual Bank, Quarterly Report (Form 10-Q) (Nov. 14, 2007); Washington Mutual Bank, Annual Report (Form 10-K) (March 21, 2008).

[9] Based on publicly available documents that discuss the offering and sale of the relevant trust preferred securities, an "Exchange Event" was defined to mean (a) the Bank becoming "undercapitalized" under the OTS' prompt corrective action regulations; (b) the Bank being placed into conservatorship or receivership; or (c) the OTS, in its sole discretion, directing such exchange in anticipation of the Bank becoming "undercapitalized" in the near term or taking supervisory action that limits the payment of dividends, as applicable, by the Bank, and in connection therewith, directing such an exchange. *See* Washington Mutual Inc., Current Report (Form 8-K) (March 7, 2006).

15. Tax Refunds and Losses.

WMI and WMB filed consolidated tax returns. The Bank was, by far, WMI's principal operating subsidiary. It generated massive losses, in large measure because of WMI's looting from, mismanagement of, and failure adequately to capitalize and act as a source of strength for, the Bank. These losses generated tax benefits. To the extent those benefits were not transferred by the FDIC to JPM, they are the sole property of and must insure to the benefit of the Bank and its creditors, including the Bank Bondholders, not WMI. Yet, public reports have indicated that WMI intends to assert that it is entitled to a multi-billion dollar tax refund. The Bank Bondholders assert a claim with respect to any and all such tax refunds and benefits that are attributable to WMB's operations, losses, and ultimate sale to JPM. This claim covers any such refunds and benefits arising out of both any already-filed tax returns, and any tax returns to be filed by WMI in the future. The assertion of such a claim is without prejudice to the right of the Bank and its receivership estate to demand the turn-over of any and all such benefits, and all proceeds resulting therefrom, as the property of the Bank which must be held in trust for its creditors.

All Federal and State tax refunds or other benefits that are attributable to WMB's operations, losses and ultimate sale are due and owing to the Bank and its creditors only, not to WMI. A tax refund resulting from offsetting losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member, in this case the Bank. Allowing WMI to retain any refunds arising from a subsidiary's losses simply because the parent and subsidiary chose, for convenience, the procedural device of filing a consolidated return to facilitate their income tax reporting would unjustly enrich the parent, would be contrary to applicable tax law, and would also be a breach of WMI's contractual and fiduciary duties to the Bank.

Provisions in the August 31, 1999 Tax Sharing Agreement entered into by WMI and the Bank, the Bank Holding Company Supervision Manual, and relevant caselaw support the conclusion that the Bank, and not WMI, should retain any tax assets that were not transferred to JPM. Such tax assets are attributable solely to the income and loss of the Bank, and not WMI, and any refunds belong entirely to the Bank.

Accordingly, to the extent that any such refunds are not turned over to the Bank's receivership estate, the Bank Bondholders assert a claim in an amount equal to any and all such refunds and benefits.

16. Mismanagement, and Breach of Fiduciary and Other Duties.

At all relevant times, the Bank was a wholly-owned subsidiary of WMI. The officers and directors of WMI set the policies for, and directed the operations of, WMB. WMI dominated the Bank. WMI's officers and directors mismanaged WMB, and looted it, causing it to suffer billions of dollars in losses and requiring the OTS to put the Bank into receivership. WMI and its officers and directors owed fiduciary duties, of care and loyalty, to WMB and its creditors, as WMB became insolvent and/or in the zone of

insolvency. WMI and its officers and directors breached those duties. WMI is liable directly to WMB's creditors, including the Bank Bondholders, as well as to the Bank receivership estate, for those breaches (and for those of its officers and directors under principals of respondeat superior, agency and the like). The Bank Bondholders assert a claim for all resulting damages, including without limitation all principal, interest and other amounts owing under the Senior Notes to the Bank Bondholders.

17. Claim for Goodwill Litigation Awards.

Based on the limited information available to the Bank Bondholders to date, it appears that WMB was the successor in interest to American Savings Bank, F.A. ("American Savings") and to Anchor Savings Bank, FSB ("Anchor Savings"). American Savings and Anchor Savings were plaintiffs in two separate actions brought against the United States by thrifts and thrift holding companies alleging that the government breached certain supervisory merger contracts following the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") (*See Am. Savings Bank v. United States*, Case No. 92-872 (Fed. Cl.); *Anchor Savings Bank, FSB v. United States*, Case No. 95-03C (Fed. Cl.); together, the "Goodwill Litigation"). The plaintiffs successfully alleged injury arising out of FIRREA's new capital mandates which prohibited thrifts from counting supervisory goodwill created in merger transactions towards these capital requirements. A partial judgment was entered in favor of the plaintiffs in *American Savings Bank v. United States* matter, and the court directed the Government to pay WMI $55,028,000. (Dec. 19, 2008 Order, *Am. Savings Bank v. United States*, Case No. 92-872 (Fed. Cl.)). A determination of damages on remaining claims is still pending in that matter. Similarly, the Government has been ordered to pay $356,454,911 to the plaintiff in the *Anchor Savings Bank, FSB v. United States* matter. (July 16, 2008 Order, *Anchor Savings Bank, FSB v. United States*, Case No. 95-03C (Fed. Cl.)).

Because WMB appears to have been the successor entity to American Savings and Anchor Savings, the judgments from these two actions are the rightful property of WMB, not WMI. Alternatively, to the extent such assets were not sold to JPM, the WMB receivership estate and its creditors would have a claim against WMI's bankruptcy estate for the judgments in the Goodwill Litigation. The Bank Bondholders assert a claim with respect to any and all awards arising out of the Goodwill Litigation.

18. Additional Claims.

The Bank Bondholders also assert any and all additional or different claims that may be asserted by other holders of the Senior Notes. Any Proofs of Claim submitted by any such other holders are incorporated herein by reference.

Reservation of Rights

19. WMB and its creditors may have additional claims for undetermined amounts based on rights of indemnity or contribution relating to pending securities class actions and other claims to which WMB is or may be a named defendant. In addition, WMB may have

rights with respect to insurance policies (and claims against WMI with respect to any such policies) under which WMB and/or WMI are insureds or additional insureds, including without limitation any such policies covering claims against directors, officers, professionals and others who acted for or provided services for WMB or WMI. The Bank Bondholders reserve all such claims and rights.

20. The Bank Bondholders reserve all rights to establish the validity, priority and amount of, and to amend, modify or supplement, this Proof of Claim including, but not limited to, by asserting additional amounts and claims, and to produce all documentary and testimonial evidence and memoranda of law in support thereof in any future proceeding as may be deemed necessary or appropriate.

21. This Proof of Claim shall not be deemed a consent by the Bank Bondholders to having any matters heard by the Bankruptcy Court. Nor shall the Bank Bondholders' submission of this Proof of Claim waive any right of the Bank Bondholders to have final orders in non-core matters entered only after de novo review by a U.S. District Judge, any right to have the District Court withdraw the reference in any matter subject to mandatory or discretionary withdrawal, or any other rights, claims, actions, defenses, setoffs or recoupments to which the Bank Bondholders are or may be entitled under any agreements, in law or equity, all of which rights, claims, actions, defenses, setoffs and recoupments are expressly reserved.

22. This Proof of Claim is not intended to be, and shall not be construed as: (a) an election of remedies; (b) waiver of any right to the determination or any issue or matter by a jury; (c) a waiver of any defaults; or (d) a waiver or limitation of any rights at law or equity, remedies, claims or interests of the Bank Bondholders.

23. Copies of various documents in support of this Claim are not attached hereto because they are voluminous nature of and the relevant provisions are described herein. Further, a significant portion of such documents should be in the possession of WMI and/or are matters of public record.

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this __th day of March 2009.

By: _____

Name: Andrew Brenner

Title: *Managing Director*

Morgan Stanley & Co. Incorporated

Acknowledged before me on March 27, 2009, by Andrew Brenner, who says that he or she holds the title of Managing Director of Morgan Stanley is and is authorized to execute this power of attorney in its behalf.

Donna M. Souza

DONNA M SOUZA
NOTARY PUBLIC-STATE OF NEW YORK
No. 02SO6132206
Qualified in New York County
My Commission Expires August 22, 2009

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LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

QVT Fund LP,

By it general partner, QVT Associates GP LLC

By: _____

Name: Nicholas Brumm

Title: *Managing Member*

Patrick J. Dillon
PATRICK J. DILLON
Notary Public, State of New York
ID No. 01DI6168877
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires 06/18/2011

Acknowledged before me on March 25, 2009, by Nicholas Brumm, who says that he holds the title of Managing Member of QVT Associates GP LLC, the general partner of QVT Fund LP is and is authorized to execute this power of attorney in its behalf.

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

Quintessence Fund L.P.,

By it general partner, QVT Associates GP LLC

By: _____

Name: Nicholas Brumm

Title: *Managing Member*

Patrick J. Dillon

PATRICK J. DILLON
Notary Public, State of New York
ID No. 01DI6168877
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires 06/18/2011

Acknowledged before me on March 25, 2009, by Nicholas Brumm, who says that he holds the title of Managing Member of QVT Associates GP LLC, the general partner of Quintessence Fund L.P. is and is authorized to execute this power of attorney in its behalf.

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

Deutsche Bank AG London

By its investment manager, QVT Financial LP

By it general partner, QVT Financial GP LLC

By: _____

Name: Nicholas Brumm

Title: *Managing Member*

Patrick J. Dillon

PATRICK J. DILLON
Notary Public, State of New York
ID No. 01DI6168877
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires 06/18/2011

Acknowledged before me on March 25, 2009, by Nicholas Brumm, who says that he holds the title of Managing Member of QVT Financial GP LLC, the general partner of QVT Financial LP, the investment manager of Deutsche Bank AG London is and is authorized to execute this power of attorney in its behalf.

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 26th day of March 2009.

Windmill Master Fund, LP

By: Joseph W. Haleski

Name: Joseph W. Haleski

Title: *Vice President, Duquesne Holdings, L.L.C.*
General Partner

Acknowledged before me on March 26th, 2009, by Joseph W. Haleski, who says that he holds the title of Vice President of the General Partner of Windmill Master Fund, LP and is authorized to execute this power of attorney in its behalf.

Witness: Karen Mart

US1DOCS 7106659v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 27th day of March 2009.

Juggernaut Fund, L.P.

By: Duquesne Capital Management, L.L.C., as its Investment Manager

By: _____

Jeffrey S. Werner

Assistant Vice President

Acknowledged before me on March 27, 2009, by Jeffrey S Werner, who says that he holds the title of Assistant Vice President of Duquesne Capital Management, L.L.C., the Investment Manager of Juggernaut Fund, L.P., and is authorized to execute this power of attorney in its behalf.

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 26th day of March 2009.

By: _____

Name: Robert E. Davis

Title: *Managing Director*

Cetus Capital, LLC

Acknowledged before me on March 26, 2009, by Barbara Ferrone, who says that he or she holds the title of Notary of State of Connecticut is and is authorized to execute this power of attorney in its behalf.

Barbara J. Ferrone

BARBARA J. FERRONE
NOTARY PUBLIC
STATE OF CONNECTICUT
My Commission Expires June 30, 2013

US1DOCS 7106664v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 30th day of March 2009.

By: _____

Name: Kevin Ulrich

Title: Director

Anchorage Capital Master Offshore, Ltd.

Acknowledged before me on March 30, 2009, by Kevin Ulrich, who says that he or she holds the title of Director of Anchorage Capital Master Offshore, Ltd. and is authorized to execute this power of attorney in its behalf.

Anne Marie Kim
Notary Public of New York
My Commission Expires
August 29, 2009

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

By: Natalie Birrell

Name: Natalie Birrell

Title: *Chief Operating Officer*

Anchorage Advisors, LLC

Acknowledged before me on March 25, 2009, by Natalie Birrell, who says that he or she holds the title of COO of Anchorage Advisors, L.L.C. is and is authorized to execute this power of attorney in its behalf.

Anne Marie Kim
Notary Public of New York
My Commission Expires
August 29, 2009

US1DOCS 7106686v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25 th day of March 2009.

By: _____

Name: Brian Meyer

Title: *Authorized Person*

Fir Tree Mortgage Opportunity Master Fund, L.P.

State of New York)
County of Westchester)

Acknowledged before me on March 25, 2009, by Brian Meyer, who says that he is authorized to execute this power of attorney on behalf of Fir Tree Mortgage Opportunity Master Fund, L.P.

_____

TRACEY KONECNIK
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. #01KO6044256
COMM. EXP. 7/3/2010

US1DOCS 7106706v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

By: _____

Name: Brian Meyer

Title: *Authorized Person*

Fir Tree Capital Opportunity Master Fund, L.P.

State of New York)
County of Westchester)

Acknowledged before me on March 25, 2009, by Brian Meyer, who says that he is authorized to execute this power of attorney on behalf of Fir Tree Capital Opportunity Master Fund, L.P.

_____

TRACEY KONECNIK
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. #01KO6044256
COMM. EXP. 7/13/2010

US1DOCS 7106706v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

By: _____

Name: Brian Meyer

Title: *Authorized Person*

Fir Tree Value Master Fund, L.P.

State of New York)
County of Westchester)

Acknowledged before me on March 25, 2009, by Brian Meyer, who says that he is authorized to execute this power of attorney on behalf of Fir Tree Value Master Fund, L.P.

_____

TRACEY KONECNIK
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. #01KO6044256
COMM. EXP. 7/3/2010

US1DOCS 7106706v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

By: L. T. Hanover

Name: Louis T. Hanover

Authorized Signatory

Marathon Credit Opportunity Master Fund, Ltd.

Acknowledged before me on March 25, 2009, by Louis T. Hanover, who says that he or she holds the title of Authorized Signatory of Marathon Credit Opportunity Master Fund, Ltd. and is authorized to execute this power of attorney in its behalf.

N. Sanjay Kathirithamby

N. SANJAY KATHIRITHAMBY
Notary Public, State of New York
No. 02KA6195318
Qualified in New York County
Commission Expires Oct. 20, 2012

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

By: L.T. Hanover

Name: Louis T. Hanover

Authorized Signatory

Marathon Credit Master Fund, Ltd.

Acknowledged before me on March 25, 2009, by Louis T. Hanover who says that he or she holds the title of Authorized of Marathon Credit Master Fund, Ltd. is and is authorized to execute this power of attorney in its behalf.

N. Sanjay Kathirithamby

N. SANJAY KATHIRITHAMBY
Notary Public, State of New York
No. 02KA6195318
Qualified in New York County
Commission Expires Oct. 20, 2012

US1DOCS 7106717v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 24 th day of March 2009.

By: L. T. Hanover

Name: Louis T. Hanover

Authorized Signatory

Marathon Special Opportunity Master Fund, Ltd.

Acknowledged before me on March 24, 2009, by Louis T. Hanover who says that he or she holds the title of Authorized Signatory of Marathon Special Opportunity Master Fund Ltd. is and is authorized to execute this power of attorney in its behalf.

N. Sanjay Kathirithamby

N. SANJAY KATHIRITHAMBY
Notary Public, State of New York
No. 02KA6195318
Qualified in New York County
Commission Expires Oct. 20, 2012

US1DOCS 7106717v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 30th day of March 2009.

By: _____

Name: Louis T. Hanover

Authorized Signatory

Corporate Debt Opportunities Fund, Ltd.

Acknowledged before me on March 30, 2009, by Louis T. Hanover who says that he or she holds the title of Authorized of Corp Debt Opportunities Fund Ltd. is and is authorized to execute this power of attorney in its behalf. Sworn

N. Sanjay Kathirithamby

N. SANJAY KATHIRITHAMBY
Notary Public, State of New York
No. 02KA6195318
Qualified in New York County
Commission Expires Oct. 20, 2012

US1DOCS 7106717v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

NATIONAL BANK OF CANADA (GLOBAL) LIMITED

AS INVESTMENT MANAGER OF ALTMA FUND SICAV P.L.C. IN RESPECT OF RUSSELL SUB-FUND

By: _____
Name: Hayden Jones
Title: Managing Director

By: _____
Name: Giorgio Pavesio
Title: Vice-President Middle Office Market Risk

STAMP DUTY: $10.00
AMOUNT PAID: $10.00
RECEIPT NO: 394169
DATE: 2009-03-26
SIGNATURE:

Acknowledged before me on March 26, 2009, by Hayden Jones and by Giorgio Pavesio who say that they hold the above-mentioned titles at the above-mentioned entity and that they are as such authorized to execute this power of attorney on behalf of Altma Fund SICAV p.l.c. in respect of Russell Sub-Fund.

Notary: _____
ASST. REGISTRAR AND AS SUCH A NOTARY PUBLIC IN AND FOR BARBADOS

US1DOCS 7106717v1

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 25th day of March 2009.

GM 9/09

THE SEAL OF)
THE GOVERNOR AND COMPANY OF)
THE BANK OF IRELAND)

was affixed hereto by the authority of the Directors)

Secretary - Jeremy Crean

Marie Somers, Bank Assistant
Bank of Ireland, Lr. Baggot St., Dublin 2.

US1DOCS 7106681v1

POWER OF ATTORNEY

BANK OF SCOTLAND PLC (registered number SC327000) having its Registered Office at The Mound, Edinburgh EH1 1YZ (**"BoS"**) hereby appoints Philip D Anker of Wilmer Cutler Pickering Hale and Dorr at 399 Park Avenue, New York, NY 1022 USA, to be its true and lawful attorney (the **"Attorney"**) with full power and authority of BoS in its name to do and perform on behalf of BoS all or any acts, and things lawfully necessary to or desirable to:

1. prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

2. prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

3. take any other action of any type whatsoever in connection with the foregoing which, in the reasonable opinion of such Attorney, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such Attorney on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such Attorney may approve in such Attorney's discretion.

BoS undertakes to ratify whatever the Attorney may do in its name or on its behalf in exercising the powers contained in this Power of Attorney.

This Power of Attorney shall be irrevocable for a period of six months from the date of this Power of Attorney.

The laws of Scotland shall apply to this Power of Attorney and the interpretation thereof and to all acts of the Attorney carried out or purported to be carried out under the terms of this Power of Attorney.

IN WITNESS WHEREOF this Power of Attorney consisting of this and the preceding page has been executed as follows:

SUBSCRIBED for and on behalf of

BANK OF SCOTLAND PLC

at LONDON

on 25 MARCH 2009

By: .....

Truett Tate

Group Executive Director, Wholesale Division

Witnessed by: .....

LORINDA J LONG
33 OLD BROAD STREET
LONDON
EC2N 1HZ
25.3.09

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 30th day of March 2009.

By: Edward A Mule

Name: Ed Mule

Title: CEO of Silver Point Capital, LP investment manager of Silver Point Capital Fund, LP and Silver Point Capital Offshore Fund, Ltd.

Acknowledged before me on March 30, 2009, by Ed Mule, who says that he or she holds the title of CEO of SilverPoint Capital LP and is authorized to execute this power of attorney in its behalf.

Brian A Jarmain

Brian A Jarmain
Notary Public-Connecticut
My Commission Expires
April 30, 2012

LIMITED POWER OF ATTORNEY

Know all by these presents, that the undersigned hereby makes, constitutes and appoints Philip D. Anker of Wilmer Cutler Pickering Hale and Dorr LLP as the undersigned's true and lawful attorney-in-fact with full power and authority as hereinafter described to:

(1) do and perform any and all acts for and on behalf of the undersigned which may be necessary or desirable to prepare, complete and execute one or more proofs of claim to be filed in the bankruptcy proceedings of Washington Mutual, Inc. (Case No. 08-12229 (MFW) pending in the United States Bankruptcy Court for the District of Delaware) or the bankruptcy proceedings of any of its affiliates;

(2) prepare, complete and execute any amendment or amendments thereto, and timely deliver and file such proofs of claim with the appropriate court or claims agent;

(3) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorney-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorney-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorney-in-fact may approve in such attorney-in-fact's discretion.

This Power of Attorney shall remain in full force and effect until revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this 31st day of March 2009.

By: Adam J. Semler

Name: Adam J. Semler

Title: CFO of York Capital Management *

* On behalf of the following entities:

York Capital Management, L.P.
York Select, L.P.
York Credit Opportunities Fund, L.P.
York Select Master Fund, L.P.
York Investment Master Fund, L.P.
York Credit Opportunities Master Fund, L.P.
Permal York Ltd.
Lyxor/York Fund Limited
HFR ED Select Fund IV Master Trust

Acknowledged before me on March 31, 2009, by Adam J. Semler, who says that he or she holds the title of CFO of York Capital Management and is authorized to execute this power of attorney in its behalf.

LISA M. URBAN
Notary Public, State of New York
No. 01UR6052245
Qualified in New York County
Commission Expires 12/11/10

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)
Debtors.	:	
	:	Jointly Administered
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	
	:	Adversary Proceeding No. _____
Plaintiffs,	:	
v.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Defendant.	:	

COMPLAINT FOR TURNOVER OF ESTATE PROPERTY

Plaintiffs Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment," and with WMI, "Plaintiffs" or "Debtors"), through their undersigned counsel, bring this turnover action against defendant JPMorgan Chase Bank, National Association ("JPMC"), and, in support thereof, respectfully allege as follows:

[1] The Debtors in these chapter 11 cases (the "Chapter 11 Cases") and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395).

NATURE OF ACTION

1. These Chapter 11 Cases have been pending for more than seven months. Incredibly, the Debtors have been proceeding without one of the most significant (and most liquid) assets of their estates – over $4 billion in cash placed on deposit in demand deposit accounts with their former bank subsidiaries Washington Mutual Bank, Henderson, Nevada ("WMB") and Washington Mutual Bank fsb, Park City, Utah ("WMB fsb," and together with WMB, the "Banks"). Now, the Debtors are prepared to move forward with developing a chapter 11 plan, but any such plan requires release and utilization of the Debtors' substantial cash assets currently being wrongfully withheld by JPMC.

2. On September 25, 2008, JPMC purportedly purchased substantially all of WMB's assets (including the stock in WMB fsb) in exchange for payment of $1.88 billion and the assumption of all of WMB's deposit liabilities, including those deposit liabilities owed to the Debtors (the "P&A Transaction"). Shortly thereafter, JPMC assumed all of WMB fsb's deposit liabilities by merging WMB fsb with its own banking operations.

3. The cornerstone of the agreement by which JPMC acquired the assets was that all Bank depositors would have immediate and ready access to their cash on deposit at JPMC. Accordingly, that certain aptly titled Purchase and Assumption Agreement Whole Bank, dated September 25, 2008 (the "P&A Agreement"), is clear with respect to JPMC's assumption of substantially all of WMB's liabilities, including, particularly, WMB's deposit liabilities. Thus, the second recital of the P&A Agreement, found on the first page of the agreement specifically provides that JPMC "desires to purchase

substantially all of the assets and *assume all deposit and substantially all other liabilities*" of WMB. (Emphasis added.)

4. Although the P&A Transaction significantly depleted the Debtors' assets (given the valuable assets delivered in exchange for underpriced consideration paid), and spurred the filing of the Chapter 11 Cases, the Debtors believed, like all other depositors of the Banks, that the P&A Transaction did not and could not operate to strip them of their more than $4 billion in cash deposits. Moreover, although they were faced with filing the Chapter 11 Cases, the Debtors contemplated that they would have access to their deposits which would serve as a source of creditor recoveries.

5. Despite the Debtors' unquestionable right to their deposits, JPMC has refused to turn them over to the Debtors. There can be no serious dispute that these funds, now on deposit with JPMC, are demand deposits and property of the Debtors' estates. The funds were specifically intended to be held in demand deposit accounts for the Debtors' benefit. However, notwithstanding the lack of ambiguity in the P&A Agreement and in all parties' understanding of the P&A Transaction itself, JPMC has refused to pay them to the Debtors. By seeking to retain over $4 billion in deposits, JPMC is positioning itself to receive an enormous windfall of unprecedented dollar amounts over and beyond the significant profits it has already realized as a result of its fire-sale purchase of the Debtors' banking assets – a transaction which contributed significantly to JPMC's first quarter 2009 "record firmwide revenue."

6. That JPMC claims it "purchased" in excess of $4 billion in cash deposits and that such cash deposits have somehow come to represent equity in WMB or WMB

fsb is both absurd, and not surprisingly, finds no support in the P&A Agreement or the undisputed facts, which clearly demonstrate that the funds represent deposit liabilities.

7. Because JPMC cannot seriously contest the nature of the funds on deposit, JPMC has suggested it has a right of set-off as a basis to continue to withhold the funds. However, any purported right of setoff against the deposits is meaningless without a valid claim to offset. Similarly, JPMC also has asserted that it holds a security interest in certain of the deposits; however, any purported security interest is of no legal significance in the absence of an obligation owed JPMC to be secured. Recognizing this, JPMC has asserted illegitimate claims to manufacture grounds to retain the funds and to justify the prejudice it is causing the Debtors' estates by failing to pay them what it owes and has wrongfully withheld. Whatever else may be said for these claims however, under any circumstances, any such claims do not belong to JPMC because under the express and unambiguous terms of the P&A Agreement, JPMC did not acquire any claims against the Debtors from the Banks.

8. Moreover, even if the P&A Agreement is interpreted to transfer claims held by the Banks to JPMC (which it does not), any such claims would have been transferred on the literal eve of the Chapter 11 Cases. The Bankruptcy Code expressly prohibits any claims acquired in the 90-day period immediately preceding the commencement of the Debtors' Chapter 11 Cases from being utilized to setoff amounts owed the Debtors where they were insolvent or rendered insolvent at the time of the transfer. The Bankruptcy Code similarly prohibits the use of any claims acquired post-petition, without regard to the Debtors' solvency, to setoff amounts owed the Debtors. Therefore, JPMC has absolutely no setoff basis to withhold the Debtors' cash deposits,

because assuming JPMC acquired claims against the Debtors pursuant to the P&A Transaction or thereafter, the Debtors were either insolvent at the time of, or rendered insolvent by, the P&A Transaction. Moreover, to the extent any claims were acquired from WMB fsb post-petition, JPMC has absolutely no basis to setoff such claims against the Debtors' cash deposits, irrespective of the Debtors' solvency.

9. JPMC has no basis to withhold the Debtors' funds and the funds are accruing interest at a rate significantly less than what the Debtors' estates would otherwise be earning. Yet, based upon JPMC's average return on interest-earning assets, by retaining the Debtors' deposits, JPMC could earn as much as $200 million per year. As a result, this Complaint seeks turnover of the more than $4 billion in Debtor funds on deposit with JPMC in demand deposit accounts that are property of the Debtors' estates and restitution in connection with JPMC's unjust enrichment.

JURISDICTION AND VENUE

10. This is an action pursuant to Federal Rule of Bankruptcy Procedure 7001 and 11 U.S.C. §§ 541 and 542.

11. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b).

12. Venue is proper in this Court under 28 U.S.C. § 1409(b).

13. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

THE PARTIES

14. Plaintiff WMI is a corporation organized under the laws of the State of Washington with its principal place of business located at 1301 Second Avenue, Seattle, Washington 98101.

15. Plaintiff WMI Investment is a corporation organized under the laws of the State of Delaware with its principal place of business located at 1301 Second Avenue, Seattle, Washington 98101.

16. On September 26, 2008 (the "Petition Date"), WMI and WMI Investment filed petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"). The Plaintiffs are debtors in the jointly-administered Chapter 11 Cases and are operating as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

17. Defendant JPMC is a national banking association organized under the laws of the United States with its principal place of business in Columbus, Ohio. JPMC is a wholly-owned subsidiary of JPMorgan Chase & Co., a corporation organized under the laws of Delaware.

FACTUAL BACKGROUND

A. THE DEBTORS' DEMAND DEPOSIT ACCOUNTS

18. On September 25, 2008, the Debtors had cash on deposit with the Banks in excess of $3.8 billion, consisting of more than $135 million in demand deposit accounts at WMB ("WMB Accounts," with the funds therein defined as the "WMB Deposits") and approximately $3.668 billion in a demand deposit account at WMB fsb (the "WMB fsb Account," with the funds therein defined as the "WMB fsb Deposits," and with the WMB Accounts and the WMB Deposits, respectively, the "Accounts" and the "Deposits").

19. The following chart illustrates the Accounts and Deposits therein as of September 30, 2008:

Debtor	Bank	Last Four Digits of Account No.	Deposit as of September 30, 2008
WMI	WMB fsb	4234 ("Account 4234")	$3,667,943,172
WMI	WMB	1206 ("Account 1206")	$52,600,201
WMI	WMB	0667 ("Account 0667")	$264,068,186
WMI	WMB	9626	$4,650
WMI	WMB	9663	$747,799
WMI Investment	WMB	4704 ("Account 4704")	$53,145,275

Copies of the September 2008 "Washington Mutual Internal Checking Detail Information" forms which reflect monthly balance and transactions for the Accounts, addressed to WMI or WMI Investment (the "Account Statements"), are attached hereto as Exhibit A.

20. Just prior to the Petition Date, WMI's Account with the largest balance was Account 4234. Approximately $3.67 billion of WMI's deposits were held in Account 4234, making such Deposits one of the most significant non-contingent assets of the Debtors' estates.

21. Account 4704 is owned by WMI Investment; the remainder of the Accounts are owned by WMI. The Accounts were listed on the Debtors' Schedules of Assets and Liabilities filed with this Court [Docket No. 475 and 619].

22. Each of the Accounts was established and maintained in accordance with internal policies and procedures of WMI and its subsidiaries governing "On-Us," or intra-corporate, deposit accounts. Per WMI's "GL Administration Policy," a document used to

"communicate policies for the establishment and usage of 'On-Us' bank accounts for all Washington Mutual entities and departments," On-Us accounts are internal "corporately owned Demand Deposit Account accounts." A copy of the GL Administration Policy is attached hereto as Exhibit B.

23. JPMC continues to issue Account Statements to the Debtors, notably with the following disclosure: "Deposit accounts now held by JPMorgan Chase Bank., N.A." A copy of the March 2009 Account Statements are attached hereto as Exhibit C. Upon information and belief, subsequent to the P&A Transaction, JPMC has reported the Deposits as deposit liabilities to the Office of the Comptroller of the Currency and has paid federal deposit insurance premiums on the Deposits, as it does for all of its deposit liabilities and as the Banks themselves did prior to the P&A Transaction.

24. Each of the Accounts was accounted for in the books and records of WMB or WMB fsb, as the case may be, as a demand deposit account and a deposit liability owing to either WMI or WMI Investment, as appropriate. Demand deposit accounts, in contrast to term deposit accounts, are accounts from which deposited funds can be withdrawn at any time without any notice to the depository institution.

B. WMI Moves Primary Checking Account to WMB fsb

25. Account 0667, a WMB Account, had served as WMI's long-time primary checking account at WMB. From this account, WMI serviced its outstanding debt, paid dividends on its preferred and common equity, and disbursed payments on account of tax obligations and myriad other operating expenses. Account 0667 was WMI's primary non-interest bearing checking account and, therefore, was very active and typically had approximately 10 to 15 transactions per day.

26. On or about September 18, 2008, WMI determined that it would transfer its primary checking account from its direct wholly-owned subsidiary, WMB, to its indirect wholly-owned subsidiary, WMB fsb. The end result was that the deposit liability owed to WMI became a deposit liability of WMB fsb.

27. As is customary with any transfer to a newly-established deposit account, this transfer was to be effectuated by submitting a "New Account Request Form" utilized to open a new demand deposit account at either Bank and completing a "Journal Entry Posting Form," accounting for the transfer of Deposits from Account 0667 to a new account at WMB fsb. Although the New Account Request Form (the "First Initial Account Request Form") properly indicated that the account was to be opened at WMB fsb, an administrative processing error caused a new account to be first opened at WMB (Account No. xxx-xxx421-8, "Account 4218"). Thus, $3.674 billion in Deposits may have initially been transferred to Account 4218 at WMB.

28. On September 22, 2008, a revised New Account Request Form (the "Revised Account Request Form") was created and the mistake was corrected, retroactively to September 19, 2009, with the creation of Account 4234 at WMB fsb. Thus, as initially intended, $3.674 billion in Deposits was properly transferred to Account 4234, a WMB fsb Account. Account 4218 was closed while Account 0667 remained a WMB Account. The September 2008 Account Statement for Account 0667 reflects an opening balance of $4.541 billion and shows four debits on September 19, 2009 in an aggregate amount of $3.674 billion. The September 2008 Account Statement for Account 4234 at WMB fsb shows four corresponding credits (deposits), effective September 19, 2009, in an aggregate amount of $3.674 billion.

29. The transfer of WMI's Deposits from WMB to WMB fsb did not change the nature of the Deposits as compared to when they were included in Account 0667. Both the Initial and Revised Account Request Forms and the supporting Journal Entry Posting Forms indicate that each of short-lived Account 4218 and new Account 4234 was intended to be a demand deposit account for the benefit of WMI. The transfer simply moved the Deposits from one Bank to the other.

30. In both instances, the Initial and Revised Account Request Forms prepared to establish Account 4218 and Account 4234, respectively, denoted expressly that the new account was to be an "On-Us" corporate checking account to be assigned a product code of "B3." Copies of the Initial and Revised Account Request Forms are attached hereto as Exhibit D. The GL Administration Policy provides that "B3's are non-interest bearing DDA accounts," and makes clear that "DDA" is an abbreviation that signals a Demand Deposit Account. The GL Administration Policy likewise provides that "On-Us" accounts are "Demand Deposit Accounts."

31. Moreover, the Journal Entry Posting Forms used to account for the transfer of funds from Account 4218 to Account 4234 denote that Account 4234 was to be a "DDA" account. The September 2008 Account Statement for Account 4234, evincing the transfer of Deposits, properly reflects such amounts as "Customer Deposits."

32. New Account Request Forms may be used to open several different account types (*e.g.*, loss drafts, commercial loans, insurance drafts, investors/custodial accounts, "on us" accounts, and public funds). However, in each instance the forms are used to create a deposit account. Thus, it is clear that the Accounts are deposits subject to turnover in this proceeding.

C. JPMC'S ACQUISITION OF WMB AND ASSUMPTION OF THE DEPOSIT LIABILITIES

33. On September 25, 2008, substantially all the assets of WMB, including the stock of its subsidiary WMB fsb, were purportedly sold to JPMC for the purchase price of $1.88 billion, pursuant to the P&A Agreement (publicly available at http://www.fdic.gov/about/freedom/popular.html). Additionally, JPMC expressly assumed all deposit liabilities and substantially all other liabilities of WMB. (P&A Agreement § 2.1). All depositors were ensured a "seamless transition" and that they were to be "fully protected." (Federal Deposit Insurance Corporation, Press Release, *JPMorgan Chase Acquires Banking Operations of Washington Mutual*, Sept. 25, 2008).

34. Under section 2.1 of the P&A Agreement, JPMC "expressly assumes . . . and agrees to pay, perform, and discharge, all of the liabilities of [WMB] . . . including the Assumed Deposits . . . ." (P&A Agreement § 2.1). "Assumed Deposits" is defined to mean "Deposits" which is defined to include the WMB Deposits, subject only to two inapplicable exceptions. (P&A Agreement § 2.1).

35. Further, under section 5.1 of the P&A Agreement, JPMC agreed to "pay all properly drawn checks, drafts and withdrawal orders of [WMB] depositors . . . to the extent that the Deposit balances to the credit of the respective makers or drawers . . . are sufficient to permit payment thereof . . . ." (P&A Agreement § 5.1).

36. Thus, the P&A Agreement is clear that JPMC unambiguously assumed liability under the P&A Agreement for the WMB Deposits in each of the WMB Accounts.

37. Under the P&A Agreement, WMB fsb became the wholly-owned subsidiary of JPMC when JPMC acquired the equity interests of WMB fsb. (P&A

Agreement § 3.1). Pursuant to the subsequent merger of JPMC and WMB fsb, JPMC assumed all deposit liabilities of WMB fsb, including with respect to WMI as depositor of the WMB fsb Account (*i.e.*, Account 4234).

38. The P&A Transaction was extremely profitable for JPMC. In 2008, JPMC realized a $1.9 billion after-tax extraordinary gain from "merger-related items" in connection with the P&A Transaction. *See* JPMorgan Chase & Co., Form 10-K for the fiscal year ended December 31, 2008, at 26. The actual windfall to JPMC was even greater, including an immediate effect on JPMC's revenues. Having acquired the Banks at fire-sale prices, JPMC has achieved "record firmwide revenue" in first quarter 2009 and has enjoyed growth in retail banking deposits by 62% and in checking accounts by 126%.[2] JPMC is now seeking to increase its windfall by $4 billion.

D. THE ACCOUNT STIPULATION

39. On October 14, 2008, the Debtors entered into a stipulation with JPMC (the "Account Stipulation"), pursuant to which JPMC agreed with the Debtors that the Accounts (in addition to various other deposit accounts held by WMB by certain of WMI's non-Debtor subsidiaries),[3] were deposit accounts of the Debtors. A copy of the

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[2] *See* JPMC Press Release, *JPMorgan Chase Reports First-Quarter 2009 Net Income of $2.1 Billion, or $0.40 per Share,* April 16, 2009. Specifically, net income in JPMC's Retail Financial Services division "was $474 million, compared with a net loss of $311 million in the prior year" due, in part, to the "positive impact of the Washington Mutual transaction . . . ." Net income in JPMC's Commercial Banking division "was $338 million, an increase of $46 million, or 16%, from the prior year, driven by higher net revenue reflecting the impact of the Washington Mutual transaction . . . ." "Net interest income [at JPMorgan Chase] was $15.5 billion, up by $6.1 billion, or 65%, due to the impact of the Washington Mutual transaction," among other things.

[3] There are twenty-nine deposit accounts which were the subject of the Account Stipulation, including the six Accounts. The last four digits of each deposit

Account Stipulation is attached hereto as Exhibit E. The Account Stipulation was based upon the fact that the Deposits were property of the Debtors' estates. The Debtors contemplated that the Deposits – one of the largest of their estates' assets – were to be the cornerstone of a successful chapter 11 plan and would be used to fund distributions to creditors.

40. Upon receipt of this Court's approval of the Account Stipulation, JPMC had agreed to transfer the Deposits "as the Debtors, in their sole and absolute discretion, may direct," with the exception of Account 1206 which was the subject of an Account Security Agreement, dated as of May 31, 2002 in favor of WMB (the "Security Agreement"). The Account Stipulation provided further that the Deposits were to remain subject to claims, rights and remedies that JPMC may have had, and afforded JPMC replacement liens to the extent of any such interests, but did not expressly enumerate or provide the basis for any such claims. The Account Stipulation further contemplated that the Deposits were to be used to pay administrative expenses of the Chapter 11 Cases and to make distributions to the Debtors' creditors pursuant to a chapter 11 plan.

41. On January 26, 2009, the Debtors were forced to withdraw their motion seeking the Court's approval of the Account Stipulation when JPMC would not agree to a form of order approving the Account Stipulation. Since then, the Deposits have

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account number are: 1206, 0844, 4234, 2184, 3525, 0667, 9626, 9663, 8359, 7731, 7187, 3411, 6282, 3429, 3487, 3495, 6290, 6307, 3445, 3461, 3479, 7719, 6323, 3672, 7873, 9697, 4704, 5081, and 5099. Of the twenty-three accounts that are owned by non-Debtor WMI subsidiaries, seventeen have been moved to other financial institutions, two have been closed, and four remain at JPMC.

continued to remain in JPMC's possession, enriching JPMC unjustly while accruing interest for the benefit of the Debtors' estates at a less than market rate.[4]

E. JPMC HAS REFUSED TO TURN OVER THE ACCOUNTS

42. JPMC has no ownership interest in the Deposits. As discussed herein, the Deposits are matured debts owed, and payable on demand, to the Debtors that JPMC assumed pursuant to the P&A Agreement and transactions subsequent to and in connection therewith.

43. On numerous occasions since the Petition Date, the Debtors have requested that JPMC confirm that the Accounts are demand deposit accounts and property of the Debtors, but JPMC has refused to do so, or has imposed unreasonable conditions on doing so, the Account Stipulation notwithstanding.

44. On October 28, 2008, the Debtors requested that JPMC turnover control of the Accounts to the Debtors. On numerous occasions thereafter, the Debtors have reiterated their request that JPMC turnover control of the Accounts to the Debtors, but JPMC has refused to do so, or has imposed unreasonable conditions on doing so, thereby denying the Debtors' estates use of the Deposits.

45. After several weeks of negotiations following October 28, 2008, JPMC finally agreed to allow interest to accrue on the Deposits, but only at a nominal rate. Thus, every day that JPMC continues to withhold the Deposits, realizing an economic advantage while enjoying increased liquidity, the Debtors' estates suffer further damage

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[4] In stark contrast to the nominal rate of return JPMC has agreed to make applicable to the Deposits, JPMC's average rate of return on interest-earning assets is 5.36%. *See* JPMorgan Chase & Co., Form 10-K, at 22 *Distribution of assets, liabilities and stockholders' equity; interest rates and interest differentials.*

because the Deposits are earning interest at a significant discount to a market rate and the estates' assets are not being maximized.

46. Nonetheless, JPMC continues to issue Account Statements indicating that the Deposits are deposit liabilities, and on information and belief, JPMC reports the Accounts as deposit liabilities to the Office of the Comptroller of the Currency and pays federal deposit insurance premiums on the Deposits, as it does for all of its deposit liabilities.

47. Further, in a proof of claim filed in the Chapter 11 Cases concerning certain federal tax refunds wired post-petition by the IRS to Account 0667, JPMC's understanding of the nature of the Account is made evident, stating that "[o]n September 30, 2008, the IRS wired the [tax refunds] *to WMI.*" (Emphasis added.) Thus, JPMC recognizes the nature of the Accounts and the ownership of any funds deposited into the Accounts.

F. THE DEBTORS OWE NO AMOUNTS TO JPMC

48. JPMC does not possess any valid claims against the Debtors' estates arising prior to, or after, the Petition Date. Thus, even if JPMC had a legitimate basis for claiming set-off rights (which it does not), it holds no claim against the Debtors to apply such rights, leaving no conceivable basis for JPMC's refusal to pay the Deposits to the Debtors.

49. JPMC cannot assert any claims against the Debtors purportedly acquired pursuant to the P&A Transaction that would initially have inured to the benefit of WMB or WMB fsb, if any. The P&A Agreement expressly so provides. Section 3.1 of the P&A Agreement concerns the purchase of WMB's assets by JPMC. (P&A Agreement §

3.1). However, that section is expressly made subject to section 3.5, which provides that Schedule 3.5, "Certain Assets Not Purchased," enumerates certain assets not purchased, acquired, or assumed by JPMC under the P&A Agreement. (P&A Agreement § 3.5). Listed on Schedule 3.5 is "any interest, right, action, claim, or judgment against . . . any shareholder or holding company of [WMB] . . . ." (P&A Agreement, Schedule 3.5). A copy of Schedule 3.5 to the P&A Agreement is attached hereto as Exhibit F. Therefore, the P&A Agreement unambiguously provides that JPMC did not acquire any interest, right, action, claim, or judgment against WMI, WMB's former sole shareholder and holding company.

50. Thus, because JPMC asserts no claims other than those allegedly derived from WMB or WMB fsb,[5] there are no grounds for the assertion of any purported rights of setoff by JPMC.

51. Similarly, without any valid claim against the Debtors, JPMC has no basis for asserting any lien or security interest in the Deposits in Account 1206, or any other Account, pursuant to the Security Agreement. Without the existence of obligations owed JPMC, there is nothing for any purported security interest to secure.

52. Moreover, even if JPMC did acquire some claim against the Debtors from WMB pursuant to the P&A Transaction or shortly thereafter from WMB fsb by merger (which it did not), such claims were transferred to JPMC from the Banks within the period commencing 90 days prior to the Petition Date. Therefore, because WMI was either insolvent at the time of, or rendered insolvent by, the P&A Transaction, the plain

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[5] The only claims that JPMC could possibly have against the Debtors that are not derivative of the Banks relate to administrative services rendered by JPMC. These, however, are being paid in the ordinary course and are immaterial to the Deposits in any event.

language of section 553(a)(2) of the Bankruptcy Code provides that JPMC cannot possess any right of setoff, as a result of acquiring such claims from the Banks, that would act as a defense to payment of the Deposits to the Debtors.

53. Further, to the extent any claims were acquired from WMB fsb after the commencement of the Chapter 11 Cases, the plain language of section 553(a)(2) of the Bankruptcy Code provides that JPMC has absolutely no basis to setoff such claims against the Debtors' Deposits, irrespective of the Debtors' solvency.

54. Setoff is also unavailable to JPMC where mutuality of parties does not exist due to the Bankruptcy Code's prohibition on triangular setoffs. The Deposits in WMI Investment Account 4704 are owed WMI Investment by JPMC. Even if JPMC did acquire some claim against the Debtors, such claim is asserted against WMI (and not WMI Investment). A setoff by JPMC of the Deposits JPMC owed WMI Investment against amounts JPMC claimed it was owed by WMI would be triangular and, therefore, prohibited due to a lack of mutuality.

55. Therefore, there exists no basis to support or defend JPMC's refusal to pay the Deposits.

FIRST CLAIM FOR RELIEF

Turnover Pursuant to 11 U.S.C. § 542

56. Plaintiffs repeat and re-allege each and every allegation contained in the preceding paragraphs 1-55.

57. The Deposits are debts owed to the Debtors' estates that are matured and payable on demand.

58. The Debtors' estates have been without use of the Deposits.

59. JPMC has no right of setoff under section 553 of the Bankruptcy Code or any other applicable law with respect to the Deposits in the Accounts because JPMC does not possess any valid claims against the Debtors' estates.

60. To the extent it is determined that JPMC does hold claims against the Debtors' estates, JPMC has no right of setoff under section 553 of the Bankruptcy Code because any such claims were acquired within the period commencing 90 days prior to the Petition Date through the date hereof. Any claims acquired from WMB fsb would have been acquired after the commencement of the Chapter 11 Cases. Therefore, with respect to the approximately $3.7 billion in WMB fsb Deposits, no such claims will provide JPMC with a right of setoff pursuant to section 553 of the Bankruptcy Code or any other applicable law.

61. WMI was either insolvent at the time of, or rendered insolvent by, the P&A Transaction. Therefore, any claims acquired from WMB will not provide JPMC with a right of setoff pursuant to section 553 of the Bankruptcy Code or any other applicable law.

62. Additionally, with respect to the Deposits in WMI Investment Account 4704, JPMC has no right of setoff under section 553 of the Bankruptcy Code or any other applicable law due to a lack of mutuality of claims as of the Petition Date.

63. Pursuant to section 542 of the Bankruptcy Code, JPMC is required to pay the Deposits in the Accounts, including pre-judgment interest at the highest applicable rate to be determined by the Court, to Plaintiffs WMI and WMI Investment.

64. Alternatively, the Deposits in the Accounts are property that Debtors WMI and WMI Investment may use pursuant to section 363 of the Bankruptcy Code.

65. JPMC has possession and custody of the Deposits in the Accounts and continues to exercise control over the Accounts.

66. The funds in the Accounts are of substantial value to the Debtors' estates.

67. Pursuant to section 542 of the Bankruptcy Code, JPMC is required to deliver to the Debtors the Deposits in the Accounts, including pre-judgment interest at the highest applicable rate to be determined by the Court.

SECOND CLAIM FOR RELIEF

Unjust Enrichment

68. Plaintiffs repeat and re-allege each and every allegation contained in the preceding paragraphs 1-67.

69. JPMC has been enriched unjustly, realizing an economic advantage, by retaining possession of the Deposits and utilizing something of value that belongs to the Debtors.

70. JPMC has retained the benefit of the Deposits at the expense of the Debtors and their creditors in the Chapter 11 Cases. Retaining the Deposits at the Debtors' expense is contrary to the principles of equity and good conscience.

71. Plaintiffs do not have an adequate remedy of law.

72. Plaintiffs seek an order that JPMC has been unjustly enriched and directing JPMC to provide restitution to Plaintiffs in an amount to be determined by the Court.

RESERVATION OF RIGHTS

73. This complaint is being filed now because the Debtors deem it in the best interests of their estates to do so. The Debtors believe that additional claims in favor of one or more of the Debtors' estates against the Defendant may exist. Thus, the claims

asserted herein are brought without prejudice to any and all other rights, claims and defenses the Debtors' may have, and the Debtors' rights to amend the Complaint to assert additional rights, claims and defenses is reserved expressly.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs WMI and WMI Investment respectfully request that the Court enter judgment in favor of Plaintiffs

A. Ordering JPMC to pay the Deposits, including pre-judgment interest, in the Accounts to WMI and WMI Investment;

B. Ordering JPMC to pay restitution to WMI and WMI Investment in an amount equal to JPMC's unjust enrichment;

C. Awarding Plaintiffs costs of suit herein; and

D. Granting Plaintiffs such other legal or equitable relief as is just.

Dated: April 27, 2009
Wilmington, Delaware

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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)
Debtors.	:	Jointly Administered
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION	:	Adversary Proceeding No. 09-50551
Plaintiff	:	
- against -	:	
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	**JURY TRIAL DEMANDED FOR COUNTERCLAIMS 15 – 18**
Defendants for all claims,	:	
- and-	:	
FEDERAL DEPOSIT INSURANCE CORPORATION,	:	**Re: Docket No. 1**
Additional Defendant for Interpleader claim.	:	

DEBTORS' ANSWER AND COUNTERCLAIMS IN RESPONSE TO THE COMPLAINT OF JPMORGAN CHASE BANK, N.A.

[1] The Debtors in these Chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395). The Debtors continue to share their principal offices with the employees of JPMorgan Chase located at 1301 Second Avenue, Seattle, Washington 98101.

DEBTORS' ANSWER

Debtors Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment," and, together with WMI, the "Debtors" or "Counterclaims-Plaintiffs"), by their undersigned counsel, for their Answer And Counterclaims To The Complaint Of JPMorgan Chase Bank, N.A. ("JPMorgan Chase" or "Counterclaims-Defendant") dated March 24, 2009 (the "Complaint"), hereby respond as follows:

INTRODUCTION

Having obtained the largest deposit and new customer base ever seized by the Federal Deposit Insurance Corporation ("FDIC", and, as receiver, the "FDIC-Receiver"), in exchange for paying a token percentage of such deposits, JPMorgan Chase now seeks to further line its pockets at the expense of WMI by grabbing assets above and beyond the assets it already acquired at a fire-sale price. This Court should not permit JPMorgan Chase to raid the most significant remaining assets of the Debtors when these assets were never owned by the former bank subsidiaries of WMI. The assets in dispute in this adversary proceeding are and have always been property of the Debtors' estates which, by definition, could not have been transferred to JPMorgan Chase without this Court's approval because they became property of the estate pursuant to section 541 of title 11 of the United States Code (as amended, the "Bankruptcy Code").

Although JPMorgan Chase is correct to seek this Court's ruling as to whether it could take assets that belong to the Debtors' estates, launching this adversary proceeding is nothing but a transparent attempt to put its proofs of claims that were filed with this Court (at least ten of which seek exactly the relief sought in this action) in front of other creditors. As JPMorgan Chase well knows, the Debtors' human resources have been drained and they are operating at a significant informational disadvantage given the loss of employees and the substantial amount of historical books and records taken by JPMorgan Chase as part of the sale. Recognizing, however, the central

role this action will have on recoveries to the Debtors' creditors and shareholders, the Debtors do not seek to delay disposition of these core estate property questions and hereby file their answer (the "Answer") and assert counterclaims (the "Counterclaims") in response to the Complaint, reserving their right under Federal Rule of Bankruptcy Procedure 7013 to amend this pleading to assert additional counterclaims after the Debtors complete their investigation of all of the facts concerning JPMorgan Chase's actions, including pre-petition dealings with the Debtors.

With respect to the issues squarely placed before the Court in this adversary proceeding, JPMorgan Chase seeks numerous rulings that lie at the heart of this Court's core jurisdiction. The Complaint concerns the administration of the Debtors' estates, seeks allowance of JPMorgan Chase's claims, and seeks to "quiet title" as to disputed property interests, all while purporting to absolve JPMorgan Chase from any potential liability under the Bankruptcy Code's avoidance powers. The Debtors respectfully request that the Court not permit JPMorgan Chase to obtain a windfall at the expense of the Debtors' significant creditor and shareholder constituency (which already face the prospect of considerable losses) and thereby thwart any realistic prospect of recoveries pursuant to a confirmable Chapter 11 plan.

GENERAL DENIAL

Except as otherwise expressly admitted, Debtors deny each and every allegation in the Complaint, including, without limitation, any allegations contained in the preamble, prayer, headings, and subheadings of the Complaint. Pursuant to Federal Rule of Civil Procedure 8(b)(6), as made applicable to this action by Federal Rule of Bankruptcy Procedure 7008, averments in the Complaint to which no responsive pleading is required shall be deemed as denied. Debtors expressly reserve the right to seek to amend and/or supplement this Answer, as may be necessary.

Complaint 1: JPMorgan Chase brings this action in order to ensure that JPMorgan Chase and its subsidiaries are not divested of their assets

and interests purchased in good faith from the Federal Deposit Insurance Corporation ("FDIC") as receiver (the "Receiver") for Washington Mutual Bank, Henderson Nevada ("WMB") under Title 12 of the United States Code pursuant to that certain Purchase and Assumption Agreement (Whole Bank) dated as of September 25, 2008, a true and correct copy of which is attached as Exhibit A hereto (the "P&A"). JPMC also brings this action for indemnification and recovery against the Debtors for certain liabilities that may be asserted against JPMorgan Chase as the successor by merger to Washington Mutual Bank, fsb, Utah ("WMB fsb"), a former subsidiary of WMB, or against other former subsidiaries of WMB that currently are subsidiaries of JPMorgan Chase.

Answer: Paragraph 1 of the Complaint characterizes the nature of the Complaint and therefore no response is required. To the extent a response is required, the Debtors deny knowledge or information sufficient to determine why JPMorgan Chase brought this action and therefore deny same. Debtors further respectfully refer the Court to the Purchase and Assumption Agreement Whole Bank, dated September 25, 2008 ("P&A Agreement") for the content thereof and deny the remainder of paragraph 1 of the Complaint.

Complaint 2: Under the P&A, JPMorgan Chase acquired the business and related assets of WMB, including ownership of all of WMB's direct and indirect subsidiaries, and all right, title and interest of the Receiver in those assets. As provided for in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest" to these assets, pursuant to and in accordance with the Federal Deposit Insurance Act, as amended (the "FDI Act"). Among the assets acquired by JPMorgan Chase under the P&A were certain assets that have been claimed by Washington Mutual, Inc. ("WMI", and collectively with WMI Investment Corp. ("WMI Investment"), the "Debtors").

Answer: Debtors deny the allegations set forth in paragraph 2 of the Complaint, except respectfully refer the Court to the P&A Agreement for the content thereof.

Complaint 3: Many of the assets the Debtors now improperly claim belong to them (but that JPMorgan Chase in fact acquired from the FDIC) have already been determined not to be the Debtors' property pursuant to the resolution procedures under Title 12. On December 30, 2008, the Debtors submitted claims in the Receivership for,

among other things, ownership of these assets. On January 23, 2009, the FDIC, as Receiver, disallowed the Debtors' claims. The Debtors elected not to appeal the disallowance of their claims to ownership of these assets. Rather, on March 20, 2009, the Debtors filed an action against the FDIC in the United States District Court for the District of Columbia, *Washington Mutual, Inc., et al. v. Federal Deposit Insurance Corporation,* Case No. 1:09-cv-00533 (the "District Court Action"), challenging to the disallowance of their claims and also claiming ownership of those assets. The Debtors have exercised their purported right to demand a trial by jury in the District Court Action.

Answer: Debtors deny the allegations set forth in paragraph 3 of the Complaint, except respectfully refer the Court to the proof of claim Debtors filed with the FDIC-Receiver on December 30, 2008 (the "Proof of Claim"), the FDIC-Receiver's notice dated January 23, 2009 (the "Disallowance Notice"), and the complaint filed in *Washington Mutual, Inc., et al. v. Federal Deposit Insurance Corporation,* Case No. 1:09-cv-00533 (the "DC Action"), for the content thereof. Debtors further admit and aver that the Disallowance Notice stated in part: "[I]f you do not agree with this disallowance, you have the right to file a lawsuit on your claim ... in the United States District (or Territorial) Court for the District within which the failed Institution's principal place of business was located or the United States District Court for the District of Columbia within 60 days from the date of this notice. **IF YOU DO NOT FILE A LAWSUIT ... BEFORE THE END OF THE 60-DAY PERIOD, THE DISALLOWANCE WILL BE FINAL, YOUR CLAIM WILL BE FOREVER BARRED AND YOU WILL HAVE NO FURTHER RIGHTS OR REMEDIES WITH RESPECT TO YOUR CLAIM.**" (Emphasis and capitalization in original.)

Complaint 4: The assets that are the subject of the Debtors' disallowed claims are also among the assets set forth in the Debtors' Schedules and Statements of Financial Affairs filed with this Court on December 19, 2008, January 27, 2009 and February 24, 2009 (collectively, the "Schedules"). Notwithstanding the assertions in the Schedules and the District Court Action, the assets put at issue by the Debtors are not property of the Debtors' estates under 11 U.S.C. § 541, nor are they property of the Receiver any longer, but rather the assets

are property of JPMC, which acquired them in good faith and for value from the FDIC pursuant to the FDI Act.

Answer: Debtors deny the allegations set forth in paragraph 4 of the Complaint, except respectfully refer the Court to the Disallowance Notice, and the Debtors' Schedules and Statements of Financial Affairs filed by the Debtors with this Court on December 19, 2008, January 27, 2009 and February 24, 2009, for the content thereof.

Complaint 5: In response to the Debtors' actions and in order to protect its economic interests in the assets the Debtors chose to put at issue in the District Court Action, JPMorgan Chase has filed this Complaint.

Answer: Paragraph 5 of the Complaint characterizes the nature of the Complaint and therefore no response is required. To the extent a response is required, Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the Complaint that concern JPMorgan Chase's putative motivations for filing the Complaint, and therefore deny same. Debtors otherwise deny the allegations set forth in paragraph 5 of the Complaint, except respectfully refer the Court to the Complaint for the content thereof.

Complaint 6: The assets of the Receiver that were sold to JPMC, as to which WMI has asserted rights or has refused to acknowledge JPMC 's ownership, include (i) approximately $4 billion in the aggregate face amount of Trust Securities (as defined below) contributed by WMI to WMB, the amount of which constitutes regulatory core capital of WMB; (ii) the right to tax refunds arising from overpayments attributable to operations of WMB and its subsidiaries for the 2008 tax year and prior tax years and net operating loss, net capital loss, and excess tax credit carrybacks from 2008 to prior tax years; (iii) approximately $3.7 billion credited by book entry shortly prior to the receivership of WMB so as to create a purported deposit account at WMB fsb in the name of WMI without any apparent deposit of funds; (iv) at least $234 million in tax refunds that belonged to WMB and/or WMB subsidiaries and were acquired by JPMorgan Chase under the P&A but were deposited to the credit of WMI in the days following the Receivership; (v) goodwill judgments that arise from pending and prior litigation; (vi) assets of certain trusts supporting deferred compensation arrangements covering the former and current

employees of WMB and its subsidiaries; and (vii) other assets of WMB, including Visa shares, intellectual property and contractual rights, as described below. The Debtors are also refusing to recognize the Receiver's ability to transfer to JPMorgan Chase certain tax qualified pension and 401(k) plans pursuant to which the trust assets are held for the exclusive benefit of participants, most of whom were WMB's employees.

Answer: Debtors deny the allegations set forth in paragraph 6 of the Complaint, except respectfully refer the Court to the P&A Agreement for the content thereof.

Complaint 7: The liabilities at issue in this adversary proceeding are liabilities that did not transfer to the Receiver or to JPMorgan Chase, but rather are liabilities of the Debtors that relate to acts, conduct or omissions of WMI in connection with events prior to the commencement of the receivership proceedings for WMB and for which WMB and/or its former subsidiaries would be entitled to indemnification and contribution from the Debtors as primary actors. These liabilities relate principally to (i) the issuance of "Trust Securities" with the aggregate face amount of approximately $4 billion; (ii) so-called "deposit accounts," which in the aggregate were recorded as having a book balance of approximately $4.3 billion as of the commencement of these Chapter 11 cases; and (iii) the restructuring and transfer of assets and liabilities among the Debtors and their former subsidiaries.

Answer: Debtors deny the allegations set forth in paragraph 7 of the Complaint.

Complaint 8: In this action, JPMorgan Chase seeks, pursuant to Title 12 and the P&A, (i) a declaration that, as the successor of the Receiver, it has or is entitled to full legal title to and the beneficial interest in the assets at issue, (ii) a declaration that it has lien rights against, and/or is entitled to setoff, recoupment and/or imposition of a constructive trust with respect to any amounts to which the Debtors may otherwise claim to be entitled, (iii) a declaration of the rights of JPMC to indemnification, contribution and/or reimbursement for amounts paid or advanced by JPMC or WMB with respect to any of the assets at issue that are not transferred to JPMC, and (iv) adjudication of any and all conflicting claims to the so-called "deposit accounts" and any funds in them. JPMorgan Chase intends to file its proofs of claim for the amounts, if any, that this Court may determine in this adversary proceeding constitute claims against the Debtors and their estates.

Answer: The first sentence of paragraph 8 of the Complaint characterizes the nature of the Complaint and therefore no response is required. To the extent a response is required, Debtors deny same and deny that JPMorgan Chase is entitled to any relief. Debtors admit that JPMorgan Chase has filed proofs of claim in the Debtors' cases and respectfully refer the Court to the proofs of claim for the content thereof, and further aver that JPMorgan Chase is entitled to no recovery on such proofs of claim.

PARTIES AND BACKGROUND RELATIONSHIPS

Complaint 9: Plaintiff JPMorgan Chase is a national banking association organized under the laws of the United States of America with its principal place of business in Columbus, Ohio. JPMorgan Chase is a wholly-owned subsidiary of JPMorgan Chase & Co., a corporation organized under the laws of the State of Delaware. JPMorgan Chase is the "Assuming Bank" as that term is defined in the P&A and is the successor to and good faith purchaser for value from the Receiver under the P&A and under Title 12 of the United States Code.

Answer: Debtors deny the allegations set forth in paragraph 9 of the Complaint, except respectfully refer the Court to the P&A Agreement for the content thereof, and deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 9 of the Complaint and therefore deny same.

Complaint 10: Defendant WMI is a holding company incorporated in Washington with its principal place of business in Seattle, Washington and is one of the debtors and debtors-in-possession in these cases, having filed its voluntary petition for reorganization under chapter 11 of Title 11 of the United States Code on September 26, 2008 (the "Petition Date") before the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

Answer: Debtors admit the allegations set forth in paragraph 10 of the Complaint.

Complaint 11: Defendant WMI Investment is a Delaware corporation with its principal place of business in Seattle, Washington and is the other debtor and debtor-in-possession in these cases.

Answer: Debtors admit the allegations set forth in paragraph 11 of the Complaint.

Complaint 12: Defendant FDIC is a federal corporation with its principal place of business in the District of Columbia. The FDIC is named as a defendant solely in connection with the interpleader claim.

Answer: Debtors admit the allegations set forth in the first sentence of paragraph 12 of the Complaint. The second sentence of paragraph 12 of the Complaint characterizes the nature of the Complaint and therefore no response is required. To the extent a response is required, Debtors deny same except respectfully refer the Court to the Complaint for the content thereof.

Complaint 13: At all times relevant hereto, WMI was a savings and loan holding company, WMI directly owned WMI Investment and directly or indirectly owned WMB and WMB's subsidiaries, including WMB fsb (WMB and WMB fsb as in existence prior to the Receivership are sometimes collectively referred to herein as the "Affiliated Banks").

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the Complaint and therefore deny same, and aver that the undefined phrase "[a]ll times relevant hereto" renders the allegations vague and ambiguous, except admit that at certain times WMI was a savings and loan holding company that owned Washington Mutual Bank ("WMB"), and indirectly owned WMB's subsidiaries, including Washington Mutual Bank fsb ("WMB fsb"), and that WMI was the direct parent of WMI Investment.

Complaint 14: At all times relevant hereto, the Debtors, WMB and WMB's direct and indirect subsidiaries, including WMB fsb, were subject to regulation by the Office of Thrift Supervision ("OTS") and various other state and federal depository institutions regulatory agencies and banking authorities, including the FDIC, which insured the banks' deposits.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14 of the Complaint and therefore deny same, and aver that the undefined phrase "[a]ll times relevant hereto" renders the allegations vague and ambiguous, except admit that at certain times WMI, WMB, and WMB fsb were subject to regulation by the Office of

Thrift Supervision ("OTS"), and WMI's banking and non-banking subsidiaries were also overseen by various federal and state authorities, including the FDIC.

Complaint 15: On September 25, 2008, the Director of the OTS by order number 200836, appointed the FDIC as Receiver for WMB and the Receiver took possession of WMB in a receivership proceeding under section 1821 of Title 12 of the United States Code (the "Receivership").

Answer: Debtors deny the allegations set forth in paragraph 15 of the Complaint, except respectfully refer the Court to order number 2008-36 for the content thereof, and admit that on September 25, 2008, the Director of OTS, by order number 2008-36, appointed the FDIC as receiver for WMB and advised that the receiver was immediately taking possession of WMB.

Complaint 16: On September 25, 2008, the FDIC, as Receiver and in its corporate capacity, also entered into a Purchase and Assumption transaction with JPMorgan Chase under the P&A, whereby JPMorgan Chase acquired substantially all of the assets and assumed the deposit liabilities (as defined in the P&A and under 12 U.S.C. § 1813(1)) and certain other liabilities of WMB's banking operations under the authority vested in the FDIC by Title 12.

Answer: Debtors deny the allegations set forth in paragraph 16 of the Complaint, except respectfully refer the Court to the P&A Agreement for the content thereof, and admit that after its appointment as receiver, the FDIC-Receiver and the FDIC in its corporate capacity sold certain of the assets of WMB, including the stock of WMB fsb, to JPMorgan Chase pursuant to the P&A Agreement.

Complaint 17: On September 26, 2008, at approximately 10:16 p.m., WMI and WMI Investment filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (as amended, the "Bankruptcy Code") in the Bankruptcy Court, thereby commencing the Chapter 11 cases in which this adversary proceeding is filed.

Answer: Debtors admit the allegations set forth in paragraph 17 of the Complaint.

Complaint 18: On January 30, 2009, the Bankruptcy Court entered its order setting March 31, 2009 as the date by which all proofs of claim against the Debtors and their estates must be filed.

Answer: Debtors deny the allegations set forth in paragraph 18 of the Complaint, except respectfully refer the Court to the January 30, 2009 order for the content thereof.

Complaint 19: On February 24, 2009, the Debtors filed amended schedules in these cases.

Answer: Debtors deny the allegations set forth in paragraph 19 of the Complaint, except respectfully refer the Court to the Court dockets in "these cases" for the content thereof.

Complaint 20: On March 20, 2009, the Debtors commenced the District Court Action.

Answer: Debtors admit that on March 20, 2009 Debtors filed the complaint in the DC Action, and respectfully refer the Court to the complaint filed by the Debtors in the DC Action for the content thereof. Debtors further admit and aver that the FDIC-Receiver's Disallowance Notice stated in part: "[I]f you do not agree with this disallowance, you have the right to file a lawsuit on your claim ... in the United States District (or Territorial) Court for the District within which the failed Institution's principal place of business was located or the United States District Court for the District of Columbia within 60 days from the date of this notice. **IF YOU DO NOT FILE A LAWSUIT ... BEFORE THE END OF THE 60-DAY PERIOD, THE DISALLOWANCE WILL BE FINAL, YOUR CLAIM WILL BE FOREVER BARRED AND YOU WILL HAVE NO FURTHER RIGHTS OR REMEDIES WITH RESPECT TO YOUR CLAIM.**" (Emphasis and capitalization in original.)

JURISDICTION AND VENUE

Complaint 21: Since the Petition Date, the Debtors have been and continue to be authorized to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

Answer: Debtors admit that they have been and continue to be authorized to operate their businesses in accordance with applicable Bankruptcy Code sections, and respectfully refer the Court to the applicable Bankruptcy Code sections for the content thereof.

Complaint 22: On October 3, 2008, this Court entered an order pursuant to Federal Rule of Bankruptcy Procedure 1015(b) (collectively, the "Bankruptcy Rules") authorizing the joint administration of the Debtors' Chapter 11 cases.

Answer: Debtors admit the allegations set forth in paragraph 22 of the Complaint, and respectfully refer the Court to the October 3, 2008 order for the content thereof.

Complaint 23: This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. § 1334, 28 U.S.C. § 157, and Bankruptcy Rule 7001.

Answer: The Debtors state that the allegations set forth in paragraph 23 of the Complaint state a conclusion of law to which no response is required, except admit and aver that one or more of the claims asserted in this proceeding are core proceedings pursuant to 28 U.S.C. § 157(b)(2), and otherwise respectfully refer the Court to 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. § 1334, 28 U.S.C. § 157, and Federal Rule of Bankruptcy Procedure 7001, for the content thereof.

Complaint 24: Venue of this adversary proceeding in this Court is proper pursuant to 28 U.S.C. § 1409(a).

Answer: Debtors state that the allegations set forth in paragraph 24 of the Complaint state a conclusion of law as to which no response is required and respectfully refer the Court to 28 U.S.C. § 1409(a) for the content thereof.

STATEMENT OF FACTS

A. The Bank Failure And Acquisition

Complaint 25: On September 18, 2008, the OTS designated WMB as a "problem institution," thus subjecting it to closer control and scrutiny by the federal regulatory authorities and on September 25, 2008, the OTS placed WMB in receivership because of significant concerns over the safety and soundness of the institution. To ensure continuity of

operations, maximize public confidence and minimize cost to the public treasury, the FDIC ran an accelerated bidding process in accordance with statutorily mandated procedures under Title 12 that, subject to certain limited exceptions, resulted in the sale of all of the Receiver's right, title and interest to or in WMB's assets whether or not reflected on the books and records of WMB, to JPMorgan Chase pursuant to the terms of the P&A.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 of the Complaint to the extent they purport to characterize motivations of the OTS and of the FDIC, and Debtors therefore deny same. Debtors further state that the allegations set forth in paragraph 25 of the Complaint concerning Title 12 state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to Title 12 for the content thereof. Debtors otherwise deny the allegations set forth in paragraph 25 of the Complaint, except respectfully refer the Court to the P&A Agreement and to the putative document that purportedly "designate[d] WMB as a 'problem institution'" for the content thereof.

Complaint 26: At the time of the Receivership, WMB was the sixth largest bank in the United States, with 2207 branches, more than 43,000 employees, and more than 13 million depositors with more than $140 billion of deposit liabilities insured by the FDIC.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 26 of the Complaint and therefore deny same.

Complaint 27: WMB also indirectly owned 100% of WMB fsb. WMB fsb or "the little bank" (as it has sometimes been called) had 26 offices to WMB's 2,207 and less than $5 billion in customer deposits insured by the FDIC to WMB's more than $140 billion.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 27 of the Complaint and therefore deny same.

Complaint 28: The FDIC's ability to promptly find a suitable acquirer of WMB's banking operations had significant economic and policy ramifications. This was a bank failure of unprecedented magnitude

that occurred in the midst of the most severe financial crisis in decades. Had the FDIC been unable to sell the assets of WMB, 13 million depositors would have lost their bank and the confidence of consumers in the banking system generally would likely have been further undermined. The protection of the title conveyed by the FDIC to institutions like JPMorgan Chase, who are encouraged to step into the breach and provide the stability and continuity necessary to avert a run on a failing bank and disruption of its services to the public, is critical to the ability of the regulators to manage bank failures under Title 12 and the government to administer an insurance fund that can maintain public confidence in the banking system.

Answer: The allegations set forth in paragraph 28 of the Complaint are argumentative and require no response. To the extent a response is required, Debtors deny same.

Complaint 29: That WMB stands as the largest bank failure in United States history stems in large part from the financial crisis and crisis of confidence that still grips the nation. In the ten days immediately prior to the Receivership, WMB experienced deposit outflows of more than $16.7 billion, amounting to more than $2 billion per banking business day, as its customers and even WMI itself were apparently moving their assets so as to avoid the effects of what was increasingly perceived to be- an inevitable bank failure.

Answer: The allegations set forth in paragraph 29 of the Complaint are argumentative and require no response. To the extent a response is required, Debtors deny same.

Complaint 30: JPMorgan Chase had only two days after being briefed by the FDIC to submit a bid and then only twenty-four hours from the time that its bid was accepted by the FDIC until the time the acquisition closed to complete the single largest acquisition of a failed institution in United States history. The circumstances which led to execution of the P&A meant that JPMorgan Chase had limited opportunity to prepare for this unprecedented transaction.

Answer: Debtors deny the allegations set forth in paragraph 30 of the Complaint.

Complaint 31: The acquisition included, among other things, a nationwide credit card lending business, a multi-family and commercial real estate lending business, and nationwide mortgage banking activities. JPMorgan Chase's acquisition avoided an interruption in banking services. It assured that the 2,207 branches operated by WMB, as well as the 26 additional branches operated by WMB fsb, opened for business on September 26, 2008, protecting the interests of

employees, customers, vendors, and communities who were dependent on WMB's banking operations. JPMorgan Chase paid $1.88 billion dollars to the FDIC for these and other assets, and assumed all deposits. This transaction involved no financial assistance from, or cost to, the FDIC's Deposit Insurance Fund. This stands in contrast to other recent bank failures such as the FDIC's sale of IndyMac Federal Bank FSB, which cost the FDIC approximately $10.7 billion, despite IndyMac being a much smaller bank than WMB.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 of the Complaint and therefore deny same, except respectfully refer the Court to the P&A Agreement for the content thereof.

Complaint 32: The task of stabilizing, integrating and creating as smooth a transition as possible has been time-consuming and arduous. But its success has been vital to the banking system, the communities served by WMB and the general public interest.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32 of the Complaint and therefore deny same.

B. Combined Operations of Washington Mutual

Complaint 33: As a federal savings association committed to serving consumers and small businesses, WMB accepted deposits from the general public, originated, purchased, serviced and sold home loans, made credit card, home equity, multi-family and other commercial real estate loans, and to a lesser degree, engaged in certain commercial banking activities. WMB's substantial mortgage business was hit especially hard by increasing home and commercial mortgage delinquencies in late 2007 and 2008.

Answer: Debtors admit that WMB accepted deposits from the general public, originated, purchased, serviced and sold home loans, made credit card, home equity, multi-family and other commercial real estate loans, and engaged in certain commercial banking activities. Debtors otherwise state that the remaining allegations set forth in paragraph 33 of the Complaint are argumentative and require no response. To the extent a response is required, Debtors deny same.

Complaint 34: As the financial crisis took root toward the end of 2007, WMI focused its efforts on raising capital for WMB. In late 2007, WMI raised approximately $3 billion in new capital through the issuance of a series of debt securities. In early 2008, WMI sought out merger partners and equity investors. A number of companies participated in the process (including JPMorgan Chase which submitted a bid to acquire WMI, but whose bid was rejected by WMI). In April 2008, in lieu of an acquisition or a merger, WMI negotiated a capital infusion of approximately $7.2 billion from a group of investment funds led by Texas Pacific Group, a private equity firm, through an issuance of preferred stock, which included anti-dilution provisions that severely constricted the ability of WMI to raise additional capital.

Answer: Debtors admit that (i) from December 2007 through April 2008, WMI raised approximately $10 billion in the capital markets, (ii) during that period, WMI's principal assets included cash, the stock of WMB, and the stock of WMI Investment and of the other WMI subsidiaries, (iii) throughout 2008, WMI's debt obligations approximated $7 billion, (iv) from December 2007 through September 2008, WMI made $6.5 billion of capital contributions to WMB (the "Capital Contributions"), and (v) in April 2008, WMI completed a significant recapitalization, which resulted in a $7.2 billion capital infusion by a group of outside investors led by TPG Capital. The remaining allegations set forth in paragraph 34 of the Complaint are argumentative and require no response. To the extent a response is required, Debtors deny same.

Complaint 35: WMI formally contributed to WMB at least $6.5 billion of the approximately $10.2 billion in capital it had raised. As discussed below, certain book entries made between September 19 and September 24, 2008 reflect an additional contribution of $3.7 billion from WMI to WMB fsb, accounting for much of the remaining debt and equity capital raised by WMI during 2007 and 2008. While book entries were made, neither WMI nor WMB transferred cash or other good funds to WMB fsb corresponding to the book entries, whether as a contribution or otherwise.

Answer: Debtors deny the allegations set forth in paragraph 35 of the Complaint, except respectfully refer the Court to the P&A Agreement and to the book entries for the content

thereof, and admit that from December 2007 through September 2008, WMI made the Capital Contributions, as more fully described in paragraph 20 of the Proof of Claim and Exhibit D thereto.

Complaint 36: Prior to the Receivership, WMI and WMB had identical and overlapping directors and held joint meetings of the Boards of Directors of both entities on a combined basis, resulting in effect in a single Board of Directors with identical directors that met on the same topics at the same time and made decisions for both entities collectively. WMI's officers and employees were also officers and directors of WMB and WMI and WMB shared a joint general ledger and other books and records, and centralized their decision making, treasury, cash management, finance, governance, regulatory and executive functions in the same individuals. The overlap was so extensive that as of the time of the Receivership and subsequent Petition Date, WMI claimed it had only a handful of employees remaining as the result of the Receivership.

Answer: The allegations set forth in paragraph 36 of the Complaint are argumentative and so generalized and vague as to require no response. To the extent a response is required, Debtors deny same.

Complaint 37: Likewise, the assets and liabilities of the Debtors and their direct and indirect subsidiaries, including the Affiliated Banks, were connected and in many cases, commingled and intertwined. Prior to the Receivership, the Debtors and their direct and indirect subsidiaries operated a centralized and consolidated cash management system pursuant to which external receipts and payments were accounted for on a consolidated basis and internal receipts or payments were done in whole or in part by book or journal entry as "due to/from" accounts on the general ledger or other books of account.

Answer: The allegations set forth in paragraph 37 of the Complaint are argumentative and so generalized and vague as to require no response. To the extent a response is required, Debtors deny same.

Complaint 38: At various times prior to the Receivership, WMI entered into agreements with third parties that titled assets or contractual rights in WMI's name although WMB or a subsidiary of WMB paid for the asset or contractual right or was the entity liable on the payment or liability therefore. At various times prior to the Receivership, WMI also entered into intercompany arrangements

with the Affiliated Banks with documentation different than the documentation that the Affiliated Banks would have obtained in an arm's-length transaction with an unaffiliated party.

Answer: Debtors deny the allegations set forth in paragraph 38 of the Complaint, except respectfully refer the Court to the putative agreements and arrangements for the content thereof.

Complaint 39: In 2007 and 2008, WMI undertook a series of projects and other acts, at least some of which appear to have moved assets away from WMB or its subsidiaries to WMI or another of WMI's subsidiaries. This included transfers undertaken during August and September 2008 as part of WMI's self-titled "WMI Cash Optimization Program", for the apparent benefit of WMI.

Answer: The allegations set forth in paragraph 39 of the Complaint are argumentative and so generalized and vague as to require no response. To the extent a response is required, Debtors deny same.

Complaint 40: To the extent that any person has or may assert claims against JPMC that resulted from these transactions, JPMC is entitled to be indemnified and held harmless by WMI since all pre-petition transactions were consummated at the behest and direction of WMI and for its benefit.

Answer: Debtors deny the allegations set forth in paragraph 40 of the Complaint.

C. Trust Securities

Complaint 41: Between March 2006 and October 2007, certain issuer trusts (the "Issuing Trusts") formed by WMI and its then subsidiaries issued securities (the "Trust Securities") in the aggregate face amount of approximately $4 billion, exchangeable into depository shares representing preferred stock of WMI upon the occurrence of certain events. A complete list of the Trust Securities is attached as Exhibit B. The Trust Securities were issued in global form registered in the name of Cede & Co., as nominee, and held by Wilmington Trust as depositary for the Depositary Trust Corporation ("DTC"). The sole assets of the Issuing Trusts, in turn, were preferred securities issued by Washington Mutual Preferred Funding LLC ("WMPF").

Answer: Debtors deny the allegations set forth in paragraph 41 of the Complaint, except admit that, between March 2006 and October 2007, in four instances, certain issuing special purpose entities formed by WMI and its then-subsidiaries (the "SPEs") issued securities (the "Trust Securities"), and respectfully refer the Court to the documents evidencing the Trust Securities and Exhibit B to the Complaint for the content thereof, and admit, on information and belief, that the Trust Securities have an aggregate liquidated preference of as much as $4 billion.

Complaint 42: As set forth below, JPMorgan Chase acquired the Trust Securities under the P&A and all steps required to transfer the Trust Securities as required were completed prior to the Petition Date save and except for the ministerial formality of changing record title as reflected at DTC and described below.

Answer: Debtors deny the allegations set forth in paragraph 42 of the Complaint.

Complaint 43: The Trust Securities, like other trust securities issued by financial institutions, qualified as regulatory core capital of WMB under applicable banking laws and regulations with specific approvals and requirements governing their issuance and treatment. They were, by their express terms, mandatorily and automatically exchangeable for a like amount of newly issued depository shares representing WMI preferred stock upon the occurrence of an exchange event. In addition, for the Trust Securities to be treated as core capital of WMB or any other regulated institution when issued, the Trust Securities would have to be structured in a manner that assured they would become property of the regulated institution upon exchange.

Answer: Debtors deny the allegations set forth in paragraph 43 of the Complaint, except respectfully refer the Court to the offering documents for the content thereof, and admit that according to the terms of the Trust Securities, the exchange of the Trust Securities for preferred stock of WMI (or depositary shares representing an interest in preferred stock of WMI) was to follow the issuance by WMI of a press release announcing the exchange event.

Complaint 44: On January 30, 2006, WMB submitted a Notice for Establishment of an Operating Subsidiary (the "Notice") to the OTS and the FDIC regarding the establishment of WMPF. WMPF's assets consisted of indirect interests in various residential mortgage and home equity

loans and other permitted investments. WMPF in turn issued preferred securities to the Issuing Trusts that entitled the Issuing Trusts to a liquidation preference against the assets of WMPF. In the Notice to the OTS and the FDIC, WMB sought confirmation from the OTS that the Trust Securities would qualify for inclusion in the core capital of WMB.

Answer: Debtors deny the allegations set forth in paragraph 44 of the Complaint, except respectfully refer the Court to the documents referenced in paragraph 44 for the content thereof, and admit that Washington Mutual Preferred Funding LLC's ("WMPF") assets were limited to direct or indirect interests in mortgages or mortgage-related assets, cash and other permitted assets, and that WMPF issued preferred securities.

Complaint 45: On February 23, 2006, WMI committed to contribute the Trust Securities to WMB and stated that WMI "hereby undertakes that if, as a result of a Supervisory Event," WMI exchanges its preferred stock for the Trust Securities, "WMI will contribute to WMB the [Trust Securities]." A true and correct copy of that commitment is attached as Exhibit C.

Answer: Debtors deny the allegations set forth in paragraph 45 of the Complaint, except refer to Exhibit C to the Complaint for the content thereof.

Complaint 46: WMI's written commitment to contribute the Trust Securities to WMB in exchange for including the Trust Securities in the core capital of WMB constituted a capital commitment to a federal depository institutions regulatory agency or its predecessor which was deemed assumed as of the Petition Date under 11 U.S.C. Section 365(o). That commitment also constituted a binding agreement (the "Contribution Agreement"), the breach of which would give rise to post-petition administrative claims against WMI.

Answer: Debtors deny the allegations set forth in paragraph 46 of the Complaint.

Complaint 47: At all times relevant hereto solely by virtue of the Contribution Agreement, WMB was permitted to include the Trust Securities in-its- core capital and counted the amount of the Trust Securities as regulatory core capital. The Trust Securities have never been beneficially owned by WMI and have always been subject to a concomitant obligation to contribute the Trust Securities to WMB

as a necessary corollary to the treatment of the Trust Securities as core capital of WMB.

Answer: Debtors deny the allegations set forth in paragraph 47 of the Complaint.

Complaint 48: The issuance of the Trust Securities and the Contribution Agreement were duly authorized by all requisite corporate action on the part of WMI and WMB. True and correct copies of the minutes of the Board of Directors authorizing the transaction are attached as Exhibit D.

Answer: Debtors deny the allegations set forth in paragraph 48 of the Complaint, except respectfully refer the Court to the documents referenced in paragraph 48 for the content thereof.

Complaint 49: On September 25, 2008, in a letter to WMI, the OTS declared an Exchange Event had occurred and directed an immediate exchange of the Trust Securities for WMI preferred stock. WMI responded to the OTS letter later on September 25, 2008, confirming the exchange and contribution.

Answer: Debtors deny the allegations set forth in paragraph 49 of the Complaint, except respectfully refer the Court to any September 25, 2008 letters for the content thereof.

Complaint 50: On September 25, 2008, WMI contributed the Trust Securities to WMB pursuant to an Assignment Agreement, a true and correct copy of which is attached as Exhibit E, pursuant to which, among other things, effective as of September 25, 2008, WMI transferred "all of [WMI's] right, title and interest, whether now owned or hereafter acquired, in and to the [Trust] Securities" to WMB. Furthermore, upon execution, WMI assigned to WMB all present and future "rights and benefits arising out of the [Trust] Securities which come into the possession of [WMI]."

Answer: Debtors deny the allegations set forth in paragraph 50 of the Complaint, except respectfully refer the Court to the Assignment Agreement for the content thereof.

Complaint 51: Under the express terms of the P&A, JPMorgan Chase purchased "all right, title, and interest of the Receiver in and to all of the assets . . . of [WMB] whether or not reflected on the books of [WMB] as of Bank Closing," which includes WMB's and the Receiver's rights to receive-the Trust Securities, a transfer that was effected on September 25, 2008. The Receiver sold the Trust

Securities to JPMorgan Chase under the P&A and, therefore, JPMorgan Chase is the sole owner of all equitable and beneficial right, title and interest in the Trust Securities, leaving only the ministerial act of correcting the record at DTC (or with the Issuing Trusts and their trustees) undone before the filing of these Chapter 11 cases.

Answer: Debtors deny the allegations set forth in paragraph 51 of the Complaint.

Complaint 52: Although the Debtors did not initially dispute JPMorgan Chase's ownership of the Trust Securities and the parties drafted and agreed to a stipulation to transfer the Trust Securities to JPMorgan Chase to accompany the account stipulation, the Debtors amended their schedules on January 27, 2009 to add a Footnote 4 to Schedule B regarding the Trust Securities which had not been mentioned in the Schedules originally filed on December 19, 2008. In that footnote, which is repeated verbatim in the Debtors' Second Amended Schedules filed on February 24, 2009, the Debtors assert unspecified and potential rights to or interests in the Trust Securities.

Answer: Debtors deny the allegations set forth in paragraph 52 of the Complaint, except admit and aver that Debtors have rights and interests in the Trust Securities, and respectfully refer the Court to the Schedules for the content thereof.

Complaint 53: To the extent that WMI ever held or now holds any interest in the Trust Securities — and JPMorgan Chase believes WMI had and has no legally cognizable interest in them — that interest has never consisted of anything more than bare legal title to a securities entitlement to the Trust Securities for the moment in time of the conditional exchange and contribution. Section 541(iv) of the Bankruptcy Code provides that "property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."

Answer: Debtors deny the allegations set forth in paragraph 53 of the Complaint except admit and aver that the Debtors have rights and interests in the Trust Securities.

Complaint 54: As set forth in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest," in the Trust Securities, pursuant to and in accordance with the FDI Act. On December 30, 2008,

WMI nonetheless submitted a claim to the Receiver asserting, among other things, ownership of the Trust Securities. On January 23, 2009, the Debtors' claims were disallowed by the Receiver. The Receiver's disallowance is dispositive of the fact that the Debtors do not own the Trust Securities. On March 20, 2009, the Debtors commenced the District Court Action with respect to the disallowance of their claims to the Trust Securities.

Answer: Debtors deny the allegations set forth in paragraph 54 of the Complaint, except respectfully refer the Court to the Proof of Claim, the Disallowance Notice, the complaint filed in the DC Action on March 20, 2009, and the P&A Agreement, for the content thereof.

Complaint 55: Accordingly, JPMorgan Chase seeks a declaration that it owns the Trust Securities and an order directing third parties including, DTC, Cede & Co., Wilmington Trust Corporation and any other trustee, custodian, depository or other securities intermediary, to take all actions reasonably necessary or appropriate, as requested by JPMorgan Chase, to have the record legal title reflect JPMorgan Chase as the sole owner of the Trust Securities.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 55 of the Complaint.

Complaint 56: In addition, JPMC is entitled to be indemnified and held harmless by WMI for any liabilities associated with the issuance, exchange, contribution or recovery of the Trust Securities, including without limitation any claims regarding authorization, enforceability, avoidability or inadequate disclosure. JPMC seeks a determination that WMI, as the controlling parent, the primary issuer and the principal actor, has the obligation to indemnify and hold harmless its indirect formerly wholly owned. subsidiaries from any liability to third parties associated with or related to the Trust Securities.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 56 of the Complaint.

D. Tax Refunds

Complaint 57: To the extent WMB is or was entitled to tax refunds, the right to receive those refunds was purchased by JPMorgan Chase under the P&A.

Answer: Debtors deny the allegations set forth in paragraph 57 of the Complaint.

Complaint 58: For taxable years prior to 2008, the Washington Mutual entities, consisting of WMI, WMB, and other direct and indirect subsidiaries of WMI (collectively, the "WaMu Group"), filed- a consolidated-tax return, a unitary tax report or a combined tax return with appropriate taxing authorities wherever permissible. WMB (and its subsidiaries) made payments to WMI in the same manner and at the same time as if filing separate returns or separate consolidated returns.

Answer: Debtors deny the allegations set forth in paragraph 58 of the Complaint, except respectfully refer the Court to the tax filings for the content thereof.

Complaint 59: For all tax refunds and rights to receive tax refunds attributable to tax attributes of WMB or its subsidiaries, pursuant to applicable rules and regulations, and as between the Debtors and WMB (or their respective subsidiaries), WMB (or such subsidiary) is the beneficial owner of such tax refund or such right to receive a tax refund attributable to its tax attributes. All or substantially all of the refunds received by, now due and hereafter expected to be due to the WaMu Group are attributable to income and losses of, and taxes paid by, WMB and its subsidiaries, and, therefore, as among the members of the WaMu Group, WMB and its subsidiaries were and are the beneficial owners of all or substantially all tax refunds received, tax refunds due and rights to receive tax refunds.

Answer: Debtors deny the allegations set forth in paragraph 59 of the Complaint.

(i) California Tax Refunds

Complaint 60: For taxable years prior to 2008, the WaMu Group filed a unitary tax report with the California Franchise Tax Board ("FTB"), pursuant to the filing of FTB Form 2523A (for years prior to 1991), and pursuant to a Schedule R-7 (for taxable years after 1991). For taxable years on or after 2005, the Schedule R-7 was filed in compliance with FTB regulations promulgated in 2005 and effective for returns filed after January 8, 2005. In each case, the WaMu Group filed group returns under California tax law, with WMI as the "key corporation." In each case, the agent and surety

for the other members included in the unitary tax report was WMI, the "key corporation" as defined under California tax law.

Answer: Debtors deny the allegations set forth in paragraph 60 of the Complaint, except respectfully refer the Court to the applicable tax regulations and tax filings for the content thereof.

Complaint 61: Even though each taxpayer corporation in the combined group is required under California law to file its own California return and pay its own tax due, as a- matter of administrative convenience, the FTB permits groups to file a group return.

Answer: Debtors deny the allegations set forth in paragraph 61 of the Complaint, except respectfully refer the Court to the applicable tax regulations and tax filings for the content thereof.

Complaint 62: A "key corporation" only acts as agent for the other taxpayer members. Thus, (i) all California refunds are identifiable to an individual taxpayer in the WMI Group, and (ii) all California tax refunds WMI receives that are identified to California income taxes of WMB (or any of WMB's subsidiaries) are held by WMI merely as agent for WMB (or its respective subsidiary) and WMB (or its respective subsidiary) is the beneficial owner of such California tax refunds.

Answer: Debtors deny the allegations set forth in paragraph 62 of the Complaint, except respectfully refer the Court to the applicable tax regulations and tax filings for the content thereof.

Complaint 63: California tax refunds, substantially all of which are expected to be attributable to WMB and its subsidiaries, are expected for the 2008 tax year and for tax years prior to 2008 relating to overpayments of taxes to the FTB.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63 of the Complaint (which refer to what is purportedly "expected" by unidentified person(s)), and therefore deny same.

Complaint 64: All facts and circumstances necessary to determine the amount of California tax refunds for WMB and for any of WMB's subsidiaries are fixed and determinable.

Answer: Debtors deny the allegations set forth in paragraph 64 of the Complaint, except respectfully refer the Court to the applicable tax regulations and tax filings for the content thereof.

Complaint 65: The Debtors have wrongly asserted that WMI—and not WMB (or its respective subsidiaries)—is entitled to the California tax refunds due to the WaMu Group. Accordingly, JPMorgan Chase requests that the Court enter an order declaring that, pursuant to the P&A, JPMorgan Chase and its subsidiaries own the rights to such refunds.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 65 of the Complaint.

Complaint 66: WMI has already received at least a portion of the California income tax refunds due as agent for the WaMu Group and owes those amounts to JPMorgan Chase and the former WMB subsidiaries acquired by JPMorgan Chase under the P&A.

Answer: Debtors deny the allegations set forth in paragraph 66 of the Complaint.

Complaint 67: The beneficial interest in all or a portion of the California income tax refunds received by WMI as agent for the WaMu Group belongs to JPMorgan Chase, as successor in interest to WMB.

Answer: Debtors deny the allegations set forth in paragraph 67 of the Complaint.

Complaint 68: WMI has refused to turn over to JPMorgan Chase those California income tax refunds received already or in the future that are properly allocable to WMB (and its subsidiaries). As a result, JPMorgan Chase seeks an order from the Court compelling the Debtors to turn over those tax refunds.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 68 of the Complaint.

Complaint 69: Various employees and agents of WMB and its subsidiaries had been in discussions with the FTB regarding ongoing California tax matters, such as the progress of audits, and anticipated tax refunds, prior to September 26, 2008. WMI had threatened FTB and its officials with sanctions for violation of the stay to prevent them from continuing their communications with WMB.

Answer: Debtors deny the allegations set forth in paragraph 69 of the Complaint.

Complaint 70: JPMorgan Chase has been significantly prejudiced by not being able to communicate directly without restrictions with the FTB about matters concerning WMB or its subsidiaries since the Petition Date. Certain employees and agents of JPMorgan Chase need to continue these discussions with the FTB about California tax matters related to WMB and its subsidiaries, in order to preserve beneficial tax attributes, to complete pending audits and refund applications, and to arrange for the receipt of California income tax refunds.

Answer: Debtors deny the allegations set forth in paragraph 70 of the Complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegations concerning what "[c]ertain employees and agents of JPMorgan Chase need" and therefore deny same.

Complaint 71: JPMorgan Chase is entitled to communicate with the FTB about matters concerning refunds that may be due to WMB and its subsidiaries, or WMB's successors. WMI only recently directed a letter to the FTB granting them "permission" to speak to WMB for the limited purpose of continuing negotiation of audit matters previously under discussion subject to numerous restrictions, including that WMI retained rights as the "key corporation" for the WaMu Group.

Answer: The allegations set forth in the first sentence of paragraph 71 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required,

Debtors deny same, except respectfully refer the Court to the putative "letter to the FTB" for the content thereof and deny that JPMorgan Chase is entitled to any relief.

Complaint 72: WMI is ineligible to serve as a "key corporation" under California law and its attempt to exercise continuing control over assets and property that do not belong to it is without legal authority or basis. WMI is no longer able to act as an agent for either- WMB or any successors in interest to WMB, for matters involving both years prior to 2008, and for years on or after 2008, because WMI is no longer affiliated with WMB or its former subsidiaries and filing for bankruptcy has caused WMI to have interests adverse to those of WMB and WMB's successors in interest. As a result, JPMorgan Chase is entitled to unrestricted communications with the FTB about all matters concerning WMB, including but not limited to audit activity, assessments, tax refunds and notices. JPMorgan Chase therefore requests that the Court enter an Order authorizing it to engage in such communications and precluding the Debtors or anyone else from interfering with those communications.

Answer: Debtors deny the allegations set forth in paragraph 72 of the Complaint, except respectfully refer the Court to the applicable tax regulations and tax filings for the content thereof, and deny that JPMorgan Chase is entitled to any relief.

(ii) Federal and Other State Tax Refunds

Complaint 73: For taxable years prior to 2008, the WaMu Group filed a consolidated U.S. federal tax return pursuant to regulations promulgated by the U.S. Department of the Treasury ("Treasury Regulations") and the Internal Revenue Service (the "IRS") under Internal Revenue Code ("IRC") Section 1501 *et seq*. For the tax year of 2008, WMB and its subsidiaries were members of the WaMu Group consolidated group until at least September 25, 2008. For each time period, WMI was the common parent of the consolidated group.

Answer: The allegations set forth in paragraph 73 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny the allegations set forth in paragraph 73 of the Complaint.

Complaint 74: To the extent permissible under applicable state law, the WaMu Group filed consolidated tax returns, unitary reports or similar, combined returns with other (non-California) state revenue

authorities with which it was required to file tax returns. Such consolidated or combined returns were filed in those states listed on Exhibit F.

Answer: Debtors deny the allegations set forth in paragraph 74 of the Complaint, except respectfully refer the Court to the applicable state law and tax filings for the content thereof.

Complaint 75: Pursuant to applicable law, WMI acted as agent for the WaMu Group in filing the consolidated tax returns.

Answer: Debtors deny the allegations set forth in paragraph 75 of the Complaint, except respectfully refer the Court to the applicable law and tax filings for the content thereof.

Complaint 76: As with California tax filings, for all tax refunds attributable to tax attributes of WMB or its subsidiaries, WMB (or its-respective subsidiary) is, and under applicable law and regulation is required to be, the beneficial owner of the portions of such tax refund attributable to its tax attributes.

Answer: Debtors deny the allegations set forth in paragraph 76 of the Complaint, except respectfully refer the Court to the applicable law and tax filings for the content thereof.

Complaint 77: WMI has already received certain U.S. federal and state income tax refunds as agent for the WaMu Group that have not been allocated and transferred to WMB (or its subsidiaries).

Answer: Debtors deny the allegations set forth in paragraph 77 of the Complaint, except respectfully refer the Court to the applicable tax regulations and tax filings for the content thereof.

Complaint 78: WMI has likely received additional U.S. federal and state income tax refunds as agent for the WaMu Group of which JPMorgan Chase is presently unaware.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 78 of the Complaint and therefore deny same.

Complaint 79: The beneficial interest in all or a portion of the U.S. federal and state income tax refunds received by WMI as agent for the WaMu Group belongs to JPMorgan Chase, as successor in interest to WMB (and its subsidiaries).

Answer: Debtors deny the allegations set forth in paragraph 79 of the Complaint.

Complaint 80: WMI has refused to turn over to JPMorgan Chase those U.S. federal and state income tax refunds received that are properly allocable to WMB (and its subsidiaries).

Answer: Debtors deny the allegations set forth in paragraph 80 of the Complaint.

Complaint 81: U.S. federal and state income tax refunds, substantially all of which are expected to be attributable to WMB and its subsidiaries, are expected for the 2008 tax year and for tax years prior to 2008 relating to overpayments of taxes by the WaMu Group to the various state taxing authorities.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 81 of the Complaint (which refer to what is purportedly "expected" by unidentified person(s)), and therefore deny same.

Complaint 82: For the 2008 tax year, the WaMu Group is expected to have a variety of tax attributes such as net operating losses, net capital losses, and excess tax credits, and a substantial portion of such tax attributes are expected to be attributable to the operations of WMB and its subsidiaries. The WaMu Group expects to be able to carry back these favorable tax attributes to prior tax years, where such carrybacks will result in additional U.S. federal and state income tax refunds for such prior tax years.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 82 of the Complaint (which refer to what is purportedly "expected" by unidentified person(s)), and therefore deny same.

Complaint 83: All facts and circumstances necessary to determine the amount of U.S. federal and state tax refunds for WMB and for any of WMB's subsidiaries are fixed and determinable.

Answer: Debtors deny the allegations set forth in paragraph 83 of the Complaint, except respectfully refer the Court to the applicable tax regulations and tax filings for the content thereof.

Complaint 84: Debtors have wrongly asserted that WMI—and not WMB (nor its respective subsidiaries)—is entitled to the U.S. federal and state tax refunds due to the WaMu Group.

Answer: Debtors deny the allegations set forth in paragraph 84 of the Complaint.

Complaint 85: As set forth in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest," in these tax refunds, pursuant to and in accordance with the FDI Act. On December 30, 2008, WMI nonetheless submitted a claim to the Receiver asserting, among other things, ownership of the tax refunds. On January 23, 2009, the Debtors' claims were disallowed by the Receiver. The Receiver's disallowance is dispositive of the fact that the Debtors do not own or have an interest the tax refunds. On March 20, 2009, the Debtors filed the District Court Action with respect to the disallowance of their claims to the tax refunds.

Answer: Debtors deny the allegations set forth in paragraph 85 of the Complaint, except respectfully refer the Court to the P&A Agreement, the Proof of Claim, the Disallowance Notice, and the complaint filed in the DC Action on March 20, 2009, for the content thereof.

Complaint 86: Accordingly, JPMorgan Chase requests that in addition to an order directing the turnover of the funds, the Court enter an order declaring that as the acquirer of WMB's interests pursuant to the P&A, JPMorgan Chase and its subsidiaries own the rights to such refunds and further ordering Debtors to turn over to JPMorgan Chase any such refunds already received.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 86 of the Complaint.

Complaint 87: In addition, during the time that WMI, WMB and their respective eligible subsidiaries filed a consolidated tax return for U.S. federal income tax purposes, items of income, deduction, loss and credit were combined in one consolidated return, filed by WMI on behalf of the consolidated group.

Answer: Debtors deny the allegations set forth in paragraph 87 of the Complaint, except respectfully refer the Court to the tax filings for the content thereof.

Complaint 88: During this time, WMB was subject to a variety of state and local taxes. The accrual and payment of these state and-local taxes generated by WMB created -a deduction against income for the combined U.S. federal income tax return. Said differently, the state and local taxes accrued by virtue of WMB's operations created deductions that were used to offset the WMI consolidated group taxable income.

Answer: Debtors deny the allegations set forth in paragraph 88 of the Complaint, except respectfully refer the Court to the applicable tax regulations and tax filings for the content thereof.

Complaint 89: Although these deductions should have been recognized as a benefit that was solely WMB's, WMI did not credit WMB in any way for the state and local income tax deductions attributable to WMB's operations. In effect, WMI claimed for itself the state and local tax deductions properly attributable to WMB. Debtors have wrongly asserted that WMI-and not WMB (nor its respective subsidiaries)—is entitled to these deductions.

Answer: Debtors deny the allegations set forth in paragraph 89 of the Complaint.

Complaint 90: The total dollar value of such deductions is at least approximately $517 million. As set forth in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest," in these assets, pursuant to and in accordance with the FDI Act. JPMorgan Chase requests that the Court enter an order declaring that as the acquirer of WMB's interests pursuant to the P&A, JPMorgan Chase and its subsidiaries own the rights to any cash value generated by such deductions and further ordering Debtors to turn over to JPMorgan Chase the value of any such deductions.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 90 of the Complaint.

(iii) Tax Sharing Agreement

Complaint 91: On August 31, 1999, WMI and members of the WaMu Group entered into a Tax Sharing Agreement, which required various members of the WaMu Group to pay WMI for each member's share of the WaMu Group's consolidated income, and required

WMI to return to each member such member's share of any tax refunds paid to WMI.

Answer: The allegations set forth in paragraph 91 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the Tax Sharing Agreement for the content thereof, and admit that WMI, WMB, WMB fsb, and certain other direct and indirect subsidiaries of WMI and WMB are parties to that certain Tax Sharing Agreement, dated as of August 31, 1999, and that pursuant to the Tax Sharing Agreement, all federal income taxes were paid directly by WMI on behalf of the consolidated tax group, which includes WMB and its subsidiaries.

Complaint 92: The Tax Sharing Agreement provides further support that WMI would receive any tax refund attributable to WMB's or WMB's subsidiaries' tax attributes merely as agent, and-that WMB (or its respective subsidiary) would be the beneficial owner of such tax refund. At all times the Tax Sharing Agreement was subject, by law and by its own terms, to applicable bank and thrift regulatory guidelines. The ownership of the tax refunds that would result from application of either applicable law or the Tax Sharing Agreement should be identical—in neither event may WMI retain refunds that are not attributable to the tax attributes of its regulated subsidiaries.

Answer: The allegations set forth in paragraph 92 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the Tax Sharing Agreement for the content thereof.

E. The Intercompany Amounts and Accounts

(i) The "On-Us" Accounting Entries

Complaint 93: On the Petition Date, WMI claimed that JPMorgan Chase was liable to pay a total purported deposit liability to WMI and its non-WMB subsidiaries, originally claimed in the amount of $5 billion and then ultimately asserted in the total amount of $4,358,492,498 (the "Intercompany Amounts"). According to WMI, the Intercompany Amounts represented deposits maintained by WMI at the Affiliated Banks, all as non-interest bearing demand deposit accounts. A true and correct copy of the original list of twenty-nine

account numbers (the "Accounts") provided to JPMorgan Chase by WMI shortly after the Petition Date is attached as Exhibit G.

Answer: Debtors deny the allegations set forth in paragraph 93 of the Complaint, except respectfully refer the Court to WMI's court filings made on September 26, 2009 (the "Petition Date") for the content thereof, and Debtors respectfully refer the Court to Exhibit G to the Complaint for the content thereof.

Complaint 94: As set forth in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest," in the Intercompany Amounts, pursuant to and in accordance with the FDI Act. On December 30, 2008, the Debtors nonetheless submitted a claim to the Receiver asserting, among other things, ownership of the Intercompany Amounts. On January 23, 2009, the Debtors' claims were disallowed by the Receiver. On March 20, 2009, the Debtors commenced the District Court Action with respect to the disallowance of their claims, assert that the Intercompany Amounts are deposit accounts at JPMorgan Chase, and claim damages relating to the Intercompany Amounts.

Answer: Debtors deny the allegations set forth in paragraph 94 of the Complaint, except respectfully refer the Court to the P&A Agreement, the Proof of Claim, the Disallowance Notice, and the complaint filed in the DC Action on March 20, 2009, for the content thereof.

Complaint 95: With the exception of signature cards for several of the smaller Accounts, JPMC has not located and believes there do not exist pre-petition any deposit account agreements, signature cards or any other documentation for the Accounts as deposit accounts. Notwithstanding that fact and while it continued to investigate whether such documents existed somewhere, JPMorgan Chase was prepared to treat the Accounts as if they were deposit accounts so long as all rights of all parties, including JPMorgan Chase's rights, were acknowledged and approved by order of this Court. Toward that end, on or about October 15, 2008, JPMorgan Chase and the Debtors entered into a proposed stipulation (the "Account Stipulation") with respect to the Accounts that was filed with the Court for approval. The Account Stipulation was ultimately withdrawn following objections filed by certain creditors of the Receivership and the FDIC and was never entered by the Court.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 95 of the Complaint and therefore deny same. Debtors deny the remaining allegations set forth in paragraph 95 of the Complaint, except Debtors respectfully refer the Court to the October 15, 2008 document for the content thereof, and further allege and aver that the October 15, 2008 document was withdrawn and never approved by the Court.

Complaint 96: Pursuant to the Account Stipulation, and before it was withdrawn, JPMorgan Chase and the Debtors executed customary deposit account agreements regarding the Accounts on or about October 21, 2008 that provided, among other things, customary rights of setoff, recoupment and banker's liens to secure JPMorgan Chase's rights to recover claims JPMC may have against the Debtors or their subsidiaries and affiliates from the funds on deposit in the Accounts.

Answer: Debtors object to the allegations set forth in paragraph 96 of the Complaint on the grounds that such allegations purport to disclose confidential settlement communications in violation of ethical and legal rules binding upon JPMorgan Chase and its counsel (*see, e.g.*, Fed. R. Evid. 408), and Debtors reserve all rights, remedies and defenses with respect to the breach of such ethical and legal obligations. To the extent a response is required, Debtors deny the allegations set forth in paragraph 96 of the Complaint.

Complaint 97: After the execution of those documents but prior to December 19, 2008, JPMorgan Chase acceded to a request of the Debtors and the Official Committee of Unsecured Creditors (the "Committee") to agree to the accrual of interest on the Intercompany Amounts as a sign of good faith in the event that it were ultimately determined that any of the Intercompany Amounts were in fact deposit accounts, without prejudice to its rights. Similarly, JPMorgan Chase agreed to the Debtors' further-request that as a sign of "goodwill" it agree to release $292 million of the Intercompany Amounts attributable to the Accounts of the non-debtor subsidiaries of WMI, without prejudice to its rights.

Answer: Debtors deny the allegations set forth in paragraph 97 of the Complaint.

Complaint 98: JPMorgan Chase agreed to those requests from the Debtors in good faith, without prejudice to its rights, and on the understanding that the parties were working diligently to resolve open questions and issues with respect to the Intercompany Amounts. It did so in reliance on the Debtors' execution of account documentation for the Accounts that protected the interests of JPMC, and on the understanding that the Debtors would respect those rights. However, on or about December 19, 2008, after obtaining from JPMorgan Chase the benefit of these concessions, the Debtors advised JPMorgan Chase that the execution of those deposit account agreements on October 21, 2008, was only in anticipation of the proposed Account Stipulation and, since that stipulation had never been approved, the execution and delivery of the agreements was in error, unauthorized and considered by the Debtors to be null, void and without legal effect.

Answer: Debtors deny the allegations set forth in paragraph 98 of the Complaint.

Complaint 99: The execution and effectiveness of the account documentation executed by the Debtors on October 21, 2008, was a key factor in JPMorgan Chase's decision to agree to the request that it accrue interest on the Intercompany Amounts and to the release of $292 million to the Debtors and their non-debtor affiliates. While JPMorgan Chase does not dispute that the Account Stipulation was never so ordered, to the extent that such documentation is ineffective, it should be ineffective for all parties and for all purposes, including the effectiveness of any post-petition book entries reflecting any portion of the Intercompany Amounts or Accounts as deposit liabilities and the release of any funds to the Debtors or their non-Debtor affiliates.

Answer: Debtors deny the allegations set forth in paragraph 99 of the Complaint.

Complaint 100: Although JPMorgan Chase still has not discovered any pre-petition deposit account agreements, signature cards or other documentation for the Accounts that would have been required of depositors that were not affiliates in order to treat the Accounts as deposit accounts (except for the signature cards on a few accounts as described above), it is nonetheless clear that if these are deposit accounts—not capital contributions—they were and are subject to the standard terms and conditions specified in the Master Business Account Disclosures and Regulations (the "MBA Policy") of the Affiliated Banks.

Answer: Debtors deny the allegations set forth in paragraph 100 of the Complaint.

Complaint 101: The Accounts were associated with the DDA numbers provided by WMI. Of the twenty-nine, most were so-called "On–Us Accounts", the internal nomenclature for intercompany receivables that were understood to represent deposit accounts at the Affiliated Banks. Thus, the balances in these Accounts as of any point in time, unlike third party deposit accounts, were maintained both at the depository institution and as intercompany book entries on the general ledger of WMI and the Affiliated Banks that were its subsidiaries.

Answer: Debtors deny the allegations set forth in paragraph 101 of the Complaint, except admit that "On Us Accounts" were deposit accounts, and respectfully refer the Court to the documents referenced in paragraph 101 for the content thereof.

Complaint 102: The decision on how to characterize an intercompany transaction was made by a single centralized Treasury group for WMI and all of its affiliates. That Treasury group was under the direct supervision of Robert Williams, currently the Chief Executive Officer of WMI.

Answer: Debtors deny the allegations set forth in paragraph 102 of the Complaint.

Complaint 103: To the extent the Intercompany Amounts and the Accounts reflect capital contributions, they are the property of JPMorgan Chase under the terms of the P&A. To the extent they are deposit liabilities, they must be governed by standard terms and conditions governing unaffiliated deposit accounts, as a result of which they become subject to any liens, claims and interests that JPMC may have, and are also subject to setoff, recoupment or other offset.

Answer: Debtors deny the allegations set forth in paragraph 103 of the Complaint.

(ii) Deposit Liabilities

Complaint 104: To the extent the Intercompany Amounts in the Accounts are not capital contributions and are in fact deposit liabilities of WMB or WMB fsb assumed by JPMorgan Chase under the P&A, WMI and its subsidiaries, like every other Affiliated Bank depositor (expressly or otherwise), are bound by the standard terms and conditions for deposits at the Affiliated Banks.

Answer: The allegations set forth in paragraph 104 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 105: The Accounts were utilized to settle intercompany obligations, including obligations arising from the payment and allocation of expenses among WMI and all of its subsidiaries, with intercompany allocations, payments and settlements on a periodic, usually monthly, basis. The balances on the Accounts were reflected on "On-Us Elevation Reports" generated on a monthly basis and on paper "Washington Mutual Internal Checking Detail" statements mailed to an employee of WMB on a monthly basis. Copies of the "On-Us Elevation Reports" and of the "Washington Mutual Internal Checking Detail" statements for August, September and October, 2008 are attached as Exhibits H and I, respectively.

Answer: Debtors deny the allegations set forth in paragraph 105 of the Complaint, except admit that Exhibits H and I to the Complaint contain, among other language, headings that state "On-Us Elevation Report" and "Washington Mutual Internal Checking Detail Information".

Complaint 106: These Accounts were established by WMI or one of its non-bank subsidiaries at the Affiliated Banks pursuant to WMI' s Internal Corporate Demand Deposit Account Establishment and Usage Policy (the "On-Us Policy"). According to that policy, WMB had the right to use the Intercompany Amounts for, among other things, processing and clearing transactions between WMB and WMI or their respective subsidiaries, customers, vendors, or investors, again raising the question of whether the Intercompany Amounts represented a continuing deposit liability or should be characterized as a general reserve, a capital contribution or a form of intercompany advance to the Affiliated Banks. The On-Us Policy was silent regarding the rules and terms governing the acceptance by the Affiliated Banks of amounts under the On-Us Policy as deposit accounts and services related to such accounts maintained at the Affiliated Banks.

Answer: Debtors deny the allegations set forth in paragraph 106 of the Complaint, except admit that the Accounts were established by WMI or one of its non-bank subsidiaries and respectfully refer the Court to the documents referenced in paragraph 106 for the content thereof.

Complaint 107: WMI and the Affiliated Banks maintained a detailed, forty-page policy, the MBA Policy, that operated as a contract setting forth the terms and conditions governing all deposit accounts established at the Affiliated Banks. The MBA Policy contained, among other things, a self-executing clause that made the terms of the policy binding upon all depositors, even those who did not

expressly give permission, through consent implied by the opening and continued use of the deposit account.

Answer: The allegations set forth in paragraph 107 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except refer to the documents referenced in paragraph 107 for the content thereof.

Complaint 108: The MBA Policy and its terms and conditions apply to and govern any accounts that are in fact deposit accounts at the Affiliated Banks, including the Accounts to the extent any are deposit accounts. WMI as the sole shareholder and parent of the Affiliated Banks is charged with knowledge and acceptance of the MBA Policy for any deposit account it maintained at the Affiliated Banks.

Answer: The allegations set forth in paragraph 108 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except refer to the documents referenced in paragraph 108 for the content thereof.

Complaint 109: Any claim that WMI is entitled to terms more favorable to it than the terms imposed on third party depositors under the MBA Policy would violate applicable federal law and regulations and be untenable. The provision of services, including deposit services, to WMI by its Affiliated Banks, under relevant banking laws and regulations, were required to have been conducted on terms and conditions no less favorable to the bank than would have been undertaken in a comparable transaction with an unaffiliated third party. Thus, these accounts, to the extent they reflect deposits, were required by law to be maintained on terms no less favorable to the Affiliated Banks than those clearly set forth in the MBA Policy.

Answer: The allegations set forth in paragraph 109 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except refer to the documents referenced in paragraph 109 for the content thereof.

Complaint 110: The MBA Policy expressly grants the Affiliated Banks a right to offset any and all claims against all deposit account liabilities. Specifically, the MBA Policy provides, "you agree we have the right to offset any account or asset of yours then held by us, by our sister bank, or any subsidiary of ours or our sister bank." Said

differently, to the extent the Accounts and the Intercompany Amounts contained therein are deposit liabilities of the Affiliated Banks, the MBA Policy created a broad contractual right of setoff against the Accounts and the Intercompany Amounts for the benefit of the Affiliated Banks and their subsidiaries.

Answer: The allegations set forth in paragraph 110 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except refer to the documents referenced in paragraph 110 for the content thereof.

Complaint 111: Accordingly, to the extent that any of the Accounts or Intercompany Amounts are found by the Court to constitute deposit liabilities of JPMorgan Chase as assignee of the Receiver, they are deposit liabilities subject to and created under the MBA Policy and JPMorgan Chase has a security interest in, lien rights against and rights of set off and recoupment against the Intercompany Amounts as deposit liabilities under the MBA Policy and standard deposit account agreement terms and conditions applicable to all third party depositors and as in effect at the time that the Affiliated Banks and their parent entered into the transactions creating and maintaining the Accounts.

Answer: The allegations set forth in paragraph 111 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same and further deny that JPMorgan Chase is entitled to any relief.

(iii) JPMorgan Chase Also Has an Express Security Interest in at Least One Account

Complaint 112: In addition, WMI entered into at least one specific security agreement with WMB (the "Security Agreement") whereby WMB received a security interest in and lien upon at least one of the Accounts in return for providing value to WMI. According to its terms, the Security Agreement "shall be binding upon [WMI] and its successors and assigns, and shall inure to the benefit of, and may be enforced by [WMB] and its successors, transferees, and assigns." This express security interest creates a lien to secure any and all intercompany obligations. JPMorgan Chase is the successor, transferee or assignee of the Security Agreement and entitled to enforce its terms against WMI at least as to Intercompany Amounts associated with Account No. 177-8911206. A true and correct copy of the Security Agreement is attached as Exhibit J.

Answer: The allegations set forth in paragraph 112 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the documents referenced in paragraph 112 for the content thereof.

(iv) The September $3.67 Billion Book Entry Transfer

Complaint 113: Between September 19, 2008 and September 24, 2008, in the days immediately preceding the impending takeover of WMB by its regulators, WMI directed book entries purporting to transfer approximately $3.67 billion (the "$3.67 Billion Book Entry Transfer") from WMB to WMB fsb. The entries direct the transfer from the triple 070-10450009909 "On-Us" Account No. 17900001650667, which is reflected in the internal On-Us Elevation Report and the Internal Checking Detail as an account at WMB, to what WMI now claims was a deposit account at WMB fsb identified as triple 070-10441-0009909 "On-Us" Account No. 44100000064234.

Answer: Debtors deny the allegations set forth in paragraph 113 of the Complaint, except Debtors admit and aver that $3.67 billion was transferred to a deposit account bearing Account No. 44100000064234, and respectfully refer the Court to the documents referenced in paragraph 113 and the Complaint for the content thereof.

Complaint 114: The general ledger entries for this transaction indicate that the entries were posted on September 24, 2008 with a "retro" date to September 19, 2008 and describe the $3.67 Billion Book Entry Transfer as "WMI contributes to FSB." WMI has asserted that the transaction was intended to be a transfer of funds from a WMI deposit account at WMB to a WMI deposit account at WMB fsb. What is clear, however, is that no cash or other funds were actually moved to or received by WMB fsb in connection with the transfer.

Answer: Debtors deny the allegations set forth in paragraph 114 of the Complaint, except admit that there was a transfer of funds from a WMI deposit account at WMB to a WMI deposit account at WMB fsb, and respectfully refer the Court to the ledger entries for the content thereof.

Complaint 115: The Debtor's agreement to the terms of the Account Stipulation and the deposit agreements that provide JPMorgan Chase on behalf of itself and its affiliates and subsidiaries with broad post-petition lien rights and rights of setoff and recoupment resulted in the entry of the $3.67 Billion Book Entry Transfer as a deposit liability on the books and records of JPMC. Having executed the standard deposit agreements with JPMorgan Chase necessary to have this account reflected as a deposit at JPMorgan Chase, WMI should be estopped from taking the position that these account agreements were a mistake and not binding on it or from enjoying-the benefit of having-the Accounts reflected as deposit liabilities free of the lien and setoff rights created by those very same agreements. To the extent that any post-petition book entry is considered as relevant to the status of the purported deposit, any such resulting deposit should similarly be considered subject to the depository institution's rights, including post-petition contractual and statutory rights of setoff, that accompany the post-petition deposit.

Answer: Debtors object to the allegations set forth in paragraph 115 of the Complaint on the grounds that such allegations purport to disclose confidential settlement communications in violation of ethical and legal rules binding upon JPMorgan Chase and its counsel (*see, e.g.*, Fed. R. Evid. 408), and Debtors reserve all rights, remedies and defenses with respect to the breach of such ethical and legal obligations. To the extent a response is required, Debtors deny the allegations set forth in paragraph 115 of the Complaint.

Complaint 116: WMB fsb would never have accepted a deposit liability from an unaffiliated third party without first receiving good funds, or at least not a deposit liability of the magnitude its parent now asserts was created on or about September 19, 2008. The $3.67 Billion Book Entry Transfer represented approximately 44% of the total deposits at WMB fsb, an increase of nearly 80% in total deposit liabilities. In no way was this an ordinary course transaction. Regardless of the fact that WMI and its affiliates may have operated a centralized cash management system for efficiency as members of the same corporate family, intracompany transfers, unaccompanied by actual movement of funds, cannot create obligations and liabilities as third parties when the corporate ownership link is broken. Because no cash or other funds were actually transferred by WMI to WMB fsb, the $3.67 Billion Book Entry Transfer could not have created a deposit liability of WMB fsb to WMI without receipt of good funds. To the extent the $3.7

Billion Book Entry Transfer is nonetheless deemed to create such a liability, JPMC is entitled to a complete offset for WMI's failure to deliver good funds representing that $3.67 billion deposit.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 116 of the Complaint.

Complaint 117: The $3.7 Billion Book Entry Transfer was not a deposit account and WMI should be estopped from making any claims to the contrary.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 117 of the Complaint.

Complaint 118: Alternatively, to the extent any third party has or may have a claim against WMB fsb and/or JPMorgan Chase with respect to or as a result of the $3.7 Billion Book Entry Transfer, JPMorgan Chase is entitled to-be indemnified by WMI for any liability it may incur and is entitled to recover the amount by which it is or may be liable to any such third party from the Intercompany Amounts.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 118 of the Complaint.

(v) The Tax Refunds and other Funds in the Accounts

Complaint 119: A substantial portion of the Intercompany Amounts were, at the time of the Receivership and the Petition Date, in fact the property of the Affiliated Banks, representing tax payments made by the Affiliated Banks either as (i) accelerated payments of amounts previously claimed by WMI against the Affiliated Banks purportedly for taxes paid in prior years by WMI on behalf of the Affiliated Banks; or (ii) amounts transferred to WMI in payment of estimated or actual 2008 taxes.

Answer: Debtors deny the allegations set forth in paragraph 119 of the Complaint.

Complaint 120: In addition, after the Petition Date, at least approximately $234 million of tax refunds due to WMB — the rights to which were purchased by JPMorgan Chase as assets of WMB (the "Tax Refunds Received") — were paid to WMI. An amount equal to at least this $234 million of the Tax Refunds Received are included in the balance of the Intercompany Amounts and the Accounts and should be paid over to JPMorgan Chase as the lawful owner of those funds.

Answer: Debtors deny the allegations set forth in paragraph 120 of the Complaint.

Complaint 121: The Tax Refunds Received should not have been, and at various times were not in fact, recorded in any way as a deposit liability. The Tax Refunds Received were and are property of JPMorgan Chase purchased under the P&A.

Answer: Debtors deny the allegations set forth in paragraph 121 of the Complaint.

(vi) Section 9.5 of P&A Agreement

Complaint 122: To the extent any of the Accounts are deposit liabilities assumed by JPMorgan Chase, pursuant to Section 9.5 of the P&A, "[a]t any time, the [FDIC] may, in its discretion, determine that all or any portion of any deposit balance assumed by [JPMorgan Chase] pursuant to this Agreement does not constitute a "Deposit" . . . and may direct [JPMorgan Chase] to withhold payment of all or any portion of any such deposit. Upon such direction, [JPMorgan Chase] agrees to hold such deposit and not make payment of such deposit balance to or on behalf of the depositor, or to itself, whether by way of transfer, set-off, or otherwise. [JPMorgan Chase] shall be obligated to reimburse the [FDIC], . . . for the amount of any deposit balance or portion thereof paid by [JPMorgan Chase] in contravention of any previous direction to withhold payment of such deposit balance or return such deposit balance, the payment of which was withheld pursuant to this Section."

Answer: Debtors deny the allegations set forth in paragraph 122 of the Complaint, except respectfully refer the Court to the P&A Agreement for the content thereof.

Complaint 123: The FDIC has not to date notified JPMorgan Chase that all or any portion of the Intercompany Amounts or Accounts are or are not Deposit Liabilities within the meaning of the P&A. Nor has the FDIC directed JPMorgan Chase to withhold payment on all or any portion of the Accounts. JPMorgan Chase requests that to the extent this Court orders JPMorgan Chase to pay any portion of the

Intercompany Amounts or Accounts to the Debtors or into the registry of this Court, that the Court do so by way of interpleader under Rule 7022, releasing JPMorgan Chase from any liability for such amounts to any person and preserving the rights of all parties and all possible claimants with respect to those funds (including JPMorgan Chase). Specifically, JPMorgan Chase requests a finding that it only has to pay or credit the Accounts or the Intercompany Amounts once and that this Court's determination regarding ownership, character and rights in or to the Intercompany Amounts or the Accounts is final so that JPMorgan Chase has no further liability in any capacity for the Intercompany Amounts or Accounts except as may be determined by this Court in this proceeding.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 123 of the Complaint and therefore deny same. Debtors further deny that JPMorgan Chase is entitled to any relief.

Complaint 124: In the District Court Action, the Debtors assert that JPMorgan Chase assumed these liabilities as deposit liabilities under the P&A and that they are now depositors of JPMorgan Chase.

Answer: Debtors deny the allegations set forth in paragraph 124 of the Complaint, except respectfully refer the Court to the complaint filed by the Debtors in the DC Action for the content thereof.

F. Goodwill Litigation

Complaint 125: JPMorgan Chase, as the successor in interest to the Receiver and WMB-and not WMI—is the proper recipient of both the $356,454,911 judgment entered in *Anchor Savings Bank, FSB v. United States*, No. 95-872C (Fed. Cl.) (the "Anchor Judgment") and the $55,028,000 partial judgment entered in American Savings Bank, F.A. v. United States, No. 92-872C (Fed. Cl.) (the "ASB Judgment"), as well as the proper plaintiff in the continuing *Anchor Savings Bank and American Savings Bank* cases.

Answer: The allegations set forth in paragraph 125 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same,

except respectfully refer the Court to the pleadings and court decisions of the referenced cases for the content thereof.

Complaint 126: The *Anchor Savings Bank and American Savings Bank* cases are two of the numerous actions brought against the United States, asserting that passage of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") breached supervisory merger contracts that permitted financial institutions to apply special accounting treatment to their acquisitions of failing savings and loan thrifts. Specifically, the contracts permitted the treatment of supervisory goodwill as regulatory capital that was no longer permissible under FIRREA.

Answer: Debtors deny the allegations set forth in paragraph 126 of the Complaint, except respectfully refer the Court to the pleadings and documents in the referenced cases for the content thereof, and state that the allegations in the last sentence of paragraph 126 of the Complaint state a conclusion of law as to which no response is required.

Complaint 127: As the facts and court decisions in the *Anchor Savings Bank* action establish, the damages resulting from the United States' breach of a series of contracts were incurred by *Anchor Savings Bank*. Ownership of the Anchor Savings Bank cause of action remained at all times with Anchor Savings Bank—the sole plaintiff in the action—and the successor thrifts so that the Anchor Judgment thereby became an asset of WMB. In 1995, the operations and assets of Anchor Savings Bank were merged with those of Dime Savings Bank. In 2002, Dime Savings Bank was merged into WMB.

Answer: The allegations set forth in paragraph 127 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the pleadings and court decisions in the referenced cases for the content thereof.

Complaint 128: Similarly, the capital at issue in the *American Savings Bank* action was provided and posted by American Savings Bank, F.A. and consisted of inventory capital and retained earnings held by American Savings-Bank, F.A. As the facts and-court decisions in the *American Savings Bank* action establish, the damages resulting from the United States' breach of the Note Forbearance—which are

the damages comprising the ASB Judgment—were incurred by American Savings Bank, F.A. The plaintiff that provided the capital, American Savings Bank, F.A., was the predecessor in interest to WMB and amended its Federal Stock Charter in 1997 to change its corporate title from American Savings Bank, F.A. to Washington Mutual Bank, F.A. In addition, the parent company of American Savings Bank, F.A., New American Capital, Inc., was subsequently liquidated and merged into WMB, not WMI.

Answer: The allegations set forth in paragraph 128 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the merger documents and to the pleadings and court decisions in the referenced cases for the content thereof.

Complaint 129: WMI has asserted that it is entitled to the ASB Judgment, which on February 16, 2009, this Court ordered be paid into its registry. This Court further directed that any party, other than the Debtors, asserting an ownership interest in the ASB Judgment bring its claim through an adversary proceeding in accordance with Bankruptcy Rule 7001. JPMorgan Chase hereby does so.

Answer: Debtors admit the allegations set forth in paragraph 129 of the Complaint, except deny that JPMorgan Chase is entitled to any relief.

G. Legacy Rabbi Trusts and Benefit Plans

(i) Legacy Rabbi Trusts

Complaint 130: The Debtors have refused to acknowledge JPMorgan Chase's ownership of the assets of certain rabbi trusts ("Legacy Rabbi Trusts") that belong to JPMorgan Chase under the terms of the P&A, even though these assets were reflected on WMB's books and records and WMB was the successor to the original settlor. These assets support obligations under certain non-qualified retirement and pension plans covering current or former employees of or retirees from WMB or its predecessors in interest.

Answer: Debtors deny the allegations that JPMorgan Chase has "ownership of the assets" and otherwise deny the allegations set forth in paragraph 130 of the Complaint.

Complaint 131: In a series of mergers in the late 1990s and the early part of this decade, WMI, through a variety of subsidiaries, acquired a

number of financial institutions, which were merged into, or the assets of which were purchased by, WMB. As part of-these acquisitions, WMB also acquired a number of non-qualified plans funded through Legacy Rabbi Trusts as well as liabilities for other plans not supported by trust assets. Rabbi Trusts are used to fund the payment of benefits under nonqualified deferred compensation plans that were adopted by some of the financial institutions WMI acquired. As of September 30, 2008, the books and records of WMB and WMI reflected 16 separate legacy plan Rabbi Trusts with aggregate legacy Rabbi Trust assets of over $550 million.

Answer: Debtors deny the allegations set forth in paragraph 131 of the Complaint, except respectfully refer the Court to the merger documents, plan documents, and books and records, for the content thereof.

Complaint 132: The "Legacy Rabbi Trusts" support the liabilities created under a number of non-qualified deferred compensation and supplemental retirement plans ("legacy plans") adopted by predecessor institutions acquired by the Washington Mutual family over the years.

Answer: Debtors admit that "Legacy Rabbi Trusts" support liabilities created under a number of non-qualified deferred compensation and supplemental retirement plans adopted by predecessor institutions acquired by certain Washington Mutual entities over the years, and otherwise deny the allegations set forth in paragraph 132 of the Complaint.

Complaint 133: Since the execution of the P&A, JPMorgan Chase has been prepared to assume the obligations supported by the rabbi trust assets that it purchased under the P&A but the Debtors have refused to provide joint instructions to the trustees even where it is incontrovertible that the assets for a particular trust were acquired by JPMorgan Chase under the P&A. In so refusing to acknowledge JPMC's ownership and utilizing the automatic stay, the Debtors in effect have halted the payment of benefits to employees and many elderly retirees.

Answer: Debtors deny the allegations set forth in paragraph 133 of the Complaint.

Complaint 134: Under the P&A, the assets of twelve Legacy Rabbi Trusts were sold to JPMorgan Chase by the FDIC. With respect to five of these Legacy Rabbi Trusts, the FDIC has directed the trustees to turn the assets over to JPMorgan Chase and, when that happens,

JPMorgan Chase has agreed to recommence the payment of benefits to retirees and others whose benefits were supported by the Legacy Rabbi Trust assets. With respect to the other seven Legacy Rabbi Trusts—four Dime Savings Bank Rabbi Trusts (the "Dime Rabbi Trusts"), two Great Western Rabbi Trusts (the "Great Western Rabbi Trusts"), and a Providian Rabbi Trust (the "Providian Rabbi Trust" and, together with the Dime Rabbi Trusts and the Great Western Rabbi Trusts, the "Bank Rabbi Trusts")[2]—there was some initial ambiguity as to either the identity of the successor to the original settlor of the Bank Rabbi Trust or the source of funding for the trust assets. JPMorgan Chase has since provided the Debtors with documentation for the conclusion that WMB had properly accounted for the assets of the Bank Rabbi Trusts on its books and that WMB was the successor to the original settlor. Accordingly, the assets of the Bank Rabbi Trusts were confirmed as property of WMB and thus also purchased by JPMorgan Chase under the P&A. To date, the Debtors have refused to acknowledge JPMorgan Chase's ownership of the Bank Rabbi Trust assets in writing.

Answer: Debtors deny the allegations set forth in paragraph 134 of the Complaint.

Complaint 135: To determine with finality the ownership of the assets of the Legacy Rabbi Trusts, JPMorgan Chase requests that the Court enter an order declaring that JPMorgan Chase purchased the assets of the Legacy Rabbi Trusts, and an order authorizing JPMorgan Chase and the trustees of each of the Legacy Rabbi Trusts to take all actions necessary or appropriate to transfer ownership of the assets to JPMorgan Chase and compel Debtors to cooperate in the transfer of them to JPMorgan Chase.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 135 of the Complaint.

(ii) The Pension Plan and the 401(k) Plan

Complaint 136: As of the Petition Date, WMI sponsored the WaMu Savings Plan, a tax qualified savings plan under section 401(k) of the Internal Revenue Code (the "401(k) Plan"), and a tax qualified

[2] JPMorgan Chase does not assert an ownership interest in the Rabbi Trusts previously sponsored by H.F. Ahmanson and Co. Accordingly, the Ahmanson Rabbi Trusts' assets and related liabilities are not included in the definition of Rabbi Trusts for the purposes of this Complaint.

cash balance pension plan, the WaMu Pension Plan (the "Pension Plan") (collectively, the "Plans"). In 2007, WMB booked an intercompany receivable of approximately $316 million payable by WMI to WMB, of which approximately $275 million is still owed to WMB.

Answer: Debtors admit that WMI sponsored employee benefit plans, including, among others, the Washington Mutual, Inc. Savings Plan, and otherwise deny the allegations set forth in paragraph 136 of the Complaint, except respectfully refer the Court to the plan documents and applicable book entries for the content thereof.

Complaint 137: While WMI was the sponsor of the Plans as of the Petition Date, nearly all of the employees covered by the Plans were employees of WMB or its subsidiaries, many of whom are now employed by JPMorgan Chase.

Answer: Debtors admit the allegations set forth in paragraph 137 of the Complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 137 that the employees are currently employed by JP Morgan Chase and therefore deny same.

Complaint 138: Employees who participate in the 401(k) Plan contribute a percentage of their pre-tax income to the 401(k) Plan. Prior to the Petition Date, WMB would then match a portion of participants' contributions and fund that amount directly or indirectly by making a payment to the trust associated with the 401(k) Plan, which was administered by Fidelity Management Trust Company. The 401(k) Plan is administered by an administration committee and investments are overseen by an investment committee, whose members were appointed by WMI.

Answer: Debtors admit the allegations set forth in paragraph 138 of the Complaint.

Complaint 139: The Pension Plan is a defined benefit plan in which no employee contributions are required. Instead, required funding contributions were made by WMI and/or participating employers. As with the 401(k) Plan, the Pension Plan was administered, and investments were overseen, by individuals appointed by WMI. As of Petition Date, the Pension Plan had approximately 32,000 participants and assets valued at approximately $1 billion.

Answer: Debtors admit that the Pension Plan is a defined benefit plan in which no employee contributions are required, that required funding contributions were made by WMI and/or participating employers, and that the Pension Plan was administered, and investments were overseen, by individuals appointed by WMI. Debtors otherwise deny the allegations set forth in paragraph 139 of the Complaint, except respectfully refer the Court to the plan documents for the content thereof.

Complaint 140: Since the Petition Date, WMI has refused to relinquish sponsorship of the Plans. Members of the committees for each plan have made all administrative and investment decisions. WMI has retained responsibility for making payments to participants in the Plans.

Answer: Debtors deny the allegations set forth in paragraph 140 of the Complaint, except admit and aver that (i) WMI has rightfully refused to relinquish sponsorship of Plans, and (ii) JPMorgan Chase has made a number of administrative decisions with respect to the Plans without WMI's guidance or permission.

Complaint 141: Since September 25, 2008, JPMorgan Chase has been seeking to assume the Plans to ensure that covered employees retain their benefits and interests under the Plans. In anticipation of sponsoring the Plans, JPMorgan Chase, for the benefit of former WMB employees currently employed by JPMorgan Chase, has continued to record accruals for the Pension Plan. JPMorgan Chase also has directed employee contributions into the 401(k) Plan and funded significant matching contributions.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 141 of the Complaint and therefore deny same.

Complaint 142: WMB, not WMI, had the real economic interest in the Plans, having (i) incurred most of the pension and other expenses associated with the Pension Plan and funded the contributions for the 401(k) Plan and (ii) employed nearly all of the participants. As of the Petition Date, the Pension and 401(k) Plans were not material to WMI's business or reorganization because WMI, by its own account, had only a handful of employees as of the Petition Date and, even since the Petition Date, has added only a dozen or two additional former employees of WMB. Thus, JPMorgan Chase believed that it would ultimately assume sponsorship of the Plans.

Answer: Debtors deny the allegations set forth in paragraph 142 of the Complaint, except Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in the last sentence of paragraph 142 of the Complaint and therefore deny same.

Complaint 143: The Debtors have nonetheless refused to allow JPMorgan Chase to assume the Plans. With respect to the Pension Plan, the Debtors' refusal appears to be based on the unfounded claim that the Pension Plan is over-funded and the desire to extract from JPMorgan Chase the purported over-funding as a condition to assuming sponsorship. There is no support for this assertion under fact, law (including the Employee Retirement Income Security Act of 1974, which likely would prevent such a recapture) or the P&A. JPMorgan Chase intends to assume and continue the Pension Plan and the sufficiency of the Pension Plan's assets to cover benefit obligations will continue to vary depending upon ongoing market and economic fluctuations that affect the value of plan assets, as well as the interest rate used to discount liabilities. It therefore makes no sense to suggest that there is "over-funding" that is due to the Debtors today as a practical matter, under relevant law or pursuant to the P&A.

Answer: Debtors deny the allegations set forth in paragraph 143 of the Complaint, and deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 143 of the Complaint that refer to what JPMorgan Chase purportedly intends and Debtors therefore deny same.

Complaint 144: With respect to the 401(k) Plan, Debtors' position is even less well reasoned. Debtors cannot obtain any value from the 401(k) Plan or its termination because the assets belong to the employees. Likewise, there is no basis for Debtors' assertion that, in connection with assumption of the Plans, JPMorgan Chase should acquire litigation pending against WMI and certain individual officers and directors arising from their pre-petition alleged misconduct.

Answer: Debtors deny the allegations set forth in paragraph 144 of the Complaint.

Complaint 145: Debtors have no rational basis on which to retain sponsorship of the Plans given the pending Chapter 11 proceeding and JPMorgan Chase's repeated attempts to assume the sponsorship and to ensure that the participants and beneficiaries are protected on an ongoing basis. To avoid hardship to its employees,

JPMorgan Chase has continued to accrue benefits and make contributions into the 401(k) Plan, while waiting for WMI to stop holding the participants and their benefits hostage as the value of the assets in the Pension Plan has dropped. The decline in value of those assets may be of little moment to WMI since it no longer employs the participants and is a debtor in bankruptcy, but it does matter to others.

Answer: Debtors deny the allegations set forth in paragraph 145 of the Complaint.

Complaint 146: JPMorgan Chase seeks a determination that either (i) JPMorgan Chase be permitted immediately to assume sponsorship of the Plans without making payments to the Debtors that they have no right to demand; or (ii) the Debtors and their estates are responsible for, and must indemnify and hold JPMorgan Chase harmless for any liabilities due to the decline in value of the Pension Plan during this Chapter 11 case.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 146 of the Complaint.

Complaint 147: JPMorgan Chase further requests that this Court allow its administrative claims against the Debtors for (i) the amount of all contributions made from and after the Petition Date to the 401(k) Plan; and (ii) the amount by which the decline in the value of the assets in the Pension Plan from and after the Petition Date has resulted from WMI's inattention and failure properly to administer the Pension Plan assets. Finally, whatever the outcome of the sponsorship issue, the pending litigation matters are and should remain the responsibility of WMI and its estate and JPMC is entitled to be fully indemnified and held harmless for any and all claims related to the Pension and 401(k) Plans prior to the date upon which JPMC may assume their sponsorship.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 147 of the Complaint.

Complaint 148: As set forth in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest," in the Plans, pursuant to and in accordance with the FDI Act. On December 30, 2008, the Debtors nonetheless submitted a claim to the Receiver asserting,

among other things, ownership of various of the employee benefits plans. On January 23, 2009, the Debtors' claims were disallowed by the Receiver. On March 20, 2009, the Debtors commenced the District Court Action with respect to the disallowance of their claims and put ownership of the plans and its liabilities at issue in that action.

Answer: Debtors deny the allegations set forth in paragraph 148 of the Complaint, except respectfully refer the Court to the P&A Agreement, the Proof of Claim, the Disallowance Notice, and the complaint filed by the Debtors in the DC Action on March 20, 2009, for the content thereof.

H. Other Assets

(i) Company and Bank Owned Life Insurance Policies

Complaint 149: JPMorgan Chase also seeks an order confirming that certain life insurance policies owned by WMB and the cash surrender value of which were reflected on the books and records of WMB as of September 25, 2008 are JPMorgan Chase's property and were purchased under the P&A. These life insurance policies are known as Bank Owned Life Insurance ("BOLI").

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 149 of the Complaint.

Complaint 150: The BOLI policies are types of life insurance policies purchased by WMB (or a predecessor company) on the lives of employees. Under these types of plans, WMB paid the premiums on the insurance and was also the primary beneficiary of the policies. In the case of a split dollar policy, the insurance proceeds are split by both WMB (or a predecessor company) and the insured employees designated beneficiary. WMB used- these BOLI policies and split dollar policies as a tax-deferred way to fund the costs of various welfare plans, hedge deferred compensation arrangements and to provide insurance benefits to certain employees.

Answer: Debtors admit the allegations set forth in the first sentence of paragraph 150 of the Complaint. Debtors deny knowledge or information sufficient to form a belief as to the truth of

the remaining allegations in paragraph 150 of the Complaint and therefore deny same, except respectfully refer the Court to the BOLI policies for the content thereof.

Complaint 151: By letter dated November 7, 2008, a true and correct copy of which is attached as Exhibit K (the "Cease and Desist Letter"), counsel for the Debtors demanded that JPMorgan Chase cease exercising control over the BOLI policies on the ground that the Debtors believed they might have an ownership interest in those policies and demanded access to books and records regarding the BOLI policies. JPMorgan Chase complied with the demand in the Cease and Desist Letter in order to provide the Debtors with the information they requested. JPMorgan Chase and Debtor have provided each other with documentation establishing the ownership of each party in certain policy list bills. (See Exhibit L for list bills owned by JPMorgan Chase.) Accordingly, each of the parties have exercised their respective ownership rights over the policies that they own.

Answer: Debtors deny the allegations set forth in paragraph 151 of the Complaint, except respectfully refer the Court to the documents referenced in paragraph 151 for the content thereof.

Complaint 152: There are two BOLI policies issued by Pacific Life list bills of 7675A and 7729A on which the Debtors and JPMorgan Chase could not reach agreement as to ownership (the "Pac Life List Bill Policies"). As between WMI and WMB, these BOLI policies are reflected on WMB's books and records and owned by WMB. WMB acquired the policies from a banking institution that merged with WMB and these policies were on the books of that institution at the time of the merger. The accounting records of WMB do not show a dividend of these policies to WMI or a purchase of these policies by WMI , the only lawful ways that these policies could have been acquired by WMI from WMB. However, the carrier has advised JPMorgan Chase that, according to the records of the carrier, Washington Mutual Revocable Trust, not WMB, is shown as the policy owner. Because Debtors have refused to acknowledge JPMorgan Chase's ownership of these policies, JPMorgan Chase has not taken any action with respect thereto. JPMorgan Chase requests that the Court determine that JPMorgan Chase acquired all right, title and interest in and to these policies under the P&A and that WMI has no interest in them. To the extent that the carrier's records reflect WMI as the policy owner, WMJ has no more than bare legal title under Section 541(iv) of the Bankruptcy

Code and JPMorgan Chase is entitled to a declaration that it, and not WMI, is the rightful owner of the policies.

Answer: Debtors admit the allegations set forth in the first sentence of paragraph 152 of the Complaint, and otherwise deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 152 of the Complaint and therefore deny same, and further deny that JPMorgan Chase is entitled to any relief.

Complaint 153: The parties did not address and no action has been taken by JPMorgan Chase with respect to certain other policies, the cash surrender value of which is reflected on WMB's books and records as of September 25, 2008. These policies consist of ING Security Life List Bills E208090000 and E208090001 and approximately 955 Split Dollar policies issue by a number of carriers.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 153 of the Complaint and therefore deny same.

Complaint 154: The ING Security Life policies were reflected on the books and records of American Savings Bank, F.A. when it merged into WMB and supported American Savings Bank's executive life insurance plan. These policies were reflected on WMB's books and records as of September 25, 2008 and therefore were acquired by JPMorgan Chase from the Receiver under the P&A. WMI has no legal, record, equitable or beneficial interest in any of these policies and no right to continue to interfere with JPMorgan Chase's administration of these policies.

Answer: Debtors deny the allegations set forth in paragraph 154 of the Complaint, except respectfully refer the Court to the P&A Agreement for the content thereof.

Complaint 155: As of the date of the P&A, the 955 Split Dollar policies were recorded on the books of WMB. These policies initially belonged to Commercial Capital Bancorp Inc. ("CCBI") when it was merged into WMB in April 2006 and were reflected on its books as of the date of the merger. Correspondence with the insurance carriers for these Split Dollar policies—Beneficial Life, Jefferson Pilot Financial, John Hancock, Massachusetts Mutual, Midland National, New York Life, Northwestern Mutual, Security Life of Denver, and West Coast Life confirms that WMB was the owner of these policies as of September 25, 2008. Once again, there can

be no legitimate dispute regarding JPMorgan Chase's ownership of these policies. WMI has no legal, record, equitable, or beneficial interest in any of these policies and no right to interfere with JPMorgan Chase's administration of these policies as they clearly are property of JPMorgan Chase acquired from the Receiver under the P&A.

Answer: Debtors deny the allegations set forth in paragraph 155 of the Complaint.

Complaint 156: Accordingly, JPMorgan Chase seeks a determination that it owns the BOLI policies and Split Dollar policies discussed above, along with an administrative claim for its damages, fees, costs, and expenses, including for any deterioration in the value of these policies during the administration of these cases.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 156 of the Complaint.

Complaint 157: As set forth in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest," in the BOLI policies and Split Dollar policies, pursuant to and in accordance with the FDI Act. On December 30, 2008, the Debtors nonetheless submitted a claim to the Receiver asserting, among other things, ownership of certain of these policies. On January 23, 2009, the Debtors' claims were disallowed by the Receiver. The Receiver's disallowance is dispositive of the fact that the Debtors do not own these policies. On March 20, 2009, the Debtors commenced the District Court Action with respect to the disallowance of their claims.

Answer: Debtors deny the allegations set forth in paragraph 157 of the Complaint, except respectfully refer the Court to the P&A Agreement, the Proof of Claim, the Disallowance Notice, and the complaint filed in the DC Action on March 20, 2009, for the content thereof.

(ii) Visa Shares

Complaint 158: WMB was the original WaMu Group member of Visa U.S.A. Inc. WMB fsb became a member on July 27, 1994, when it signed the Visa U.S.A Inc. Membership Agreement with Washington Mutual, a Federal Savings Bank (predecessor to WMB) serving as its sponsor. WMB conducted the Visa payment card business for WaMu Group, paid all service fees, and bore the risk of the Visa payment card business.

Answer: The allegations set forth in paragraph 158 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the documents referenced in the allegations set forth in paragraph 158 of the Complaint for the content thereof.

Complaint 159: As part of Visa's restructuring and initial public offering, members of Visa U.S.A. were allocated shares of Class B common stock in Visa, Inc. The shares were allocated based on each member's ownership interest, which was calculated on the basis of service fees paid over a period of time.

Answer: The allegations set forth in paragraph 159 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the relevant restructuring and initial public offering documents for the content thereof.

Complaint 160: The allocation of Class B shares and Visa's retrospective responsibility plan (the "Plan") are outlined in Visa, Inc.'s Prospectus dated March 18, 2008 (the "Final Prospectus") (filed with the U.S. Securities and Exchange Commission), as well as in certain transaction documents. Class B shares are subject to the restrictions and are encumbered by contingent liabilities. The Class B shares are convertible into Class A shares upon the satisfaction of certain conditions and pursuant to a conversion formula, all as described in Visa Inc.'s Final Prospectus and certain related transaction documents.

Answer: The allegations set forth in paragraph 160 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the documents referenced in the allegations set forth in paragraph 160 of the Complaint for the content thereof.

Complaint 161: Pursuant to the restructuring documents, Visa U.S.A. members have litigation indemnification obligations to Visa Inc. with respect to certain antitrust litigation (whether a named defendant or not) referred to in the transaction documents as "Covered Litigation." The Class B shares are restricted until the later of three years or the conclusion of all Covered Litigation. If

shares remain at the conclusion of the Covered Litigation and after the passage of three years, the Class B shares may be converted to Class A shares.

Answer: The allegations set forth in paragraph 161 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the documents referenced in the allegations set forth in paragraph 161 of the Complaint for the content thereof.

Complaint 162: In connection with and in furtherance of the restructuring, certain Visa U.S.A. members executed a Loss Sharing Agreement (the "LSA") and an Interchange Judgment Sharing Agreement (the "JSA"), each document is dated July 2007. Each agreement provides that its signatories will indemnify Visa Inc. for potential liabilities associated with the Covered Litigation whether the signatory is a named defendant or not. The obligation is limited to their Visa U.S.A. respective membership-portions. WMB signed the JSA on July 2, 2007; WMI signed the LSA, which applied to all Covered Litigation, on July 2, 2007.

Answer: The allegations set forth in paragraph 162 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the documents referenced in the allegations set forth in paragraph 162 of the Complaint for the content thereof.

Complaint 163: Indemnity obligations that may arise in connection with the Covered Litigation are to be funded by an escrow account established by Visa. The escrow was established with some proceeds of Visa Inc.'s initial public offering and, to the extent that the escrow must be replenished, through further dilution of the Class B common stock. If the funds contained in the escrow account (after continued Class B share dilution) prove insufficient to satisfy a Covered Litigation, the Final Prospectus as well as certain transaction documents, provide that in addition to the dilution of the Visa Class B shares, any shortfall is to be paid from the voting members' own funds in accordance with their respective ownership proportion. The foregoing is clearly set out in the Final Prospectus, as well as in the LSA and in other transaction documents.

Answer: Debtors deny the allegations set forth in paragraph 163 of the Complaint, except respectfully refer the Court to the documents referenced in paragraph 163 for the content thereof.

Complaint 164: On October 2, 2007, a notice of pre-true up share allocation was sent to WMI, indicating that WaMu Group would be allocated 5,465,562 shares of Visa Inc. class USA common stock. Pursuant to a true-up procedure, on March 17, 2008, the share allocation was adjusted to 5,130,523 shares of Visa Class B common stock. In the course of the initial public offering, Visa Inc. redeemed some of the Class B Shares of its members and paid proceeds to the members. On March 28, 2008, after redemption and payment of proceeds, 3,147,059 shares of Visa Inc. Class B common stock (the "Visa shares") were allocated to WaMu Group.

Answer: Debtors deny the allegations set forth in paragraph 164 of the Complaint, except respectfully refer the Court to the documents referenced in paragraph 164 for the content thereof.

Complaint 165: JPMorgan Chase believes that the Visa shares were issued in the name of WMI consistent with Visa's general practice of issuing its stock to the holding company of its issuing bank members. The Visa shares were not in the name of the bank entity issuing the credit and/or debit payment cards, which entity had paid fees to Visa and also had responsibility for the gains and-losses associated with being a card issuing Visa member.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 165 of the Complaint which refer to what JPMorgan Chase supposedly "believes", and therefore deny same. Debtors deny the remaining allegations set forth in paragraph 165 of the Complaint, except respectfully refer the Court to the documents referenced in paragraph 165 for the content thereof.

Complaint 166: The proceeds Visa paid to its members in the initial public offering were in the case of WaMu Group, distributed to WMB.

Answer: Debtors deny the allegations set forth in paragraph 166 of the Complaint.

Complaint 167: Although WMI may have received bare legal title from Visa upon distribution of the shares, WMB at all times remained, and was required by applicable regulations and law to be, the beneficial owner of the Visa shares.

Answer: Debtors deny the allegations set forth in paragraph 167 of the Complaint.

Complaint 168: The expense and reserve associated with the Covered Litigation were posted to WMB and recorded in the profit and loss statement at the WMB level. For example, in 2007, WMB recognized a guarantee liability of $50 million for the modified indemnification obligation that resulted from Visa's reorganization and initial public offering. According to publicly filed documents, therefore, WMB accounted for loss with respect to the Covered Litigation which burdens the Visa shares. WMB was the beneficial owner of the Visa shares, ownership which passed to JPMorgan Chase as the successor to the Receiver under the P&A.

Answer: Debtors deny the allegations set forth in paragraph 168 of the Complaint.

Complaint 169: Debtors have refused to transfer title in the Visa shares to JPMorgan Chase. In WMI's Schedule of Assets and Liabilities, originally filed December 19, 2008, first amended on January 27, 2009 and then amended again on February 24, 2009, Debtors list approximately 5.4 million shares of Visa Inc. Class B stock as an asset of the estate in "Schedule B — Personal Property," Item 13.

Answer: Debtors admit that Debtors have not transferred to JPMorgan Chase title in the Class B common stock of Visa that was allocated to the WaMu Group on March 28, 2008 (the "Visa Shares"). Debtors deny the remaining allegations set forth in paragraph 169 of the Complaint, except respectfully refer the Court to the documents referenced in paragraph 169 of the Complaint for the content thereof.

Complaint 170: Upon information and belief, WMI holds only 3.147 million Visa shares, which it received post-redemption.

Answer: Debtors admit that WMI holds 3.147 million Visa Shares, which it received post-redemption.

Complaint 171: As set forth in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest," in the Visa shares, pursuant to and in accordance with the FDI Act. JPMorgan Chase seeks an

order determining that the Visa shares in which WMI has bare legal title were owned by WMB are JPMorgan Chase's property and were purchased pursuant to the P&A.

Answer: Debtors deny the allegations set forth in paragraph 171 of the Complaint, except respectfully refer the Court to the P&A Agreement for the content thereof, and deny that JPMorgan Chase is entitled to any relief.

(iii) Contracts, Intellectual Property and Other Intangible Assets

Complaint 172: Prior to the Receivership, WMB was the primary operating subsidiary of WMI and both WMI and WMB had registered the trademarks "Washington Mutual" and the "W" logo ("Trademarks") and utilized the marks interchangeably in their operations, agreements and transactions.

Answer: Debtors admit that WMB was the primary operating subsidiary of WMI. Debtors deny the remaining allegations set forth in paragraph 172 of the Complaint, except respectfully refer the Court to the registration documents for the content thereof.

Complaint 173: Prior to the Receivership, a number of contracts and other counterparty transactions to lease property, perform services, deliver goods, license, develop or acquire software were entered into for the benefit of the banking operations formerly owned by WMB, now owned and operated by JPMorgan Chase (the "Vendor Contracts"), were bought or paid for by WMB and were utilized extensively if not exclusively by WMB. Some of the Vendor Contracts include prepaid rights, incentives, rebates or developed software (all of the foregoing, together with the Trademarks and the Vendor Contracts, the "Intangible Assets").

Answer: Debtors deny the allegations set forth in paragraph 173 of the Complaint, except admit that (i) WMI is party to numerous agreements with vendors (the "Vendors") who lease property, perform services, deliver goods, or license software that primarily benefit the banking operations formerly owned by WMB (the "Vendor Contracts"); (ii) typically, prior to the receivership, WMB, as the primary beneficiary, paid Vendors for goods and services received pursuant to the Vendor Contracts; (iii) after September 25, 2008 (the "Receivership Date"),

JPMorgan Chase paid certain Vendors for outstanding pre- and post-receivership obligations incurred in connection with the Vendor Contracts; and (iv) notwithstanding these payments, there continue to be unpaid obligations outstanding in connection with certain of the Vendor Contracts.

Complaint 174: As a result of the Receivership and the P&A, WMB's banking operations and subsidiaries no longer belong directly or indirectly to WMI. Vendors have, nonetheless, continued to provide goods and services under the Vendor Contracts. By order dated December 16, 2008, this Court authorized and approved a stipulation between the Debtors and JPMorgan Chase regarding certain of the Vendor Contracts (the "Vendor Stipulation"). The Vendor Stipulation, among other things, (i) facilitates the transfer of the services to JPMorgan Chase, (ii) requires JPMorgan Chase to pay for the services provided under those contracts until twenty days after notice of the rejection of a contract is given by JPMorgan Chase to the Debtors, thereby reducing or eliminating certain expenses of administration, and (iii) allows the Debtors to use any new contracts negotiated by JPMorgan Chase for such services to mitigate any--damage claims filed by such vendors for rejection of their contracts.

Answer: Debtors admit that WMI no longer owns any subsidiaries with any banking operations and that vendors have continued to provide goods and services under vendor contracts. Debtors deny the remaining allegations set forth in paragraph 174 of the Complaint, except respectfully refer the Court to the December 16, 2008 order for the content thereof.

Complaint 175: While the Vendor Stipulation resolved a number of the outstanding issues and protected the estates against administrative liability, the Vendor Stipulation did not resolve issues regarding ownership of the Intangible Assets. There are a number of Intangible Assets which JPMorgan Chase believes were properly assets of WMB, not WMI, and which have not been resolved to date.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 175 of the Complaint and therefore deny same, except respectfully refer the Court to the December 16, 2008 order for the content thereof.

Complaint 176: Any interest of WMI in these Intangible Assets consists of nothing more than bare legal title and all beneficial and equitable

rights thereunder were WMB's and now belong to JPMorgan Chase as the successor to the Receiver under the P&A and Title 12. While WMI may have been the nominal contracting party for contracts entered by the WaMu Group entities, WMB held all beneficial and equitable title and interest in each Intangible Asset. WMB paid for the Intangible Assets, recorded the Intangible Assets on its books, and interacted directly with the counterparties as the Intangible Assets supported WMB's business, now owned and operated by JPMorgan Chase. All payments and pre-payments on the Vendor Contracts and other Intangible Assets were made by WMB.

Answer: The allegations set forth in paragraph 176 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 177: WMI's Schedule of Assets and Liabilities appears to assert ownership over a number of these Intangible Assets in Schedule G—Executory Contracts and Unexpired Leases.

Answer: Debtors deny the allegations set forth in paragraph 177 of the Complaint, except respectfully refer the Court to the schedule for the content thereof.

Complaint 178: As set forth in the P&A, JPMorgan Chase purchased "all of the Receiver's right, title and interest," in the Vendor Contracts, pursuant to and in accordance with the FDI Act. On December 30, 2008, WMI nonetheless submitted a claim to the Receiver asserting, among other things, an interest in certain of these contracts. On January 23, 2009, the WMI's claims were disallowed by the Receiver. The Receiver's disallowance is dispositive of the fact that the Debtors do not own these contracts. On March 20, 2009, the Debtors commenced the District Court Action with respect to the disallowance of their claims.

Answer: Debtors deny the allegations set forth in paragraph 178 of the Complaint, except respectfully refer the Court to the P&A Agreement, the Proof of Claim, the Disallowance Notice, and the complaint filed in the DC Action on March 20, 2009, for the content thereof.

Complaint 179: JPMorgan Chase is entitled to a declaration that it has all right, title and interest to these Intangible Assets or, in the alternative, JPMorgan Chase is entitled to a claim for the full amount of all damages it may suffer from the loss of these Intangible Assets and to exercise rights of offset and recoupment for that loss.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 179 of the Complaint.

RELIEF REQUESTED BY JPMORGAN CHASE

TRUST SECURITIES

Count One: Trust Securities (Declaratory Judgment)

Complaint 180: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 180 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 181: As set forth above, JPMorgan Chase contends that, pursuant to the P&A, it purchased the Trust Securities. The Debtors have disputed JPMorgan Chase's ownership of these assets in this bankruptcy case, in their Schedules and in the filing of the District Court Action.

Answer: Paragraph 181 of the Complaint characterizes the nature of the Complaint and therefore no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the Complaint for the content thereof.

Complaint 182: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 182 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 183: JPMorgan Chase requests a declaratory judgment finding that Debtors must proceed with any claim to the Trust Securities

through the District Court Action it chose to commence. In the alternative, JPMorgan Chase requests a declaratory judgment determining that the Trust Securities are assets purchased by and belonging to JPMorgan Chase.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 183 of the Complaint.

Count Two: Trust Securities
(Breach of Contract)

Complaint 184: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 184 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 185: WMI assumed a direct obligation to WMB upon entering into the Contribution Agreement to immediately contribute and transfer the Trust Securities to WMB following the conditional exchange. In the alternative, WMB was the third party beneficiary of WMI' s commitment to the OTS and the FDIC under the Contribution Agreement. WMI also assumed a direct obligation to WMB pursuant to the Assignment Agreement.

Answer: The allegations set forth in paragraph 185 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same, except respectfully refer the Court to the documents referenced in paragraph 185 for the content thereof.

Complaint 186: To the extent the Assignment Agreement is interpreted as leaving WMI with anything other than bare legal title, WMI breached the Contribution Agreement. WMI further breached the Contribution Agreement and the Assignment Agreement by refusing to assist JPMorgan Chase in obtaining registered ownership of the Trust Securities.

Answer: Debtors deny the allegations set forth in paragraph 186 of the Complaint.

Complaint 187: JPMorgan Chase (as successor in interest to WMB), has suffered, and will suffer, substantial monetary damages as a proximate result of WMI's breach of the Contribution Agreement and the Assignment Agreement.

Answer: Debtors deny the allegations set forth in paragraph 187 of the Complaint.

Count Three: Trust Securities
(Unjust Enrichment)

Complaint 188: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 188 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 189: The Debtors would be unjustly enriched if they retained the Trust Securities. From the time of the creation of the Trust Securities, the Debtors benefited from the treatment of the Trust Securities as core capital, which permitted the Debtors to, among other things, satisfy regulatory requirements and report higher capital ratios.

Answer: Debtors deny the allegations set forth in paragraph 189 of the Complaint.

Complaint 190: Thus, to the extent the Court does not enter a declaratory judgment determining that the Trust Securities are assets purchased by and belonging to JPMorgan Chase, JPMorgan Chase requests that the Court establish a constructive trust for the benefit of JPMorgan Chase consisting of the value recognized by Debtors as a result of the treatment of the Trust Securities as core capital.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 190 of the Complaint.

TAX REFUNDS

Count Four: Tax Refunds (Declaratory Judgment)

Complaint 191: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 191 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 192: As discussed above, JPMorgan Chase is the beneficial owner of tax refunds due to, and deductions generated by, the WaMu Group. JPMorgan Chase is also the beneficial owner of tax refunds already received by, and deductions taken by, WMI. The Debtors dispute JPMorgan Chase's ownership of these refunds and deductions.

Answer: The allegations set forth in paragraph 192 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 193: Furthermore, JPMorgan Chase should be permitted to communicate directly without restriction with the taxing authorities concerning ongoing tax matters affecting WMB and its subsidiaries. The Debtors have sought to prohibit JPMorgan Chase from engaging in these communications.

Answer: The allegations set forth in paragraph 193 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 194: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 194 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 195: JPMorgan Chase requests a declaratory judgment finding that Debtors must proceed with any claim to the tax refunds and deduction through the District Court Action they elected to commence. In the alternative, JPMorgan Chase requests a declaratory judgment determining that the tax refunds and deductions are assets purchased by and belonging to JPMorgan Chase.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 195 of the Complaint.

Count Five: Tax Refunds
(Unjust Enrichment)

Complaint 196: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 196 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 197: In the alternative, WMI would be unjustly enriched if it retained any tax refunds received on behalf of, or generated by, the WaMu Group that are attributable to tax attributes of WMB or its subsidiaries.

Answer: The allegations set forth in paragraph 197 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 198: WMI received the tax refunds and deductions merely as agent for the WaMu Group. If WMI is permitted to retain the tax refunds, it will have received a windfall by receiving a refund on income tax paid by WMB (or its subsidiaries).

Answer: The allegations set forth in paragraph 198 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 199: JPMorgan Chase requests that the Court establish a constructive trust for the benefit of JPMorgan Chase consisting of the tax refunds received by and/or deductions recognized by WMI to which WMB is entitled.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 199 of the Complaint.

Complaint 200: Furthermore, any future tax refunds received by and/or deductions recognized by WMI as agent for the WaMu Group should be similarly deposited into the constructive trust for the benefit of JPMorgan Chase.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 200 of the Complaint.

DISPUTED INTERCOMPANY AMOUNTS

Count Six: Disputed Funds (Declaratory Judgment: $3.7 Billion Book Entry Transfer)

Complaint 201: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 201 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 202: WMI has asserted that the $3.7 Billion Book Entry Transfer creates a deposit liability owed to it by WMB fsb, now JPMorgan Chase. JPMorgan Chase disputes that there is a valid deposit liability due to Debtors as the result of the $3.7 Billion Book Entry Transfer.

Answer: Paragraph 202 of the Complaint characterizes the nature of the Complaint and is argumentative and therefore no response is required. To the extent a response is required, Debtors deny same, except admit that $3.7 billion was transferred to a deposit account.

Complaint 203: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 203 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 204: JPMorgan Chase requests a declaratory judgment finding that Debtors must proceed with any claim to assert ownership of or interest in the $3.7 Billion Book Entry Transfer through the District Court Action they elected to commence. In the alternative, JPMorgan Chase requests a declaratory judgment determining that there is no valid deposit liability due to Debtors as a result of the $3.7 Billion Book Entry Transfer.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 204 of the Complaint.

Count Seven: Disputed Funds
(Declaratory Judgment: Setoff, Recoupment, and Other Equitable Limitations)

Complaint 205: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 205 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 206: To the extent that JPMC has any liabilities to Debtors, including deposit account liabilities, it is entitled to (i) recoup and or setoff all such amounts under the MBA Policy and/or any other applicable terms and conditions governing those liabilities or deposit accounts; (ii) imposition of a constructive trust for the amount of all such liabilities over any funds of Debtors it possesses; and (iii) enforce any security interest determined to apply to the funds of the Debtors. Debtors dispute that JPMorgan Chase has these rights.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 206 of the Complaint.

Complaint 207: The amounts owed to JPMorgan Chase include, but are not limited to, the at least approximately $234 million in tax refunds deposited in the Accounts and due to WMB, which the Debtors have claimed as their own, the intercompany receivables of $275 million due from WMI to WMB, and any amounts awarded by the Court under this Complaint.

Answer: Debtors deny the allegations set forth in paragraph 207 of the Complaint.

Complaint 208: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 208 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 209: JPMorgan Chase requests a declaratory judgment determining its right to setoff, recoupment, imposition of a constructive trust, and/or enforcement of its security interests.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 209 of the Complaint.

Count Eight: Any Remaining Deposit Liabilities (Interpleader Pursuant to Bankruptcy Rule 7022)

Complaint 210: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 210 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 211: Pursuant to the terms of the P&A, JPMorgan Chase, WMI, and the FDIC have asserted, or may assert, competing claims to any funds that constitute deposit liabilities and JPMorgan Chase may be exposed to double liability if it were to pay these claims to the wrong party.

Answer: The allegations set forth in paragraph 211 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 212: JPMorgan Chase seeks to interplead any remaining funds that constitute deposit liabilities pursuant to Bankruptcy Rule 7022, less any attorneys' fees and costs, so that all claims to the amounts can be adjudged and the funds can be properly disbursed.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 212 of the Complaint.

GOODWILL LITIGATION

Count Nine: Goodwill Litigations (Declaratory Judgment)

Complaint 213: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 213 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 214: There is an actual and substantial controversy between JPMorgan Chase and WMI as to whether WMI or WMB (as successor in interest to Anchor Savings Bank and American Savings Bank) is entitled to the Anchor and ASB Judgments and any future judgment entered in either litigation.

Answer: The allegations set forth in paragraph 214 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 215: This is an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 215 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 216: JPMorgan Chase requests a declaratory judgment determining that WMB (and thus JPMorgan Chase as successor in interest) owns the beneficial interest in the Anchor and American Judgments and all monies paid on account of those judgments and directing payment of the Anchor and ASB Judgments, as well as any future judgment in either the *Anchor Savings Bank or the American Savings Bank* litigations, to JPMorgan Chase.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 216 of the Complaint.

RABBI TRUSTS

Count Ten: Rabbi Trusts (Declaratory Judgment)

Complaint 217: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 217 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 218: As set forth above, JPMorgan Chase contends that, pursuant to the P&A, it purchased the Legacy Rabbi Trusts. The Debtors dispute JPMorgan Chase's ownership of these assets.

Answer: Paragraph 218 of the Complaint characterizes the nature of the Complaint and therefore no response is required. To the extent a response is required, Debtors deny same.

Complaint 219: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 219 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 220: JPMorgan Chase requests a declaratory judgment determining that JPMorgan Chase purchased the assets of the Legacy Rabbi Trusts and an order authorizing JPMorgan Chase and the trustees of each of the Legacy Rabbi Trusts to take all actions necessary or appropriate to transfer ownership to JPMorgan Chase.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 220 of the Complaint.

Count Eleven: Rabbi Trusts
(Unjust Enrichment)

Complaint 221: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 221 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 222: In the alternative, in the event that this Court finds that JPMorgan Chase did not purchase the assets of the Legacy Rabbi Trusts, the Debtors would be unjustly enriched if they were allowed to retain the assets. The Debtors did not fund the Trusts and the assets were owned by WMB.

Answer: The allegations set forth in paragraph 222 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Complaint 223: JPMorgan Chase requests that the Court establish a constructive trust for the benefit of JPMorgan Chase consisting of the value of the assets of the Legacy Rabbi Trusts.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 223 of the Complaint.

PENSION AND 401(K) PLANS

Count Twelve: Pension and 401(k) Plans (Declaratory Judgment)

Complaint 224: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 224 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 225: JPMorgan Chase stands ready, willing and able to assume the Pension and 401(k) Plans, and continues to record accruals for the Pension Plan and fund significant matching contributions to the 401(k) Plan in anticipation of doing so.

Answer: Debtors deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 225 of the Complaint and therefore deny same.

Complaint 226: As set forth above, JPMorgan Chase contends that it may assume the Pension and 401(k) Plans in their entirety. The Debtors dispute this contention. Debtors assert that JPMorgan Chase is required to pay them an amount reflecting a purported "excess funding" in the Pension Plan. However, the Pension and 401(k) Plans will not be terminated if they are assumed by JPMorgan Chase. Rather, JPMorgan Chase would assume the Pension Plan on an ongoing basis without any termination but, instead, with the continuing obligation to pay accrued benefits. And, because the Pension Plan is continuing, the sufficiency of their assets to cover benefit obligations will continue to vary depending upon ongoing fluctuations in the value of plan assets as well as the interest rate used to discount liabilities. It therefore makes no sense to suggest that there exists some excess value to which Debtors are presently entitled as though the Pension Plan was being terminated with no further liabilities.

Answer: Paragraph 226 of the Complaint characterizes the nature of the Complaint (to the extent it describes what JPMorgan Chase "contends") and is argumentative and therefore no response is required. To the extent a response is required, Debtors deny same, except that with respect to the allegations concerning what Debtors supposedly have "assert[ed]", Debtors respectfully refer the Court to Debtors' pleadings for the content thereof.

Complaint 227: In addition, the Debtors have claimed that, in order to assume the Pension and 401(k) Plans, JPMorgan Chase must assume the liabilities associated with litigation against WMI and its officers and directors for their conduct in administrating the Pension and 401(k) Plans before the Petition Date. JPMorgan Chase does not have any obligation to assume these liabilities.

Answer: Paragraph 227 of the Complaint is argumentative and therefore no response is required. To the extent a response is required, Debtors deny same, except with respect to the allegations concerning what Debtors supposedly have "claimed", Debtors respectfully refer the Court to Debtors' pleadings for the content thereof.

Complaint 228: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 228 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 229: JPMorgan Chase requests a declaratory judgment finding that Debtors must proceed with any claim to assert ownership of any assets in any employee benefit plans through the District Court Action they elected to commence. Alternatively, JPMorgan Chase requests a declaratory judgment determining that JPMorgan Chase may assume the Pension and 401(k) Plans without requiring it to forfeit any hypothetical over-funding to Debtors and without imposing liability for litigation that does not belong to JPMorgan Chase. In the alternative, JPMorgan Chase requests a declaratory judgment determining that, if it is not permitted to assume the

Pension and 401(k) Plans, it has no further liability to any person for any liabilities associated with those plans.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and further state that the allegations set forth in paragraph 229 of the Complaint state a conclusion of law to which no response is required. To the extent a response is required, Debtors deny same.

Count Thirteen: Pension and 401(k) Plans (Unjust Enrichment)

Complaint 230: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 230 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 231: In the alternative, in the event that this Court finds that JPMorgan Chase can only assume the Pension and 401(k) Plans by either paying the hypothetical excess funding or assuming pending litigation liabilities upon assumption of the Pension and 401(k) Plans, and JPMorgan Chase does not assume the Pension and 401(k) Plans, the Debtors would be unjustly enriched by benefiting through JPMorgan Chase's contributions to the 401(k) Plan that were made in the expectation that it would be able to assume the 401(k) Plan pursuant to the P&A. Debtors and JPMorgan Chase understood that JPMorgan Chase was making these payments in anticipation of assumption of the plans.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 231 of the Complaint.

Complaint 232: The Debtors would unjustly realize a windfall from the circumstances alleged herein if they do not reimburse JPMorgan Chase for the funds contributed to the 401(k) and resources it allocated to the Plans, which Debtors (or another party) would have needed to contribute if JPMorgan Chase had not done so. The Debtors did not contribute any of these funds or resources relating to the post-September 25, 2008 operation of the Pension and 401(k) Plans and have no right to them.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 232 of the Complaint.

Complaint 233: By reason of the foregoing, a post-petition constructive trust should be imposed on the Debtors in the full amount necessary to reimburse JPMorgan Chase for the amounts it contributed to the 401(k) Plan.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 233 of the Complaint.

BANK OWNED LIFE INSURANCE POLICIES

Count Fourteen: Life Insurance Policies (Declaratory Judgment)

Complaint 234: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 234 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 235: As set forth above, there is an actual and substantial controversy between JPMorgan Chase and the Debtors. JPMorgan Chase contends that, pursuant to the P&A, it purchased the BOLI policies and Split Dollar policies referenced above. The Debtors appear to contend to the contrary.

Answer: Paragraph 235 of the Complaint characterizes the nature of the Complaint and states a conclusion of law and therefore no response is required. To the extent a response is required, Debtors deny same.

Complaint 236: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 236 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 237: JPMorgan Chase requests a declaratory judgment finding that Debtors must proceed with any claim to assert ownership of or interest in the BOLI Policies and Split Dollar policies through the District Court Action they elected to commence. Alternatively, JPMorgan Chase requests a declaratory judgment determining that the BOLI policies and Split Dollar policies are assets purchased by and belonging to JPMorgan Chase.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 237 of the Complaint.

Count Fifteen: Life Insurance Policies
(Unjust Enrichment)

Complaint 238: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 238 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 239: In the alternative, in the event that this Court finds that JPMorgan Chase did not purchase the BOLI policies and Split Dollar policies, the Debtors would be unjustly enriched if they were allowed to retain the policies. The Debtors were never the policyholders for the BOLI policies and Split Dollar policies. Accordingly, they have no right to the BOLI policies and Split Dollar policies and would unjustly realize a windfall from the circumstances alleged herein if they are permitted to retain the BOLI policies and Split Dollar policies.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 239 of the Complaint.

Complaint 240: JPMorgan Chase requests that the Court establish a constructive trust for the benefit of JPMorgan Chase consisting of the value of the BOLI policies and Split Dollar policies.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 240 of the Complaint.

VISA SHARES

Count Sixteen: Visa Shares (Declaratory Judgment)

Complaint 241: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 241 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 242: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 242 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 243: JPMorgan Chase requests a declaratory judgment determining that the Visa shares are assets purchased by and belonging to JPMorgan Chase. In the alternative, if the Court should determine that the Visa shares are assets belonging to the Debtors, JPMorgan Chase requests a declaratory judgment determining that Debtors assume the full liabilities associated with the Visa Inc.

restructuring and initial public offering in which those shares were issued by requiring that the Debtors pay and discharge any Covered Litigation obligation not satisfied by the Visa shares.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 243 of the Complaint.

Count Seventeen: Visa Shares
(Unjust Enrichment)

Complaint 244: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 244 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 245: The Debtors would be unjustly enriched if they retained title to the Visa shares.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 245 of the Complaint.

Complaint 246: If the Debtors are permitted to retain the Visa shares without bearing full liability associated with the reorganization and creation of the asset, they will incur a windfall if and to the extent JPMorgan Chase is responsible for any Covered Litigation shortfall relating to the Visa shares.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 246 of the Complaint.

Complaint 247: Thus, to the extent the Court does not enter a declaratory judgment protecting JPMorgan Chase from any such liabilities, JPMorgan Chase requests that the Court establish a constructive trust for the benefit of JPMorgan Chase over any Visa shares

remaining after satisfaction of obligations related to the Covered Litigation.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 247 of the Complaint.

INTANGIBLE ASSETS

Count Eighteen: Intangible Assets (Declaratory Judgment)

Complaint 248: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 248 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 249: As set forth above, JPMorgan Chase contends that, pursuant to the P&A and Title 12, it owns the Intangible Assets. The Debtors dispute this.

Answer: Paragraph 249 of the Complaint characterizes the nature of the Complaint and therefore no response is required. To the extent a response is required, Debtors deny same.

Complaint 250: There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and otherwise deny the allegations set forth in paragraph 250 of the Complaint, except admit that the Complaint purports to present a request for declaratory relief, and respectfully refer the Court to 28 U.S.C. § 2201 for the content thereof.

Complaint 251: JPMorgan Chase requests a declaratory judgment determining that JPMorgan Chase is the owner of the Intangible Assets. In the alternative, JPMorgan Chase requests a declaratory judgment determining that, if it is not the owner of the Intangible Assets, it

has no liability to any person for any liabilities associated with those Intangible Assets.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 251 of the Complaint.

Count Nineteen: Intangible Assets
(Unjust Enrichment)

Complaint 252: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 252 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 253: In the alternative, in the event that this Court finds that JPMorgan Chase does not own the Intangible Assets, the Debtors would be unjustly enriched if they were allowed to retain the Intangible Assets or were not ordered to repay JPMorgan Chase for amounts paid by WMB in connection with the Intangible Assets.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 253 of the Complaint.

Complaint 254: JPMorgan Chase requests that the Court establish a constructive trust for the benefit of JPMorgan Chase consisting of the value of Intangible Assets.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 254 of the Complaint.

ADMINISTRATIVE CLAIM

Count Twenty: Administrative Expenses

Complaint 255: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 255 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 256: To the extent the Court accepts WMI's claims of ownership of any of the Pension and 401(k) Plans or other assets and JPMorgan Chase has made payments and incurred expenses in connection with these assets, JPMorgan Chase is entitled to reimbursement from Debtors of all post-petition expenses it has incurred and payments it has made on account of those assets.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 256 of the Complaint.

Complaint 257: To the extent JPMorgan Chase incurs any liability or suffers any loss as the result of conduct by Debtors after the Petition Date, including conduct by the Debtors as the sponsor of any of the Pension and 401(k) Plans, JPMorgan Chase is entitled to post-petition administrative claim for those amounts.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 257 of the Complaint.

INDEMNIFICATION

Count Twenty-One: Indemnification

Complaint 258: JPMorgan Chase realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

Answer: In response to paragraph 258 of the Complaint, Debtors repeat and reallege the answers to the foregoing paragraphs of the Complaint as if fully set forth herein.

Complaint 259: Claims have been threatened against JPMC arising out of or relating to the acts, omissions or conduct of Debtors prior to the Petition Date. To the extent that any claim is asserted against JPMC as a result of such matters, JPMC is entitled to be indemnified and held harmless by the Debtors for any loss, damage or liability they might incur.

Answer: Debtors deny that JPMorgan Chase is entitled to any relief and to the extent a response is otherwise required Debtors deny the allegations set forth in paragraph 259 of the Complaint.

DEFENSES, AFFIRMATIVE DEFENSES, AND RESERVATION OF RIGHTS

The statement of any defense hereinafter does not assume the burden of proof for any issue as to which applicable law places the burden upon JPMorgan Chase. Debtors expressly reserve the right to assert, and hereby give notice that they intend to rely upon, any other defense and/or affirmative defense that may become available or appear during discovery proceedings or otherwise in this case and hereby reserve the right to amend this Answer to assert any such defense and/or affirmative defense. Debtors hereby incorporate into this Answer and assert any and all defenses asserted or pled in this proceeding by any other party to the extent the defenses are applicable to the Debtors under the facts and law.

Debtors have not knowingly or intentionally waived any applicable affirmative defenses. Debtors presently lack sufficient knowledge or information on which to form a belief as to whether they may have, as yet unstated, affirmative defenses, and expressly reserve all rights with respect to all affirmative defenses that may be revealed during the course of discovery. Debtors further reserve all rights to assert any and all applicable defenses or affirmative defenses against JPMorgan Chase, including, but not limited to, all equitable claims, avoidance actions, and set-off rights.

Debtors assert the following affirmative defenses, without assuming the burden of proof when the burden of proof would otherwise be on JPMorgan Chase:

First Defense

The Complaint fails to state a claim upon which relief may be granted.

Second Defense

JPMorgan Chase is not entitled to a declaration that it has a right to set off the amount of claims it owes to Debtors against the amount of obligations that Debtors allegedly owe to it because such setoff does not comply with the Bankruptcy Code or any other applicable law, including because, without limitation, mutuality among the parties is lacking.

Third Defense

JPMorgan Chase's claims are barred, in whole or in part, by section 502(d) of the Bankruptcy Code because JPMorgan Chase is in possession of property recoverable by the Debtors under sections 542 and 550 of the Bankruptcy Code and because JPMorgan Chase is a transferee of transfers avoidable under sections 544, 547 and 548 of the Bankruptcy Code.

Fourth Defense

JPMorgan Chase's claims are barred, in whole or in part, by section 558 of the Bankruptcy Code because the Debtors are entitled to the defense of setoff or recoupment under applicable state law.

Fifth Defense

JPMorgan Chase is not the real party in interest with respect to some or all of its claims.

Sixth Defense

JPMorgan Chase lacks standing to assert some or all of its claims.

Seventh Defense

JPMorgan Chase's Complaint is barred in whole or in part by the Statute of Frauds.

Eighth Defense

JPMorgan Chase has benefited from the acts and transactions of Debtors complained of in an amount exceeding JPMorgan Chase's claimed damages. JPMorgan Chase is required to set off against such alleged damages the benefits received and thus has suffered no legally cognizable damages proximately caused by any conduct of Debtors.

Ninth Defense

JPMorgan Chase is precluded to the extent it seeks any recovery or indemnification, in whole or in part, because JPMorgan Chase has failed to mitigate its damages.

Tenth Defense

JPMorgan Chase is precluded from recovery because it would be unjustly enriched thereby.

Eleventh Defense

By virtue of its conduct, JPMorgan Chase is estopped from asserting the claims in the Complaint.

Twelfth Defense

JPMorgan Chase's claims are barred, in whole or in part, by waiver.

Thirteenth Defense

JPMorgan Chase's claims are barred, in whole or in part, by the doctrine of laches.

Fourteenth Defense

JPMorgan Chase's claims are barred, in whole or in part, by JPMorgan Chase's approval and ratification of the conduct upon which the claims are based.

Fifteenth Defense

JPMorgan Chase is precluded from recovery, in whole or in part, because of its own wrongful and/or negligent conduct and the doctrines of comparative negligence and contributory negligence.

Sixteenth Defense

JPMorgan Chase's Complaint is barred, in whole or in part, by the doctrine of unclean hands.

Seventeenth Defense

JPMorgan Chase is precluded from recovery, in whole or in part, because JPMorgan Chase had knowledge of and approved and assumed the risk of the transactions of which it complains.

Eighteenth Defense

JPMorgan Chase's Complaint is barred, in whole or in part, by the doctrine of *in pari delicto*.

Nineteenth Defense

JPMorgan Chase's claims are barred, in whole or in part, by the statute of limitations.

Twentieth Defense

JPMorgan Chase's claims are barred, in whole or in part, by its illegal conduct.

Twenty-First Defense

JPMorgan Chase's claims are barred, in whole or in part, by the release of those claims.

Twenty-Second Defense

JPMorgan Chase's claims are barred, in whole or in part, by the payment of those claims.

Twenty-Third Defense

With respect to Counts 4 and 5, JPMorgan Chase's claims are barred, in whole or in part, by operation of the Internal Revenue Code (26 U.S.C.) and the Federal Tax Regulations (26 C.F.R.).

Twenty-Fourth Defense

JPMorgan Chase's claims, in whole or in part, have been or will be discharged in the bankruptcy.

DEBTORS' COUNTERCLAIMS

The Debtors, through their undersigned counsel, bring the following Counterclaims against JPMorgan Chase. The Debtors assert and expressly reserve all rights with respect to all counterclaims or cross-claims that may be revealed during the course of discovery, including the right to amend to assert any counterclaims or cross-claims that may hereafter be revealed during discovery.

INTRODUCTION

1. This suit is brought to redress certain injuries that WMI has suffered as a result of fraudulent and preferential transfers of potentially more than $10 billion in WMI assets to WMB and subsequently to JPMorgan Chase, among other things.

2. Since at least December 2007 until it was ultimately seized and placed into receivership by the FDIC, WMB was under liquidity pressure. During this period, WMI down-streamed billions of dollars without recompense and made significant preferential transfers to WMB on account of antecedent debts.

3. To the extent such contributions were made at a time when WMI was insolvent or engaged in business for which its assets were unreasonably small capital and when WMB was insolvent, WMI received no consideration in exchange for making such contributions and they are avoidable as a matter of law. Moreover, contributions or other transfers made when the likelihood of the FDIC's seizure was increasingly becoming inevitable resulted in WMI again receiving no consideration in exchange for making such contributions. Similarly, to the extent the transfers on account of prior obligations were made at a time when WMI was insolvent, they too are avoidable as a matter of law.

4. WMI and WMB's financial condition ultimately resulted in regulatory action. On the Receivership Date, by order number 2008-36, the OTS closed WMB and appointed the FDIC

Receiver. Immediately upon its appointment, the FDIC sold the majority of WMB's assets – having a book value of more than $300 billion – to JPMorgan Chase in exchange for payment of just $1.88 billion (the "P&A Transaction"), pursuant to the P&A Agreement.

5. JPMorgan Chase thereupon booked an extraordinary gain, reflecting that it acquired WMB's assets at a significant discount to fair market value. Specifically, based upon JPMorgan Chase's own accounting, the adjusted fair value of the net assets acquired was higher than the purchase price paid in the amount of $1.9 billion – an amount in and of itself more than the total consideration paid by JPMorgan Chase. Moreover, JPMorgan Chase has recently announced that it stands to realize a $29 billion gain on WMB assets it purchased and marked down pursuant to the P&A Transaction based upon the actual value of such assets. On the date of the P&A Transaction, WMI was both a creditor and a stockholder of WMB, and thus WMI was harmed further by this transaction. The next day, the Debtors commenced their cases under chapter 11 of the Bankruptcy Code.

JURISDICTION AND VENUE

6. This is an action pursuant to Federal Rule of Bankruptcy Procedure 7001 and 11 U.S.C. §§ 541, 544, 547, 548, and 550.

7. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b).

8. Venue is proper in this Court under 28 U.S.C. § 1409(b).

9. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

THE PARTIES

10. Counterclaim-Defendant JPMorgan Chase is a national banking association organized under the laws of the United States with its principal place of business in Columbus, Ohio.

JPMorgan Chase is a wholly-owned subsidiary of JPMorgan Chase & Co., a corporation organized under the laws of Delaware.

11. Counterclaim-Plaintiff WMI is a corporation organized under the laws of the State of Washington with its principal place of business located at 1301 Second Avenue, Seattle, Washington 98101.

12. Counterclaim-Plaintiff WMI Investment is a corporation organized under the laws of the State of Delaware with its principal place of business located at 1301 Second Avenue, Seattle, Washington 98101.

FACTUAL ALLEGATIONS

A. WMI's Capital Contributions

13. From December 2007 through April 2008, WMI made the Capital Contributions to WMB in the amount of $6.5 billion:

Date	Amount Contributed to WMB
December 18, 2007 (the "December '07 Capital Contribution")	$1 billion
April 18, 2008 (the "April '08 Capital Contribution")	$3 billion
July 21, 2008 (the "July '08 Capital Contribution")	$2 billion
September 10, 2008 (the "September '08 Capital Contribution")	$500 million

14. During this period, WMI had public debt obligations of approximately $7 billion, 3.5 million shares of preferred stock, and more than 1.7 billion shares of common stock.

15. All Capital Contributions made at a time when WMI was insolvent or engaged in business for which its assets were unreasonably small capital and when WMB was insolvent resulted

in WMI receiving no consideration in exchange for making such contributions. Moreover, Capital Contributions made during this period, when the likelihood of the FDIC's closing of WMB was increasingly inevitable, although not understood to be by WMI, resulted in WMI receiving no consideration in exchange for making such contributions. Thus, WMB (and ultimately, JPMorgan Chase) received the benefit of billions of dollars of Capital Contributions to the detriment of WMI.

(i) December '07 and April '08 Capital Contributions

16. In December 2007, WMI was recognizing serious signs of asset deterioration. On December 10, 2007, WMI announced a loss for the fourth quarter because of a $1.6 billion charge to write down the value of its home-loan business, and its plans to lay off approximately 3,150 employees. *See* Bill Virgin, *WaMu To Slash 3,150 Jobs Facing Fourth Quarter Loss, Bank Cuts Dividend 73% And Sets Office Closures*, THE SEATTLE POST-INTELLIGENCER, Dec. 11, 2007, at A1.

17. At this time, WMI already carried a debt burden that included approximately $7 billion in publicly-traded debt.

18. On the day of the April '08 Capital Contribution, WMI announced a net loss of approximately $1.1 billion, a provision for loan losses for the first quarter of approximately $3.5 billion, and expected first quarter net charge-offs of approximately $1.4 billion. *See* Washington Mutual, Inc. Press Release, *Company Expects First Quarter Net Loss of Approximately $1.1 Billion*, April 8, 2008.

(ii) July '08 Capital Contribution

19. On June 30, 2008, the OTS completed an examination of WMB and identified various "supervisory issues," and a general weakened financial condition. Pursuant to this examination WMB's board of directors and management were instructed to construct a three-year business plan to be submitted to the OTS for its approval. This examination culminated on September 7, 2008, when the OTS entered into Memorandums of Understanding with each of WMI and WMB (the "MOUs").

The MOU entered into by WMB provided various measures aimed at improving its financial health, including, among other things, limitations placed on the ability of WMB to pay dividends, a requirement that WMB's board of directors review and approve a "contingency capital plan," and incorporation of an asset reduction plan with respect to certain targeted assets.

20. On Friday, July 11, 2008, the OTS seized IndyMac Bank and appointed the FDIC receiver of its assets. *See IndyMac Taken Over By Regulators,* REUTERS, July 11, 2008. On Monday, July 14, 2008, WMB experienced significant loss of deposits in the wake of IndyMac Bank being placed into receivership.

21. On July 22, 2008 – one day after the July '08 Capital Contribution was made – WMI announced a second quarter net loss of $3.33 billion and increased loan loss provisions by 69 percent to $5.9 billion. *See* Washington Mutual, Inc. Press Release, *WaMu Reports Significant Build-Up of Reserves Contributing to Second Quarter Net Loss of $3.3 Billion*, July 22, 2008. WMI's second quarter announcement spurred analyst concerns. Citi analyst Bradley Ball stated Citi's concern that "credit and market conditions will continue to damage Washington Mutual's financial flexibility over the near to intermediate term." *See* Maurna Desmond, *Alarm Over WaMu,* FORBES.COM, July 24, 2008.[3] Richard Bove, a Ladenburg Thalmann analyst, discussing his firm's projections noted that, "these numbers are based on our projection of what Washington Mutual must do to return to profitability, not what is necessarily likely to happen." *Id.*

22. The capital markets evidenced WMI's financial distress. WMI credit default swaps (reflecting risk of default on WMI's publicly-issued notes) were trading at record-high levels just four days after the consummation of the July '08 Capital Contribution. *See* Shannon D. Harrington,

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[3] http://www.forbes.com/2008/07/24/wamu-analyst-update-market-equity-cx_md_0724markets46.html.

WaMu Bond Risk Climbs to Record Amid Mortgage Losses, BLOOMBERG.COM, July 25, 2008.[4] Further indicative of WMI's financial distress, WMI subordinated notes were offering 15.0% yields to compensate investors for their risk, in stark contrast to five-year Treasury bonds that were offering a mere 3.3%. *See* Maurna Desmond, *Alarm Over WaMu,* FORBES.COM, July 24, 2008.

(iii) September '08 Capital Contribution

23. In September, 2008, WMI and WMB continued to experience a deterioration of their financial positions. On September 7, 2008, it was reported that WMI was forced to replace its then acting CEO, Kerry Killinger. *Washington Mutual CEO Killinger is out*, CNNMONEY.COM, Sept. 7, 2008.[5] The September '08 Capital Contributions were transferred to WMB only three days later.

24. The ratings agencies perceived WMI's financial distress. One day after the September '08 Capital Contributions were made, on September 11, 2008, both Moody's and Fitch Ratings downgraded their ratings on WMI to "junk status" and BBB- "with a negative outlook," respectively. *See Washington Mutual tries to soothe anxiety,* CNNMONEY.COM, September 7, 2008.[6] Just five days later, Standard & Poor's followed suit, lowering its WMI ratings to three levels below investment grade. *See* Ari Levy, *WaMu Rating Lowered to Junk by S&P on Mortgage Losses,* BLOOMBERG.COM, Sept. 15, 2008.[7]

25. In a September 25, 2008 letter to the WMI board of directors, the OTS discussed the prior two-week period as one of substantial "deposit outflows" from WMB that gave rise to "significant liquidity pressures." During this period, more than $16.7 billion was withdrawn by

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4 http://www.bloomberg.com/apps/news?pid=20601087&sid=ax7YtHccUeAQ&refer=home

5 http://money.cnn.com/2008/09/07/news/companies/wamu_ceo/?postversion=2008090722

6 http://money.cnn.com/2008/09/12/news/companies/wamu_3Q_update/index.htm

7 http://www.bloomberg.com/a pps/news?pid=20601087&sid=awDjhtIfoz_Q

WMB customers. *See* Robin Sidel, David Enrich, and Dan Fitzpatrick, *WaMu Is Seized, Sold Off to J.P. Morgan, In Largest Failure in U.S. Banking History,* WALL ST. J., Sept. 26, 2008, at A1. The OTS ultimately concluded that WMB "is likely to be unable to pay its obligations or meet its depositors' demands in the normal course of business because it does not have sufficient liquid assets to pay those obligations and fund the expected withdrawals." *See* OTS Order 2008-36 at 2.

(iv) Capital Contributions Were Made For Less Than Reasonably Equivalent Value

26. To the extent that as of the time the Capital Contributions were made, WMB was insolvent, WMI's equity value in those entities was worthless and WMI did not receive any value in exchange for the Capital Contributions. Moreover, as the prospect of WMB being seized by the OTS approached inevitability, WMI's equity shares in WMB were likewise valueless.

27. WMI did not receive any tangible benefit in exchange for disbursing the funds. WMI received no indirect benefit either, such as increased equity value flowing from its wholly-owned subsidiary, WMB. At such time, there was no possibility that WMI would ever receive any return on the Capital Contributions.

28. At all such times, WMI had a debt burden of more than $7 billion, and its primary asset, the equity value in WMB, was reduced to nothing. To the extent that WMI was either insolvent or engaged in business for which its assets were unreasonably small capital, each of the Capital Contributions harmed WMI and are avoidable as a matter of law.

(v) Capital Contributions are Subsequently Transferred to JPMorgan Chase

29. The Capital Contributions were transfers of an interest in WMI's property. In its Complaint, JPMorgan Chase admits that the Capital Contributions were transferred to WMB, stating: "WMI formally contributed to WMB at least $6.5 billion of the approximately $10.2 billion in capital it had raised." (Complaint at ¶ 35).

30. Pursuant to the P&A Agreement, JPMorgan Chase purchased substantially all of WMB's assets. On the Receivership Date, funds that comprised the Capital Contributions were transferred to JPMorgan Chase.

31. Because the Capital Contributions are avoidable as constructive fraudulent transfers, WMI may recover from JPMorgan Chase as the subsequent transferee of the Capital Contributions, either the Capital Contributions or the value of the Capital Contributions for the benefit of WMI's estate pursuant to section 550 of the Bankruptcy Code. On the Receivership Date, JPMorgan Chase knew or should have known of the Capital Contributions and about the respective financial conditions of WMI and WMB. Thus, JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the Capital Contributions.

B. The Trust Securities

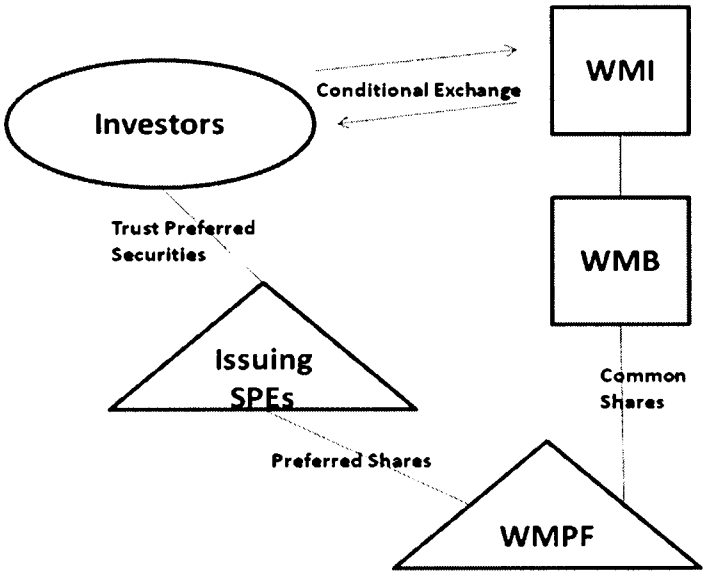
(i) Issuance of the Trust Securities

32. Between March 2006 and October 2007, in four instances, certain SPEs associated with WMI and its then subsidiaries issued the Trust Securities in connection with, and facilitated by, WMPF. The Trust Securities have an aggregate liquidation preference of approximately $4 billion and upon information and belief are currently worth at least as much.

33. WMPF's assets were limited to direct or indirect interests in mortgage or mortgage-related assets, cash, and other permitted assets which were held in certain trusts. WMPF issued preferred securities which were held by, and were the only asset of, the SPEs. These securities were senior in priority to the common equity interests of WMPF which were indirectly held by WMB and WMI. In turn, the SPEs issued the Trust Securities.

34. The Trust Securities were offered and sold to "qualified institutional buyers" or "qualified purchasers" subject to a conditional exchange feature that operated to exchange the Trust Securities into related classes of WMI preferred stock, or depository shares representing WMI

preferred stock, upon the occurrence of certain events as directed by the OTS under certain circumstances (*i.e.*, WMB becoming undercapitalized, WMB being placed into receivership, or the OTS anticipating WMB becoming undercapitalized in the near future, each an "Exchange Event"). Pursuant to the declaration of such an Exchange Event, the Trust Securities would be then held by WMI, having been exchanged for newly-issued preferred stock of WMI (a "Conditional Exchange"). A simplified illustrative chart follows:



35. On February 23, 2006, by letter addressed to Darrel Dochow of the OTS, John F. Robinson, WMI Corporate Risk Management, indicated to the OTS that if, as a result of the occurrence of an Exchange Event declared by the OTS, WMI issues preferred stock, or depository shares representing WMI preferred stock, in exchange for the Trust Securities, "WMI will contribute to WMB the [Trust Securities]" (collectively, with the November 14, 2006 and the August 17, 2007 correspondence discussed below, the "Downstream Undertakings"). On February 24, 2006, the OTS responded by letter from Dochow to Robinson, indicating that it would consider the value of the Trust Securities in WMB's core capital in light of WMI's Downstream Undertaking. With respect to

subsequent issuances of Trust Securities, similar letter exchanges took place on November 14, 2006 and December 4, 2006, and August 17, 2007 and September 20, 2007.

36. The February 26, 2006 OTS letter went on to state that "[n]otwithstanding the above, the OTS reserves the right, in its sole discretion, to exclude the [Trust Securities] (or prospective issuances of [Trust Securities]) if the terms are revised or it otherwise ceases to provide meaningful capital support and a realistic ability to absorb losses, or otherwise raises supervisory concerns." Similar reservations of rights appeared in correspondence relating to subsequent issuances of Trust Securities (collectively, the "OTS Reservation of Rights").

37. The Trust Securities were certificated securities, represented by global certificates held by Depository Trust Company ("DTC") and registered in the name of DTC's nominee, Cede & Co.

(ii) The OTS Declares an Exchange Event

38. On September 24, 2008, the day prior to the Receivership Date, the OTS notified WMI that an Exchange Event had occurred.

39. On September 25, 2008, by letter addressed to Steve Frank and Alan Fishman of WMI from Darrel Dochow of the OTS, the OTS directed WMI to cause a Conditional Exchange, exchanging the Trust Securities for preferred shares of WMI.

40. Later that day, immediately after the OTS closed WMB, its assets were purportedly sold to JPMorgan Chase pursuant to the P&A Transaction.

41. Still later that day, just prior to 9:00 p.m. Eastern time, an employee of WMI executed an Assignment Agreement which purported to assign the right, title, and interest in the Trust Securities to WMB (the "Assignment").

42. Pursuant to section 4.08 of the Amended and Restated Trust Agreement, dated as of March 7, 2006 (the "Trust Agreement") governing the Trust Securities, the Trust Securities were to

be transferred to WMI in a Conditional Exchange at "the earliest possible date such exchange could occur consistent with the directive, as evidenced by the issuance by WMI of a press release prior to such time." (Trust Agreement §4.08). WMI sent a letter to the OTS on the evening of September 25, 2008, indicating that the Conditional Exchange would occur at 8:00 a.m. Eastern time on the 26th of September and that WMI would immediately contribute the Trust Securities to WMB upon the Conditional Exchange.

(iii) The Transfer of the Trust Securities Was Made For Less Than Reasonably Equivalent Value

43. The transfer of the Trust Securities pursuant to the Assignment Agreement is avoidable as a constructive fraudulent transfer of an interest in WMI's property that harmed WMI and its creditors.

44. At 8:00 a.m. Eastern time on the Petition Date, at a time when WMI was insolvent, WMI transferred the Trust Securities to WMB or to JPMorgan Chase, as successor in interest to WMB (Complaint at ¶ 79), for no consideration.

45. WMI did not receive any direct benefit in exchange for the transfer of the Trust Securities. WMI received no indirect benefit either, such as increased equity value flowing from WMB because its wholly-owned subsidiary WMB was insolvent. Moreover, both the transfer, and the Assignment the day prior, were made after WMB had been seized by the OTS, and thus WMI's equity shares in WMB were likewise valueless.

46. JPMorgan Chase is liable to WMI's estate as an initial or subsequent transferee of the Trust Securities. On the Receivership Date and the Petition Date, JPMorgan Chase knew or should have known of the transfers of the Trust Securities and about the financial condition of WMI and WMB. Thus, JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the transfer of the Trust Securities.

(iv) In the Alternative, the Transfer of the Trust Securities in Satisfaction of the Downstream Undertakings is Fraudulent as to Creditors and a Voidable Preference

47. Alternatively, the transfer of the Trust Securities at 8:00 a.m. Eastern time on the Petition Date in satisfaction of the Downstream Undertakings was both fraudulent as to WMI's creditors under applicable state law and a preferential transfer under the Bankruptcy Code.

48. First, the transfer of the Trust Securities was fraudulent as to WMI's creditors that existed as of the date of the transfer under applicable state law because the transfer was made to an insider, WMB or JPMorgan Chase, as successor in interest to WMB, while WMI was insolvent and while WMB or JPMorgan Chase had reasonable cause to believe that WMI was insolvent. The transfer was made on account of an antecedent obligation – the Downstream Undertakings. Thus, JPMorgan Chase is liable to WMI's estate as an initial or subsequent transferee of the Trust Securities. On the Receivership Date and the Petition Date, JPMorgan Chase knew or should have known of the purported transfers of the Trust Securities and about the financial condition of WMI. Thus, JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the transfer of the Trust Securities.

49. Second, the transfer of the Trust Securities was a preferential transfer under the Bankruptcy Code. At a time when WMI was insolvent, WMI transferred the Trust Securities on account of an antecedent obligation – the Downstream Undertakings.

50. The transfer was made either to WMB or JPMorgan Chase and enabled WMB or JPMorgan Chase to receive more than either would have received if WMI had not transferred the Trust Securities and had filed a bankruptcy case under chapter 7 of the Bankruptcy Code.

51. JPMorgan Chase expressly did not acquire any claims against WMI under the P&A Agreement and cannot be construed as a contractual assignee (P&A Agreement, Schedule 3.5), yet it asserted a claim to the Trust Securities in light of its assumption of all of WMB's deposit liabilities.

If the Trust Securities are deemed to have been transferred to JPMorgan Chase, they were transferred to JPMorgan Chase as subrogee to WMB, and subrogees do not enjoy the priority contemplated by section 507(a)(9) of the Bankruptcy Code. Therefore, the transfer enabled WMB to receive more than it would have received in a hypothetical WMI chapter 7 bankruptcy case. As such, JPMorgan Chase would be left with only a general unsecured claim and would stand to recover significantly less than the value of the Trust Securities.

52. Further, even if WMB or JPMorgan Chase could assert a priority claim under section 507(a)(9) of the Bankruptcy Code, which WMI disputes, the transfer enabled WMB or JPMorgan Chase to receive more than either would have received in a hypothetical WMI chapter 7 bankruptcy case. This is so because, as asserted above and below, WMB and JPMorgan Chase are transferees of transfers that are avoidable under the Bankruptcy Code. Section 502(d) of the Bankruptcy Code would operate to disallow any claim of WMB in a hypothetical WMI chapter 7 bankruptcy case.

53. JPMorgan Chase is liable to WMI's estate as an initial or subsequent transferee of the Trust Securities. On the Receivership Date and the Petition Date, JPMorgan Chase knew or should have known of the purported transfers of the Trust Securities and about the financial condition of WMI. Thus, JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the transfer of the Trust Securities.

(v) In the Alternative, the Trust Securities Were Not Transferred and are Owned by WMI

54. In the alternative, if it is determined that the Trust Securities were not in fact transferred to WMB or to JPMorgan Chase pursuant to the Assignment Agreement, then the Trust Securities are owned by WMI and are property of WMI's bankruptcy estate.

55. Pursuant to section 4.08 of the Trust Agreement, upon a Conditional Exchange, until replacement certificates are issued by WMI for the new WMI preferred stock issued to the prior

holders of the Trust Securities, the certificates formerly representing the Trust Securities shall be deemed for all purposes to represent the preferred shares of WMI. (Trust Agreement § 4.08). The September 26, 2008 press release provided that "until such depositary receipts are delivered or in the event such depositary receipts are not delivered, any certificates previously representing [Trust] Securities will be deemed for all purposes, effective as of 8:00 AM New York time on September 26, 2008, to represent Fixed Rate Depositary Shares or Fixed-to-Floating Rate Depositary Shares, as applicable." A copy of the press release is attached hereto as Exhibit 1. Thus, upon a Conditional Exchange, the Trust Securities necessarily became uncertificated.

56. Upon information and belief, the SPEs, the issuers of the Trust Securities, have made no transfer notations registering the Trust Securities to WMB to reflect any purported Assignment.[8]

57. More than simply a clerical act, registration is a legally significant act that facilitates the administration of a large-scale security issuance involving multiple holders, like the Trust Securities. Neither WMB nor JPMorgan Chase is the registered owner listed in the registrar's books with respect to the Trust Securities. Therefore, under applicable law and the Uniform Commercial Code as adopted by the State of Washington, the Trust Securities have not been delivered to WMB. Thus, the Trust Securities are property of WMI's bankruptcy estate.

(vi) JPMorgan Chase Has No Claim for the Trust Securities

58. The Trust Securities were not assigned to JPMorgan Chase under the terms of the P&A Agreement. Under Section 3.2(b) of the P&A Agreement, JPMorgan Chase was required to submit a bid for any securities that were not the capital stock of an acquired subsidiary of WMB. (P&A Agreement ¶ 3.2(b)). No such bid was submitted to WMB or the FDIC for the Trust

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[8] The Debtors are not aware of any transfer notations being made post-petition, but reserve their right to amend the complaint to avoid any such unauthorized transfers of property of the Debtors' estate.

Securities. The P&A Agreement further provides that "in the absence of an acceptable bid from [JPMorgan Chase], each such security shall not pass to [JPMorgan Chase] and shall be deemed to be an excluded asset hereunder." (P&A Agreement ¶ 3.2(b)). Therefore, JPMorgan Chase has no claim to the Trust Securities.

59. Further, Section 3.5 of the P&A Agreement provides that Schedule 3.5, "Certain Assets Not Purchased," enumerates certain assets not purchased, acquired, or assumed by JPMorgan Chase under the P&A Agreement. (P&A Agreement ¶ 3.5). Listed on Schedule 3.5 is "any interest, right, action, claim, or judgment against . . . any shareholder or holding company of [WMB] . . . ." (P&A Agreement, Schedule 3.5). Thus, JPMorgan Chase expressly did not acquire any claim from WMB for the Trust Securities under the Assignment Agreement or otherwise.

60. Further, in light of the fact that JPMorgan Chase assumed all of WMB's deposit liabilities, to the extent JPMorgan Chase has subrogated to the rights of WMB with respect to the Trust Securities, section 507(d) of the Bankruptcy Code provides that any priority status that WMB may have with respect to the Trust Securities will not inure to the benefit of JPMorgan Chase as subrogee.

61. Moreover, property is recoverable from JPMorgan Chase on account of, among other things, its status as a transferee of the avoidable Capital Contributions, as asserted above. Thus, section 502(d) of the Bankruptcy Code operates to disallow any claim of JPMorgan Chase (in any event) until JPMorgan Chase turns over the value of the avoidable Capital Contributions, among other things, to WMI's estate. Accordingly, any claim JPMorgan Chase may have on account of the Trust Securities or otherwise is disallowed.

C. Preferential Payments

(i) WMI Transfers Cash and Interests in Property to WMB on Account of Antecedent Debt

62. On or before the Receivership Date, WMI transferred significant sums or other interest in property to WMB, to third parties for the benefit of WMB, or to WMB fsb. These transfers were made on account of pre-existing tax-related (the "Tax Transfers") or administrative obligations (the "Intercompany Settlements," and with the Tax Transfers, the "Preferential Transfers") owed WMB and were made during the one-year period immediately preceding the Petition Date.

63. During this period, the Tax Transfers were made to WMB by WMI in an approximate amount of $1,112,517,472. During this period, the Intercompany Settlements were made to WMB by WMI in an approximate amount of $151,934,564. The Preferential Transfers are detailed in the schedules attached hereto as Exhibit 2. At the time of the Preferential Transfers, WMB and WMB fsb were both "insiders" of WMI and "creditors" of WMI as those terms are defined in the Bankruptcy Code or under applicable non-bankruptcy law.

64. WMB and WMB fsb received more on account of the Preferential Transfers than they would have received under a hypothetical chapter 7 bankruptcy case had the Preferential Transfers not been made.

65. To the extent WMI was insolvent at the time of the various Preferential Transfers, the Preferential Transfers are avoidable under the Bankruptcy Code and under applicable state law as fraudulent transfers. To the extent WMI was insolvent at the time of the various Preferential Transfers, WMB and WMB fsb had reasonable cause to believe that WMI was insolvent.

(ii) Preferential Transfers are Subsequently Transferred to JPMorgan Chase

66. The Preferential Transfers were transfers of an interest of WMI in property. Pursuant to P&A Agreement, JPMorgan Chase purchased substantially all of WMB's assets. Moreover, by subsequent transaction, JPMorgan Chase merged with WMB fsb. Thus, on the Receivership Date, the funds and/or value that comprised the Preferential Transfers were transferred to JPMorgan Chase.

67. Because the Preferential Transfers are avoidable as preferential transfers or as fraudulent transfers, then pursuant to section 550 of the Bankruptcy Code, WMI may recover the Preferential Transfers from JPMorgan Chase as subsequent transferee, or the value of the Preferential Transfers for the benefit of WMI's estate. On the Receivership Date and the Petition Date, JPMorgan Chase knew or should have known of the Preferential Transfers and about the financial condition of WMI. Thus, JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the Preferential Transfers.

D. FDIC Sells WMB's Assets to JPMorgan Chase For Less Than Reasonably Equivalent Value

68. As reported in the *Wall Street Journal*, because the FDIC had informed JPMorgan Chase in early September that it desired to "immediately auction off WaMu's assets" upon the seizure of WMB, "J.P. Morgan was well-prepared . . . when the FDIC asked for bids" for the purchase of WMB's assets. Heidi N. Moore, *Deal Journal*, WALL ST. J., Sept. 30, 2008, at C7.

69. Prior to the Receivership Date, the FDIC determined that it would accept JPMorgan Chase's bid for WMB's assets.

70. Immediately after its appointment as receiver, the FDIC purportedly sold the majority of WMB's assets to JPMorgan Chase in exchange for consideration of $1.88 billion.

71. Under the P&A Transaction, JPMorgan Chase likely acquired more than $300 billion of assets at book value, including $134 billion of retail deposits and over $8 billion of uninsured deposits which have matching liabilities. *See* FDIC Memorandum to Board of Directors, September 24, 2008.

72. Less than a week after the P&A Transaction was consummated, JPMorgan Chase booked an after-tax extraordinary gain from "merger-related items" in connection with the P&A Transaction in the amount of $581 million. *See* JPMorgan Chase & Co., Form 10-Q for the quarter ended September 30, 2008, at 9. This amount reflected "negative goodwill," or a gain occurring when the price paid for an acquisition is less than the fair value of the acquired net assets. Subsequently, and because JPMorgan Chase's initial assessment of the value received over and beyond what it paid was conducted just days after the P&A Transaction, that gain was reassessed and increased to *$1.9 billion* – an amount in and of itself more than the total consideration paid by JPMorgan Chase. *See* JPMorgan Chase & Co., Form 10-K for the fiscal year ended December 31, 2008, at 26.

73. The actual windfall to JPMorgan Chase was even greater, taking an immediate effect on JPMorgan Chase revenues. Having acquired WMB at fire-sale prices, JPMorgan Chase has achieved "record firmwide revenue" in first quarter 2009 and has enjoyed growth in retail banking deposits by 62% and in checking accounts by 126%.[9] Further, JPMorgan Chase has announced that

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[9] *See* JPMorgan Chase Press Release, *JPMorgan Chase Reports First-Quarter 2009 Net Income of $2.1 Billion, or $0.40 per Share,* April 16, 2009. Specifically, net income in JPMorgan Chase's Retail Financial Services division "was $474 million, compared with a net loss of $311 million in the prior year" due, in part, to the "positive impact of the Washington Mutual transaction . . ." Net income in JPMorgan Chase's Commercial Banking division "was $338 million, an increase of $46 million, or 16%, from the prior year, driven by higher net revenue reflecting the impact of the Washington Mutual transaction . . ." "Net interest income [at JPMorgan Chase] was $15.5 billion, up by $6.1 billion, or 65%, due to the impact of the Washington Mutual transaction," among other things.

it is now poised to recognize significant gains (*i.e.*, as much as $29 billion), as it recognizes the actual market value of many of the WMB assets it purchased and marked down at aggressive discounts. *See* Ari Levy and Elizabeth Hester, *JPMorgan's WaMu Windfall Turns Bad Loans Into Income,* BLOOMBERG.COM, May 26, 2009.[10]

74. At the time of the P&A Transaction, WMI was an actual creditor of WMB pursuant to various promissory notes and other intercompany payables. WMB was insolvent at the time of, or was rendered insolvent by, the P&A Transaction or was engaged in a business for which its remaining assets were unreasonably small.

75. In short, WMB did not receive from JPMorgan Chase reasonably equivalent value in exchange for the transfer of WMB's assets in the P&A Transaction.

E. Former Intercompany Amounts Due Assumed and Payable by JPMorgan Chase

76. WMB was indebted to WMI, or certain of WMI's non-bank, non-Debtor subsidiaries, under certain demand promissory notes that are due and payable in an approximate aggregate amount of $177 million as of the Petition Date (the "Promissory Notes"), plus interest accruing thereafter, as follows:[11]

- $82,048,081 under that certain Revolving Master Note, dated as of December 22, 2005, by and between WMB, as borrower, and H.S. Loan Corporation, as lender. H.S. Loan Corporation is a subsidiary of WMI, in which WMB owns 1.3283%.
- $73,670,153 under that certain Revolving Master Note, dated as of December 22, 2005, by and between WMB, as borrower, and H.S. Loan Partners, as lender. H.S. Loan Partners is an indirect, wholly-owned subsidiary of WMI.

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[10] http://www.bloomberg.com/apps/news?pid=20601087&sid=aYhaiSOq_Tbc&refer=home

[11] Separately, WMB and WMB fsb were indebted to the Debtors on account of deposit liabilities in an amount in excess of $4 billion. These deposit liabilities are the subject of a separate adversary proceeding commenced on April 27, 2009, captioned *Washington Mutual, Inc. et al.v. JPMorgan Chase Bank, N.A.*, Adv. No. 09-50934.

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

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

77. Further, there were significant intercompany receivables, that arose pursuant to that certain Administrative Services Agreement (the "Administrative Services Agreement"), identified by account numbers 28101, 28120, and 28025 owed WMI by WMB or its subsidiary WaMu Capital Corp. in the approximate amount of $22.5 million (the "Intercompany Receivables"). A summary of the amounts owed to WMI is as follows:

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

78. Additionally, there may be other service agreements which would fall under the Administrative Services Agreement that operated to benefit WMB or one of its subsidiaries prior to the Petition Date. To the extent it is determined that the Debtors are liable for any amounts owed under such agreements, a related intercompany payable would have accrued payable from WMB to WMI (the "Additional Intercompany Receivables").

79. Separately, as of the Petition Date, WMI sponsored a tax qualified cash balance pension plan, the WaMu Pension Plan (the "Plan"). Beginning in December 2006, and contrary to historical practice, WMI began to make contributions on account of both WMI and WMB plan participants. Pursuant to the Administrative Services Agreement, WMB is obligated to compensate WMI for such contributions. From December 2006 through the Petition Date, WMI contributed

approximately $491 million on account of both WMI and WMB plan participants and has not been paid any amounts owed it by WMB for the amount contributed on account of WMB plan participants (the portion allocable to WMB or WMB subsidiary plan participants being the "Retirement Benefit Advances," and collectively, with the Promissory Notes, the Intercompany Receivables, and the Additional Intercompany Receivables, the "Intercompany Amounts Due").

80. Under the P&A Agreement, JPMorgan Chase "expressly assumes . . . all of the liabilities of [WMB] which are reflected on the Books and Records of [WMB]. . .and all liabilities associated with any and all employee benefit plans . . . ." (P&A Agreement at § 2.1). Thus, JPMorgan Chase assumed the Intercompany Amounts Due. However, the Intercompany Amounts Due have not been paid to WMI's estate and remain due and payable.

F. JPMorgan Chase's Unauthorized Use of the WaMu Trademarks

81. WMI is the owner of more than 80 federal trademark registrations and applications comprising a family of Washington Mutual trademarks, including but not limited to the marks "WAMU," "WASHINGTON MUTUAL," and the "W Logo" for a variety of services including but not limited to banking, credit card, lending, investment and other financial services as well as community, education and philanthropic oriented services (the "WaMu Marks"). The registrations are valid and subsisting, unrevoked and uncancelled, in full force and effect. A list of the aforesaid federal trademark registrations and applications is attached hereto as Exhibit 3.

82. In the years preceding the seizure, the WaMu corporate family encompassed dozens of companies that operated, primarily under the WAMU brand, as a single, unified organization. Many of these companies conducted business under the WaMu Marks, as part of the larger Washington Mutual corporate family.

82. The WaMu Marks are unquestionably famous and extremely valuable. Banking services and related services have been provided under some or all of the WaMu Marks since 1889.

The WAMU mark has been continuously used since at least as early as 1983. At the time of the seizure of WMB, it was the largest thrift and the sixth largest banking institution in the United States. In fact, the rights to the WAMU brand alone was recently valued at approximately $6 billion.

83. WMI also owns registrations for at least 140 other trademarks and service marks, each in connection with various lines of business of the WaMu corporate family (the "Secondary Marks"). The registrations are valid and subsisting, unrevoked and uncancelled, in full force and effect. A list of the aforesaid federal trademark registrations and applications is attached hereto as Exhibit 4.

84. It was WMI's policy and practice to register the WaMu Marks and the Secondary Marks with the United States Patent and Trademark Office in the name of WMI, the holding company. WMI subsidiaries operating under the WaMu Marks and/or using the Secondary Marks were permitted to use them for the products and services relevant to such subsidiary's business pursuant to an implied license from WMI for as long as the subsidiary remained part of the Washington Mutual corporate family.

85. WMI is the owner of approximately 1350 domain names containing the WaMu Marks and the Secondary Marks, including, but not limited to, wamu.com, washingtonmutual.com, and wamubank.com. WMI is also the owner of numerous other domain names related to advertising campaigns (together, the "WaMu Domain Names"). WMI subsidiaries were permitted to use the WaMu Domain Names to advertise and provide information to customers regarding the products and services relevant to such subsidiary's business pursuant to an implied license from WMI for as long as the subsidiary remained part of the Washington Mutual corporate family.

86. Wamu.com was the primary website for WMI and its subsidiaries, and as such was the primary centralized focal point for customer interaction, from advertising WMI's various

products and services to providing online banking and financial and investment consultation services. In addition, WAMU.COM is the subject of a U.S. federal trademark registration for a broad range of banking and financial services.

87. WMB, as a subsidiary of WMI, used the WaMu Marks pursuant to an implied license from WMI which operated so long as WMB remained a member of WMI's corporate family.

88. On September 25, 2008, upon the OTS's seizure of WMB, WMB's license to use the WaMu Marks terminated.

89. JPMorgan Chase's continued use of the WaMu Marks, including the WaMu Domain Names, in connection with its business operations is unauthorized and infringing.

90. JPMorgan Chase has infringed the WaMu Domain Names by continuing to use at least 120 active domain names, including, but not limited to wamu.com, and by causing at least 60 active of the WaMu Domain Names, including, but not limited to wamu.com, to display JPMorgan Chase-branded and run websites.

91. JPMorgan Chase's continued use of the WaMu Marks, the Secondary Marks and the WaMu Domain Names will cause consumers to falsely believe that the products and/or services provided by JPMorgan Chase under such marks and domain names emanate from WMI, or are being rendered with the authorization or approval of WMI, when they are not.

92. JPMorgan Chase's use of the WaMu Marks, the Secondary Marks and the WaMu Domain Names is intentional and willful.

FIRST COUNTERCLAIM

Avoidance and Recovery of Capital Contributions Pursuant to 11 U.S.C. §§ 548, 550

93. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-92.

94. Each of the Capital Contributions was a transfer of an interest in WMI's property within two years of the Petition Date.

95. WMI received no direct consideration in exchange for each of the Capital Contributions.

96. As of the time of each of the Capital Contributions, to the extent that WMI was either insolvent or was left with unreasonably small capital and WMB was insolvent or the prospect of WMB being seized by the OTS was so likely that equity shares in WMB were valueless, each of the Capital Contributions was for less than reasonably equivalent value and is avoidable as a fraudulent transfer under section 548 of the Bankruptcy Code.

97. JPMorgan Chase is liable to WMI's estate as a subsequent transferee of the interest in WMI's property that was transferred by each of the Capital Contributions plus pre-judgment interest at the highest applicable rate to be determined by the Court. JPMorgan Chase did not acquire its interest in the WMI property that was transferred by each of the Capital Contributions in good faith and without knowledge of the voidability of each of the Capital Contributions.

SECOND COUNTERCLAIM

Avoidance and Recovery of Capital Contributions Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.041, 19.40.051, 19.40.071 & 19.40.081

98. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-97.

99. On the dates of each of the Capital Contributions, there were actual creditors of the Debtors holding unsecured claims allowable against the Debtors' estates within the meaning of sections 502(d) and 544(b) of the Bankruptcy Code, which claims remained unsatisfied on the Petition Date. Pursuant to section 544(b) of the Bankruptcy Code, the Debtors have the rights of an existing unsecured creditor of the Debtors.

100. Each of the Capital Contributions was a transfer of an interest in WMI's property within four years of the Petition Date.

101. WMI received no direct consideration in exchange for each of the Capital Contributions.

102. As of the time of each of the Capital Contributions, to the extent that WMI was either insolvent or was left with unreasonably small remaining assets and WMB was insolvent or the prospect of WMB being seized by the OTS was so likely that equity shares in WMB were valueless, each of the Capital Contributions was not for reasonably equivalent value and are avoidable fraudulent transfers under RCW §§ 19.40.041, 19.40.051 and section 544 of the Bankruptcy Code.

103. JPMorgan Chase is liable to WMI's estate as a subsequent transferee of the interest in WMI's property that was transferred by each of the Capital Contributions plus pre-judgment interest at the highest applicable rate to be determined by the Court. JPMorgan Chase did not acquire its interest in the WMI property that was transferred by each of the Capital Contributions in good faith and without knowledge of the voidability of each of the Capital Contributions.

THIRD COUNTERCLAIM

Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 548, 550

104. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-103.

105. The transfer of the Trust Securities to WMB or to JPMorgan Chase is avoidable pursuant to 11 U.S.C. § 548.

106. The transfer of the Trust Securities was a transfer of an interest in WMI's property within two years of the Petition Date.

107. At the time of the transfer of the Trust Securities, WMI was insolvent or had unreasonably small capital. WMI did not receive any value for transferring the Trust Securities to WMB or to JPMorgan Chase. Further, WMI received no indirect benefit either, such as increased equity value flowing from WMB because its wholly-owned subsidiary WMB was insolvent or had been seized by FDIC thereby rendering WMI's equity stake in WMB worthless. Moreover, both the purported transfer, and the Assignment the day prior, were made after WMB had been seized by the OTS, and thus WMI's equity shares in WMB were likewise valueless.

108. If the Trust Securities were transferred by WMI to JPMorgan Chase, then pursuant to section 550 of the Bankruptcy Code, WMI may recover the Trust Securities from JPMorgan Chase as initial transferee, or the value of the Trust Securities for the benefit of WMI's estate plus, in both instances, pre-judgment interest at the highest applicable rate to be determined by the Court.

109. If the Trust Securities were transferred by WMI to WMB and then to JPMorgan Chase, then pursuant to section 550 of the Bankruptcy Code, WMI may recover the Trust Securities from JPMorgan Chase as subsequent transferee, or the value of the Trust Securities for the benefit of WMI's estate plus, in both instances, pre-judgment interest at the highest applicable rate to be

determined by the Court. JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the Trust Securities.

FOURTH COUNTERCLAIM

Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.041, 19.40.051, 19.40.071 & 19.40.081

110. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-109.

111. The transfer of the Trust Securities to WMB or to JPMorgan Chase is avoidable pursuant to applicable Washington state law.

112. The transfer of the Trust Securities was a transfer of an interest in WMI's property within four years of the Petition Date.

113. On the date of the transfer of the Trust Securities, there were actual creditors of WMI holding unsecured claims allowable against WMI's estate within the meaning of sections 502(d) and 544(b) of the Bankruptcy Code, which claims remained unsatisfied on the Petition Date. Pursuant to section 544(b) of the Bankruptcy Code, WMI has the rights of an existing unsecured creditor of WMI.

114. At the time of the transfer of the Trust Securities, WMI was insolvent or had unreasonably small remaining assets. WMI did not receive any value for transferring the Trust Securities to WMB or to JPMorgan Chase. Further, WMI received no indirect benefit either, such as increased equity value flowing from WMB because its wholly-owned subsidiary WMB was insolvent or had been seized by FDIC thereby rendering WMI's equity stake in WMB worthless. Moreover, both the purported transfer, and the Assignment the day prior, were made after WMB had been seized by the OTS, and thus WMI's equity shares in WMB were likewise valueless.

115. If the Trust Securities were transferred by WMI to JPMorgan Chase, then pursuant to section 550 of the Bankruptcy Code, WMI may recover the Trust Securities from JPMorgan Chase as initial transferee, or the value of the Trust Securities for the benefit of WMI's estate plus, in both instances, pre-judgment interest at the highest applicable rate to be determined by the Court.

116. If the Trust Securities were transferred by WMI to WMB and then to JPMorgan Chase, then pursuant to section 550 of the Bankruptcy Code, WMI may recover the Trust Securities from JPMorgan Chase as subsequent transferee, or the value of the Trust Securities for the benefit of WMI's estate plus, in both instances, pre-judgment interest at the highest applicable rate to be determined by the Court. JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the Trust Securities.

FIFTH COUNTERCLAIM

Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 547, 550

117. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-116.

118. In the alternative to the third and fourth counterclaims, if it is determined at or before trial that WMI transferred the Trust Securities to WMB or to JPMorgan Chase in satisfaction of the Downstream Undertakings as valid, enforceable, antecedent obligations, then such transfer is avoidable pursuant to 11 U.S.C. § 547.

119. As such, WMB or JPMorgan Chase, as subrogee or successor in interest to WMB, were creditors of WMI pursuant to the Downstream Undertakings at the time the transfer was made.

120. The transfer of the Trust Securities was a transfer of an interest in WMI's property within ninety days of the Petition Date.

121. WMI was insolvent at the time the transfer was made.

122. As asserted above, WMB, as recipient of the Capital Contributions, is a transferee of a transfer avoidable under the Bankruptcy Code. Property is recoverable under the Bankruptcy Code from JPMorgan Chase on account of its status as a transferee of the Capital Contributions.

123. The transfer allowed WMB or JPMorgan Chase to receive more by virtue of the transfer than either of them would have received had the transfer not been made in a hypothetical WMI chapter 7 bankruptcy case.

124. Pursuant to section 550 of the Bankruptcy Code, WMI may recover the Trust Securities from JPMorgan Chase as initial or subsequent transferee, or the value of the Trust Securities for the benefit of WMI's estate plus, in both instances, pre-judgment interest at the highest applicable rate to be determined by the Court. JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the Trust Securities.

SIXTH COUNTERCLAIM

Avoidance and Recovery of Trust Securities Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.051, 19.40.071 & 19.40.081

125. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-124.

126. On the dates of the transfer of the Trust Securities, there were actual creditors of WMI holding unsecured claims allowable against WMI's estate within the meaning of sections 502(d) and 544(b) of the Bankruptcy Code, which claims remained unsatisfied on the Petition Date. Pursuant to section 544(b) of the Bankruptcy Code, WMI has the rights of an existing unsecured creditor of WMI.

127. In the alternative to the third and fourth counterclaims, if it is determined at or before trial that WMI transferred the Trust Securities to WMB or to JPMorgan Chase in satisfaction of the

Downstream Undertakings as valid, enforceable, antecedent obligations, then such transfer is avoidable pursuant to 11 U.S.C. § 544 and Washington state law.

128. As such, WMB or JPMorgan Chase, as successor in interest to WMB, were creditors of WMI pursuant to the Downstream Undertakings at the time the transfer was made.

129. WMB or JPMorgan Chase, as successor in interest to WMB, was an insider of WMI under applicable law at the time the transfer of the Trust Securities was made.

130. The transfer of the Trust Securities was a transfer of an interest in WMI's property within one year of the Petition Date.

131. WMI was insolvent at the time the transfer was made and WMB or JPMorgan Chase had reasonable cause to believe that WMI was insolvent in light of the seizure of WMB by the FDIC, among other reasons.

132. Pursuant to section 550 of the Bankruptcy Code, WMI may recover the Trust Securities from JPMorgan Chase as subsequent transferee, or the value of the Trust Securities for the benefit of WMI's estate plus, in both instances, pre-judgment interest at the highest applicable rate to be determined by the Court. JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the Trust Securities.

SEVENTH COUNTERCLAIM

Declaratory Judgment that Trust Securities are Property of the Estate

133. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-132.

134. In the alternative to the third, fourth, fifth, and sixth counterclaims, as set forth above, the Trust Securities were not transferred to WMB, the FDIC, or JPMorgan Chase.

135. JPMorgan Chase asserts a claim of ownership to the Trust Securities.

136. The Trust Securities were not assigned to JPMorgan Chase under the terms of the P&A Agreement. Thus, at best, JPMorgan Chase has a general unsecured claim against WMI's estate as subrogee to WMB.

137. There is an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

138. Debtors request a declaratory judgment that the Trust Securities are property of WMI's bankruptcy estate and were never delivered or transferred therefrom.

EIGHTH COUNTERCLAIM

Avoidance and Recovery of Preferential Transfers to WMB Pursuant to 11 U.S.C. §§ 547, 550

139. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-138.

140. The Preferential Transfers were transfers of an interest in WMI's property within one year of the Petition Date.

141. WMB and WMB fsb were creditors of WMI at the time the Preferential Transfers were made and the Preferential Transfers were made to WMB or WMB fsb or for their benefit.

142. WMB and WMB fsb were insiders of WMI within the meaning of the Bankruptcy Code at the time the Preferential Transfers were made.

143. The Preferential Transfers allowed WMB and WMB fsb to receive more by virtue of the Preferential Transfers than they would have received had the Preferential Transfers not been made in a hypothetical WMI chapter 7 bankruptcy case.

144. To the extent WMI was insolvent at the time the Preferential Transfers were made, the Preferential Transfers are avoidable pursuant to 11 U.S.C. § 547.

145. JPMorgan Chase is liable to WMI's estate as a subsequent transferee of the Preferential Transfers plus pre-judgment interest at the highest applicable rate to be determined by the Court. JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the Preferential Transfers.

NINTH COUNTERCLAIM

Avoidance and Recovery of Preferential Transfers to WMB Pursuant to 11 U.S.C. §§ 544, 550; RCW §§ 19.40.051, 19.40.071 & 19.40.081

146. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-145.

147. On the dates of the Preferential Transfers, there were actual creditors of WMI holding unsecured claims allowable against WMI's estate within the meaning of sections 502(d) and 544(b) of the Bankruptcy Code, which claims remained unsatisfied on the Petition Date. Pursuant to section 544(b) of the Bankruptcy Code, WMI has the rights of an existing unsecured creditor of WMI.

148. The Preferential Transfers were transfers of an interest in WMI's property within one year of the Petition Date.

149. WMB and WMB fsb were creditors of WMI at the time the Preferential Transfers were made.

150. WMB and WMB fsb were insiders of WMI under applicable law at the time the Preferential Transfers were made.

151. To the extent WMI was insolvent at the time the Preferential Transfers were made (which WMB and WMB fsb each would have had reason to know of), the Preferential Transfers are avoidable pursuant to 11 U.S.C. § 544 and Washington state law.

152. Pursuant to section 550 of the Bankruptcy Code, JPMorgan Chase is liable to WMI's estate as a subsequent transferee of the Preferential Transfers plus pre-judgment interest at the

highest applicable rate to be determined by the Court. JPMorgan Chase did not acquire its interest in WMI property in good faith and without knowledge of the voidability of the Preferential Transfers.

TENTH COUNTERCLAIM

Fraudulent Transfer Pursuant to 11 U.S.C. § 541; RCW §§ 19.40.041, 19.40.051, 19.40.071, & 19.40.081; NEV. REV. STAT. §§ 112.180, 112.190, 112.210, & 112.220

153. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-152.

154. The P&A Transaction is avoidable as a fraudulent transfer by WMI in WMI's capacity as a creditor of WMB under Nevada state law or alternatively under Washington state law.

155. At the time of the P&A Transaction, WMI was an actual creditor of WMB pursuant to various promissory notes and other intercompany payables. WMB was insolvent at the time of, or was rendered insolvent by, the P&A Transaction or was engaged in a business for which its remaining assets were unreasonably small.

156. The P&A Transaction is avoidable because it took place within four years of the date hereof and WMB did not receive reasonably equivalent value for its assets from JPMorgan Chase.

157. JPMorgan Chase did not acquire WMB's assets in good faith.

158. JPMorgan Chase is liable to WMI's estate for the actual value of WMB's assets at the time of the P&A Transaction to be demined at trial plus pre-judgment interest at the highest applicable rate to be determined by the Court.

159. Alternatively, JPMorgan Chase is liable to WMI's estate in an amount necessary to satisfy any and all claims that WMI has against WMB in full.

160. With respect to the claims recited in paragraphs 158 and 159 hereof, WMI has a claim against JPMorgan Chase for money damages and for any other relief that the circumstances may require.

161. Alternatively, WMI may avoid the P&A Transaction to the extent necessary to satisfy any and all claims that WMI has against WMB in full.

ELEVENTH COUNTERCLAIM

Disallowance of Claims Pursuant to 11 U.S.C. §§ 105, 502

162. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-161.

163. JPMorgan Chase filed proofs of claims in the Debtors' bankruptcy cases. The Debtors hereby object to any and all claims filed or asserted by JPMorgan Chase pursuant to section 502(d) of the Bankruptcy Code.[12]

164. Property is recoverable from JPMorgan Chase on account of its status as a transferee of the Capital Contributions, the Preferential Transfers, and to the extent applicable, the Trust Securities, as asserted above. JPMorgan Chase has failed to turn over to the Debtors such property of the Debtors' estates.

165. Pursuant to Section 502(d) of the Bankruptcy Code, each claim asserted by JPMorgan Chase must be disallowed because property of the Debtors' estates is recoverable from JPMorgan Chase and JPMorgan Chase has not turned over all of such property to the Debtors.

166. Further, pursuant to Section 502(b)(1) of the Bankruptcy Code, the Debtors have a right of setoff under applicable state law, and because the Debtors have claims against JPMorgan

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[12] The Debtors reserve their rights to object to JPMorgan Chase's proofs of claims on different grounds through the Debtors' claims reconciliation process.

Chase that exceed the amount (if any) owed by the Debtors to JPMorgan Chase, JPMorgan Chase's claims are unenforceable and must be disallowed.

TWELFTH COUNTERCLAIM

Declaratory Judgment that Certain Assets are Property of the Estate

167. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-166.

168. In its Complaint, JPMorgan Chase asserts a claim of ownership to the: (i) Trust Securities; (ii) Tax Refunds; (iii) $3.7 Billion Book Entry Transfer; (iv) Anchor and American Judgments (as defined therein) and all monies paid on account of those judgments, as well as any future judgment in either the *Anchor Savings Bank* or the *American Savings Bank* litigations; (v) Legacy Rabbi Trusts; (vi) Pension and 401(k) Plans; (vii) BOLI and Split Dollar Policies; (viii) Visa Shares; and (ix) Intangible Assets (each as defined in the Complaint, and collectively, the "Disputed Assets").

169. The Disputed Assets are property of the Debtors' estates and were not purchased by JPMorgan Chase under the terms of the P&A Agreement.

170. There is an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

171. The Debtors request a declaratory judgment determining that all of the Disputed Assets are property of the Debtors' estates and were not purchased by JPMorgan Chase under the terms of the P&A Agreement.

THIRTEENTH COUNTERCLAIM

Turnover of Intercompany Amounts Due Pursuant to 11 U.S.C. § 542

172. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-171.

173. The Intercompany Amounts Due are debts owed to the Debtors' estates that are matured and payable on demand.

174. Pursuant to section 542 of the Bankruptcy Code, JPMorgan Chase is required to pay the Intercompany Amounts Due, including pre-judgment interest at the highest applicable rate to be determined by the Court, to the Debtors' estates.

FOURTEENTH COUNTERCLAIM

Unjust Enrichment, Constructive Trust, and Equitable Lien

175. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-174.

176. JPMorgan Chase would be unjustly enriched if it were allowed to retain the Capital Contributions, the Trust Securities (if transferred), the Preferential Transfers, or any of the Disputed Assets.

177. In order to prevent that unjust enrichment, equity entitles WMI to recover the value of the property transferred, including through the remedies of constructive trust and/or equitable lien.

FIFTEENTH COUNTERCLAIM

Trademark Infringement Pursuant to 15 U.S.C. § 1114

178. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-177.

179. JPMorgan Chase's continued use of the WaMu Marks, the Secondary Marks, and the WaMu Domain Names that incorporate either the WaMu Marks or the Secondary Marks, in connection with its business operations is unauthorized and infringing.

180. JPMorgan Chase's use of the WaMu Marks, the Secondary Marks and the WaMu Domain Names is intentional and willful.

181. The aforesaid acts of JPMorgan Chase constitute trademark infringement in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

182. The aforesaid acts of Counterclaim-Defendants have caused, and are causing, great and irreparable harm to WMI and, unless JPMorgan Chase is permanently restrained by this Court, said injury will continue.

183. WMI, the owner of the WASHINGTON MUTUAL and W Logo marks, permitted WMB, as its licensee, to retain two United States trademark registrations that cover a small fraction of WMB's services (United States Trademark Registrations Nos. 1197378 and 1214303), as an administrative convenience. Since the license is now terminated, WMI is entitled to an order requiring that JPMorgan Chase assign said trademark registrations to WMI to rectify the Federal Register or, in the alternative, cancelling such registrations.

184. WMI is entitled to recover its damages sustained as a result of JPMorgan Chase's federal trademark infringement, together with an accounting of JPMorgan Chase profits arising from such infringing activities.

185. WMI is entitled to recover treble damages under 15 U.S.C. § 1117 by reason of the willful and deliberate acts of federal trademark infringement by JPMorgan Chase.

186. WMI is entitled to recover its reasonable attorneys' fees pursuant to 15 U.S.C. § 1117.

SIXTEENTH COUNTERCLAIM

Common Law Trademark Infringement

187. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-186.

188. The aforesaid acts of JPMorgan Chase constitute use that is likely to cause confusion as to the source of JPMorgan Chase's services.

189. The aforesaid acts of JPMorgan Chase constitute trademark infringement in violation of WMI's continuing and residual common law trademark rights in the WaMu Marks and the Secondary Marks.

190. The aforesaid acts of JPMorgan Chase have caused, and are causing, great and irreparable harm to WMI, and, unless permanently restrained by this Court, said injury will continue.

191. WMI is entitled to recover JPMorgan Chase's profits and/or damages by reason of JPMorgan Chase's acts of trademark infringement under the common law.

SEVENTEENTH COUNTERCLAIM

Patent Infringement

192. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-191.

193. The Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157.

194. WMI is the owner by assignment of United States Patent No. 6,681,985, entitled "System For Providing Enhanced Systems Management, Such As In Branch Banking" (the "'985 patent"). The '985 patent was duly and legally issued by the United States Patent and Trademark Office ("USPTO") on January 27, 2004. A true and correct copy of the '985 patent is attached hereto as Exhibit 5.

195. In the years preceding the seizure, the WaMu corporate family encompassed dozens of companies that operated as a single, unified organization. WMB practiced the '985 patent as part of the larger corporate family.

196. Related companies were permitted to practice the '985 patent pursuant to an implied license from WMI for as long as they remained part of the Washington Mutual corporate family.

197. On September 25, 2008, upon the OTS's seizure of WMB, WMB's implied license to practice the '985 patent terminated.

198. JPMorgan Chase has continued to practice the '985 patent in connection with its business operations, which use is unauthorized and infringing.

199. In violation of 35 U.S.C. § 271, JPMorgan Chase has been and is now directly infringing and indirectly infringing, by way of inducement and/or contribution, literally and/or under the doctrine of equivalents, the '985 patent by practicing one or more claims of the '985 patent by making, using, selling, offering for sale, contributing to the use of, and/or inducing the use of financial transaction processing systems to process financial transactions for a customer in a branch bank.

200. JPMorgan Chase's infringement of the '985 patent includes, but is not limited to, use of the patented system in connection with banking operations in former Washington Mutual branch banks.

201. JPMorgan Chase's actions have damaged WMI in an amount to be determined at trial and have caused and will continue to cause WMI irreparable injury for which WMI has no adequate remedy at law.

202. Upon information and belief, JPMorgan Chase's infringement, contributory infringement, and inducement to infringe have been, and continue to be, willful, and will continue to injure WMI unless and until the Court enters an injunction prohibiting further infringement.

203. WMI is entitled to an award of damages adequate to compensate WMI for the infringement that has occurred, together with prejudgment interest from the date infringement began.

204. WMI is also entitled to increased damages as permitted under 35 U.S.C. § 284, as well a finding that this case is exceptional, entitling WMI to attorneys' fees and costs as provided by 35 U.S.C. § 285.

205. WMI is also entitled to a permanent injunction prohibiting JPMorgan Chase's further infringement, inducement of infringement, and contributory infringement of the '985 patent.

EIGHTEENTH COUNTERCLAIM

Federal Copyright Infringement Pursuant to 17 U.S.C. § 501

206. Debtors repeat and re-allege each and every allegation contained in the preceding paragraphs 1-205.

207. WMI owns the copyright for, and has applied to register, its website at wamu.com (the "Website"). True and correct copies of the applications as filed with the United States Copyright Office, and the filing receipts for these applications, are attached hereto as Exhibit 6.

208. Upon information and belief, JPMorgan Chase has continued to display, reproduce and distribute the Website, or significant parts thereof, without authorization from WMI.

209. Upon information and belief, JPMorgan Chase has created, reproduced and distributed derivative works based on the Website without authorization from WMI.

210. The actions and conduct by JPMorgan Chase as described above infringe upon the exclusive rights of WMI granted by Section 106 of the Copyright Act, 17 U.S.C. § 106, to display, reproduce, and distribute the copyrighted Website to the public, and to create derivative works based on the copyrighted Website. WMI is informed and believes, and on that basis alleges, that JPMorgan Chase has infringed directly and indirectly WMI's exclusive rights in the Copyrighted Website.

211. Such actions and conduct by JPMorgan Chase constitute copyright infringement under Section 501 of the Copyright Act, 17 U.S.C. § 501.

212. As a result of the copyright infringement described above, WMI is entitled to relief including, but not limited to, injunctive relief, actual damages, and prejudgment interest.

PRAYER FOR RELIEF

WHEREFORE, Debtors WMI and WMI Investment respectfully request that the Court enter judgment in favor of Debtors:

A. Dismissing the Complaint with prejudice;

B. Ordering JPMorgan Chase to return and pay to WMI's estate an amount equal to the Capital Contributions plus pre-judgment interest at the highest applicable rate to be determined by the Court;

C. Declaring that the Trust Securities are property of WMI's estate and were never delivered or transferred therefrom;

D. In the alternative, ordering JPMorgan Chase to return the Trust Securities to WMI's estate or to pay to WMI's estate an amount equal to the value of Trust Securities as of the Petition Date plus pre-judgment interest at the highest applicable rate to be determined by the Court;

E. Ordering JPMorgan Chase to return and pay to WMI's estate an amount equal to the Preferential Transfers plus pre-judgment interest at the highest applicable rate to be determined by the Court;

F. Ordering JPMorgan Chase to pay to WMI's estate the fair market value of the assets it purchased from WMB at the time of the P&A Transaction or, in the alternative, ordering JPMorgan Chase to return and pay to WMI's estate an amount necessary to satisfy any and all claims that WMI has against WMB in full, or, in the alternative, avoiding the P&A Transaction to the extent necessary to satisfy any and all claims that WMI has against WMB in full, in each case plus pre-judgment interest at the highest applicable rate to be determined by the Court;

G. Ordering JPMorgan Chase to pay restitution to the Debtors in an amount equal to JPMorgan Chase's unjust enrichment;

H. Disallowing each and every claim asserted by JPMorgan Chase against the Debtors' estates;

I. Declaring that the Disputed Assets are property of WMI's estate and were not purchased by JPMorgan Chase under the terms of the P&A Agreement;

J. Declaring that JPMorgan Chase has assumed the Intercompany Amounts Due and that such debts are due and payable;

K. Enjoining the further use of the WaMu Marks, the Secondary Marks and the WaMu Domain Names by JPMorgan Chase;

L. Ordering that JPMorgan Chase be required to assign United States Trademark Registrations Nos. 1197378 and 1214303 to WMI to rectify the Federal Register or, in the alternative, ordering the cancellation said trademark registrations;

M. Ordering that WMI recover its damages sustained as a result of JPMorgan Chase's federal trademark infringement, together with an accounting of JPMorgan Chase's profits arising from such infringing activities;

N. Ordering that WMI have and recover treble damages under 15 U.S.C. § 1117 by reason of the willful and deliberate acts of federal trademark infringement by JPMorgan Chase;

O. Ordering that WMI have and recover its reasonable attorneys' fees pursuant to 15 U.S.C. § 1117;

P. Ordering that WMI have and recover JPMorgan Chase's profits and/or damages by reason of JPMorgan Chase's acts of trademark infringement under the common law;

Q. Ordering that JPMorgan Chase pay damages adequate to compensate Debtors for JPMorgan Chase's past and ongoing willful infringement of the '985 patent and increased damages as permitted under 35 U.S.C. § 284;

R. Ordering that WMI have and recover its reasonable attorneys' fees and costs pursuant to 35 U.S.C. § 285;

S. Enjoining JPMorgan Chase's infringement, inducement of infringement, and contributory infringement of the '985 patent;

T. Ordering that WMI recover its damages sustained as a result of JPMorgan Chase's federal copyright infringement, together with prejudgment interest;

U. Enjoining JPMorgan Chase's copyright infringement;

V. Awarding the Debtors costs and attorneys' fees and expenses; and

W. Granting Debtors such other legal or equitable relief as is just.

DEMAND FOR JURY TRIAL

Debtors hereby demand trial by jury on counts fifteen to eighteen (15-18).

Dated: May 29, 2009

Wilmington, Delaware

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF DELAWARE

IN RE:	
WASHINGTON MUTUAL, INC., et al.,	Bankruptcy Action Case No. 08-12229(MFW)
Debtors,	Chapter 11
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	
Plaintiff,	Adv. Pro. No. 09-50551(MFW)
v.	
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	
Defendant for all claims	
and	
FEDERAL DEPOSIT INSURANCE CORPORATION,	
Additional Defendant for Interpleader claim	
WASHINGTON MUTUAL, INC., AND WMI INVESTMENT CORP.,	Adv. Proc. No. 09-50934
Plaintiffs,	
v.	
JPMORGAN CASH BANK, NATIONAL ASSOCIATION,	Wilmington, DE June 24, 2009
Defendant.	10:38 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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I N D E X

(Call to the Order of the Court)

THE COURT: Good morning.

MR. ROSEN: Good morning, Your Honor, Brian Rosen, Weil Gotshal & Manges, on behalf of Washington Mutual, Inc.

And, Your Honor, this is the monthly omnibus hearing. Just quickly going through some matters on the agenda. As the Court will note, item 1, which was the debtors' motion to take certain actions in connection with a rabbi trust and distribution of assets there has been adjourned to the next omnibus hearing on July 27th.

The debtors do intend to file a response by July 22. Do you want to take care of that first?

THE COURT: Yes. Could the parties on the phone please mute their phones, so we don't listen to your background noise?

MR. ROSEN: The next two items, Your Honor, items 2 and 3, the Court has already entered orders with respect to those, granting the relief that was requested. And we've reflected that on the agenda. That brings us, Your Honor, to item 4, which is the --

THE COURT: Well let me suggest we go in a little different order with respect to the adversary matters.

MR. ROSEN: Okay.

THE COURT: I think it's appropriate that I first decide the FDIC motion to intervene, which is item 6.

I can then address items 4 and 7, which are the motions to stay the action. Then I'll deal with the -- item number 5, the motion for reconsideration. And, if necessary, item 8, the motion to dismiss.

MR. ROSEN: Thank you, Your Honor.

THE COURT: Does that sound logical?

MR. ROSEN: That sounds fine to us, Your Honor. I'll pass the podium to Mr. Califano.

THE COURT: All right.

MR. CALIFANO: Your Honor, I just want to make clear, the FDIC is not seeking to interfere in the administration of this case. We've sat by and we've played, what I believe to be a minimal role in this case. But we do have the obligation to uphold the statute and uphold Firrea.

And right now, the FDIC's rights, powers and duties under Firrea are directly implicated by the adversary proceedings before Your Honor, and we talk about the stay.

We can go through that. But with respect to intervention in the turnover action, you remember the four elements of intervention are timeliness, and Your Honor may recall at the first status conference we brought up the fact that we would intervene and seek a stay of both adversary proceedings. Because we believe both adversary proceedings were commenced in violation of Firrea's jurisdictional bar.

Where there's an interest, or property, or the

transactions underlying it, Your Honor, we, in our stay motion, will show that the debtors, in their proof of claim in the receivership, in their litigation in the District Court of D.C., recognized the FDIC's interest, and that's why they sought relief with respect to these very same deposits in that litigation and in that proof of claim.

THE COURT: Well in that litigation and proof of claim, weren't they seeking damages from the FDIC, to the extent they don't get the deposit accounts? They weren't asserting title to the deposit accounts.

MR. CALIFANO: I'll get you the exact language. Not title, Your Honor, but the claim implicates the rights of the FDIC. And if you look at what their proof of claim said about the deposit:

"Claimants hereby assert a protective claim for the outstanding balance on each of the accounts, in the event the FDIC exercises any rights it may have under the purchase and assumption agreement, or otherwise with respect to the lawsuit."

Now when we get to the stay motion, Firrea has a jurisdictional bar, not just against claims, but against claims related to the actions of the FDIC as receiver. Now the purchase and assumption agreement -- the entering into the purchase and assumption agreement, the transactions thereunder, that was the core of the FDIC's action as receiver in this

case.

So to the extent they're seeking a determination, or they're seeking to impact the rights under the purchase and assumption agreement, the FDIC's interests are directly impacted by the turnover action.

The purchase and assumption agreement, Your Honor, has provisions which gives the FDIC rights with respect to deposits. And it also gives the FDIC the right to direct the assuming bank to withhold deposits, pending any determination of claims against those deposits and against the depositor.

THE COURT: What rights does it have with respect to the deposit account?

MR. CALIFANO: Your Honor, with respect to the deposit accounts, under the purchase and assumption agreement, which was recognized by the debtors, which is why they recited it in their proof of claim and in the District Court action, the FDIC has the power with respect to the deposits, for example, to direct the assuming bank, in this case JPMorgan Chase, to withhold payments of that deposit until their respective rights are determined. The turnover action --

THE COURT: All right. I'm going -- excuse me -- I'm going to direct the operator to mute everybody on the line, since they have not listened to my request. Is the operator on?

OPERATOR: I am, Your Honor, and I'm muting the lines

now.

THE COURT: Thank you.

OPERATOR: You're welcome.

THE COURT: I'm sorry to interrupt.

MR. CALIFANO: Okay. That's fine, Your Honor. The FDIC's rights directly are implicated by the proof of claim and by the District of D.C. action. And the turnover --

THE COURT: Well what rights other than to direct JPM to withhold payment until title is determined, what other rights does the FDIC assert in the deposit account?

MR. CALIFANO: We've already asserted, Your Honor, early on in this case in connection with the aborted stipulation with JPMorgan Chase regarding deposits, we already asserted, and the debtors are aware of it, potential setoff rights.

The FDIC is doing its investigation. That investigation has not been completed. We have filed a proof of claim in this case. We have potential setoff rights that are preserved by statute and by the purchase and assumption agreement --

THE COURT: Well but --

MR. CALIFANO: -- in these deposits.

THE COURT: -- but your proof of claim did not assert setoff rights, did it?

MR. CALIFANO: Yes, it did, Your Honor.

THE COURT: To the deposit accounts?

MR. CALIFANO: We preserved our setoff rights in the proof of claim.

THE COURT: All right.

MR. CALIFANO: And in any event, Your Honor, in addition to the direct interest in the deposits, because this turnover action implicates Firrea and the FDIC's -- and Firrea's bar of actions, the FDIC's interests, as an agency, are directly implicated. And we've cited the cases and the support for that.

The FDIC has the interest in protecting its governing statute. The next element is where the disposition of the case may effect that interest. Since the debtors are seeking a determination that the deposits are indisputably theirs, and that the deposits should be turned over, it directly implicates the FDIC's potential interests in those deposits.

And finally, Your Honor, the question of inadequate representation. Whether or not JPMorgan Chase would have an interest in defending that turnover action, the FDIC has a distinct interest, as is recognized under the purchase and assumption agreement.

There is an interest that they have that's protected in 9.5 to direct withholding of payments. Also JPMorgan Chase is a private litigant, does not have the same interest in upholding the provisions of Firrea and the agency's protections

thereunder.

So I think we've established all the elements, Your Honor. As the debtors recognize, this is one of the principal assets in a Chapter 11 case, which is also related to the largest bank failure in U.S. history.

I find it difficult for them to argue that the FDIC doesn't have a right to intervene, and doesn't have an interest that needs to be protected.

THE COURT: Thank you.

MR. CARLINSKY: Good morning, Your Honor, Michael Carlinsky from Quinn, Emanuel on behalf of the debtors. To take up the issue which Your Honor has put first on the calendar, which is the motion to intervene, some of what I'm going to say will also be relevant when we address -- if we address the issue of the motion to stay.

What the FDIC has said in its papers is its supposed interest in these adversary proceedings, and in particular the turnover action, is because the claim against JPMC violates the jurisdictional bar of Firrea.

Your Honor, what's interesting is, in their opening papers that was the FDIC's first argument. In their reply, it's now moved to the second or third position. We think because the FDIC, frankly, did not anticipate the Rosa (phonetic) case, which is Third Circuit authority binding on this Court, and which we respectfully submit really is the

answer to this case.

The Rosa case, and if I can, Your Honor, I brought some boards along and I've given proofs to my friends.

The Rosa case, I think really these are the quotes that the Court needs to focus on the Rosa case. But let me describe what happened in Rosa, and I'll return to the podium.

THE COURT: Yes. So that your argument can be kept as part of the record, and those on the phone can at least hear you.

MR. CARLINSKY: Your Honor, in Rosa you had three banks. Two that were in receivership and a third bank which was not. The assets of the first bank in receivership went to the second bank, as well as an assumption of liabilities. Those assets and liabilities were then sent to a second bank, which was in receivership. And then, ultimately, were assigned to a third bank, which was not in receivership.

The argument before the Third Circuit, and first the District Court, was, does the jurisdictional bar apply? And what Rosa clearly does is it looks at 1821 13 d -- I always get the numerals wrong -- but looks at the two provisions of the jurisdictional bar and asks the question, to which institutions does that jurisdictional bar apply?

And what the Third Circuit tells us clearly, unequivocally, and we submit it really is case over on this issue is, as to the two institutions in receivership, the bar

applies. But the Court draws a sharp distinction as to claims against the institution not in receivership, the bar did not apply.

And if I may come back now to the board, these are the two quotes out of Rosa. The Court says:

"The language of the bar simply states that it applies when there is an institution for which RTC has been appointed receiver. Thus, the issue at bar is whether at the time the case came before the District Court RTC has been appointed receiver of the institutions."

And then the Court draws the distinction I was alluding to.

"At the time the complaint was filed, the successor bank, bank number 3, was in conservatorship, not receivership. Thus the successor bank was not then a depository institution for which the corporation has been appointed receiver."

The Court goes on, if there were any doubt in that language, the Court said:

"We do not believe claims against the successor bank fall under 1821(d)(13)(D)(1), because they seek neither payment from nor determine a right with respect to the assets of the depository institution for which RTC has been appointed receiver. Nor does the second prong of the bar, bar these claims. This is so because we construe the relating language of that clause to refer to claims against the very institution

that are challenged, which must be an institution for which RTC has been appointed receiver."

We have essentially the exact paradigm as in this case. The third institution here is an assignee of assets. If you trace the lineage of those assets, surely they go back to an institution in receivership. But the fact that the institution which is the assignee of the assets is not in receivership, according to the Third Circuit says, no bar.

That's our situation here, Your Honor. What was startling was, frankly, in their reply the FDIC ignores Rosa. They say, Judge, you should look at this case called National Union, which is subsequent from Rosa. And, Your Honor, National Union, frankly, has nothing to do with the issue of the jurisdictional bar as it applies in this case, or potentially applies in this case.

But what's more, Judge, if there were any doubt as to when the bar applies, when the bar doesn't apply, and the whole purpose behind Firrea, the whole purpose that Mr. Califano fails to really point out, would put before the Court -- let me just go in order.

This is the New Rock Asset Partners case, a 1996 decision in which the issue here was whether Firrea applied, so that the FDIC would have jurisdiction in Federal Court. And the Court in this case says, Firrea was enacted to deal with a banking crisis and to smooth the modalities by which

rehabilitation might be accomplished. In other words, the congress wanted to have a fund so claims against the RTC or that institution, direct claims that funneled through the administrative process, and the Third Circuit says:

"It is clear to the Court that this policy is not advanced in any significant way by retaining Federal jurisdiction, once the failed bank's assets have been assigned to a private company."

Here, Chase. We have the FDIC v. McFarlane case out of the Fifth Circuit. Again, right on point, holding that the bar doesn't apply "When the FDIC relinquishes ownership, the procedures governing its role as a receiver no longer apply."

And we have the Henrich case out of the Ninth Circuit. And I want to talk about the Henrich case, because, again, let's just look at what the FDIC has previously told, not this Court, with all due respect, the United States Supreme Court. In its petition for certiorari in the Henrich's case, and this is right out of their brief, Judge.

And what's interesting is, again, in their reply, they treat it with the back of the hand footnote that says, oh, ignore the Henrich case.

But this is what they told the U.S. Supreme Court. In Henrich, in 2007.

"The jurisdictional bars through Firrea do not apply to suits that are brought, not against the FDIC, but against an

assignee of an asset formerly held by the FDIC."

That is exactly our case. And they also added "Section 1821(d)(13)(D) does not apply to claims that are not susceptible to resolution through the administrative procedure..." And I've highlighted the language. "...such as claims against a private party who hold an asset that was once held by an FDIC receivership. In that circumstance, there is no administrative claims procedure to exhaust, because that procedure governs only claims against the FDIC receivership. Once the receivership transferred an asset to the third party, the asset is no longer an asset of the depository institution for which the corporation has been appointed receiver."

Those were the FDIC's words.

And not to overstate it, but the last point I would make, Your Honor, is, if there was still even a shadow of a doubt as to what Rosa stands for, here's the Third Circuit in a case called Hudson United Bank, describing what their holding was in Rosa, in plain and simple terms.

And Hudson is 43 F.3d 843. And at 848, the Third Circuit says -- I'm sorry let me go back a page. This is actually at -- yes, 848, footnote 10, the Court talks about Rosa and says the following.

"Thus with respect to this two-part subdivision..."

Referring specifically to romanette i and ii.

"...we held (i) applied..."

Meaning romanette i.

"...applied only to claims against failed institutions, while (ii) applied to claims against failed institutions specified in (i), as well as to claims against the receiver of such institutions."

The Court goes on to say:

"The jurisdictional bar of 1821(d)(13)(D) extends explicitly to claims against the receiver, as well as to those against the depository institution, and even concludes in its opinion by once again giving a nice sound bite and says:

"A single claims procedure is more consistent with our decision in Rosa, which held that claims against the receiver, as well as claims against the failed institution, were subject to the statutory exhaustion requirement of administrative review."

Your Honor, we think the issue is clear as day. And it is that jurisdictional bar which is the pretense for the FDIC's motion to intervene. If they cannot satisfy that element, we respectfully submit, they should not be allowed to intervene into the turnover proceeding. They should not be allowed to cause the additional delay that will invariably result if we're now stayed in this Court and we have to proceed in Washington, and we ultimately have months, and months, and months of additional delay.

I'll hold my other remarks, if I may, until we get to

the stay motion, unless Your Honor has any questions.

THE COURT: No. But tell me more about the -- their assertion that they otherwise have an interest in the adversary through their proof of claim assertion.

MR. CARLINSKY: Well, I was looking at the proof of claim assertion, and I may have to defer to Mr. Kirpalani on that issue. But what I would say is this, Your Honor. They have not taken any action. What they've told the Court, as I heard Mr. Califano is, we have a right, we may have a right that we want to assert. We may have a right to tell JPMC not to pay this deposit. We have a right.

Well I think about it this way. Judge, there were lots and lots of deposits that went from WMI to JPMC. Let's assume my mom was a depositor, she goes to the ATM, she goes to take out a hundred dollars from her account and it only gives her eighty. She goes to Chase and says, you owe me $20.

Is Mr. Califano seriously contending that, wait a minute, we have a potential right to take back that account, therefore, Mrs. Carlinsky -- oh, has a different last name than me, but is it seriously contended she has to file a claim, a proof of claim, go through the administrative process and bring her suit in a D.C. Court?

I think all of these suggestions, well we might have this claim to pull back the account. We have this proof of claim where we've protected, we might have some claim of

setoff.

That's not the stated basis for which they asked to intervene here, Judge. They said they needed to do so under Firrea. That's the motion before the Court. And we suggest that they're now just trying to dance around the fact that Rosa stands in their way.

Now if I could just ask Mr. Kirpalani to address Your Honor's specific question.

THE COURT: Thank you.

MR. KIRPALANI: Good morning, Your Honor. Susheel Kirpalani from Quinn, Emanuel. Just in response to your question about this Section 9.5, what I would call the yank a deposit provision that the FDIC reserved its rights to do in the purchase and assumption whole bank contract.

First of all, there's something that's being lost in all of this. There's only one bank that was ever subject, even just for a nanosecond to the FDIC's regulatory authority, and that was Washington Mutual Bank, not the subsidiary bank Washington Mutual FSB, which, frankly, and this is really important, Your Honor, that's where 3.7 billion dollars is.

It's not at the entity that, even in their proof of claim they say they would potentially have some sort of setoff right relating to tax refunds.

It's important, Your Honor, also it's in the magnitude. These tax refunds, for their setoff rights, is

about 240 million dollars, max, from what's there.

That's six percent of the deposits that's at issue, and it's only against the entity that was once, for a nanosecond, in receivership, not against the FSB bank, the stock of which was acquired by JPMorgan Chase. So this yank a (sic) deposit provision -- excuse me, the yank a deposit provision doesn't even apply to deposits that were down below at the FSB level.

And, secondly, Judge, and I'm sure this one's not going to be surprising to you, you know, with all due respect to the FDIC and their contract here, Section 9.5, I don't see this as having, you know, a get out of jail free card with respect to the automatic stay.

It would have to come here first. They would have to come here and say we want a yank a deposit that's property of the estate, and pull it back, and not let JPMorgan turn it over to the estate. It would have to come here, and I believe the FDIC has even admitted that to us, Your Honor, they would have to come here and ask Your Honor to something.

MR. SACHS: Your Honor, Robert Sachs from Sullivan and Cromwell representing JPMorgan Chase. We support the FDIC's motion to intervene in the turnover action, and we also, as Your Honor is aware, have filed a motion independently, in case it's denied, to stay that action.

THE COURT: Yes.

MR. SACHS: And we filed this morning, though it's not on for today, a motion to withdraw the reference in connection with that action on the basis of the Firrea bar. But I'd like to respond, perhaps from our perspective to --

THE COURT: Reference of which adversary, the turnover, or both.

MR. SACHS: Both -- both adversaries, Your Honor, on the basis that both are barred under Firrea, and involves substantial questions of banking law that need to be resolved.

But I'd like to address the two questions you posed to Mr. Califano, in the context of the issues that need to be resolved in the turnover action, and why they implicate not only the rights of the FDIC, but they squarely implicate the rights of a determination of the assets of the institution in receivership.

And under 1821(d)(13)(D)(1), there's been discussion about claims, but there's not been a discussion about the other part of subpart (1), which is that it applies to any action seeking a determination of rights with respect to the assets of any depositary institution for which the corporation has been appointed a receiver.

Adjudication of the turnover action in this context is going to require a determination and adjudication of those rights. The debtors assert that these are deposit accounts. But we have said they are not deposit accounts.

There are substantial issues as to whether these are deposit accounts, whether the -- what the source of funds is in those accounts, if they are deposit accounts, or if they're not.

Whether the funds are capital contributions. Whether in fact there are any funds, or whether this is simply a book entry transfer offset by corresponding book entry transfers, and whether there was any delivery of funds at all. All those are going to be issues that need to be resolved as part of the determination --

THE COURT: And how do they implicate the FDIC interests?

MR. SACHS: Because they go to whether something is or is not an asset, was or was not an asset of WMB at the time of receivership.

If the debtors are correct that this was -- and I'll explain why that then gets around to effecting the rights of the FDIC, because the character of what these were or were not will dramatically effect whether there are -- whether these are -- let's assume for a minute, Your Honor, that these are not deposit accounts, that we are correct that these were not deposit accounts that were there.

The FDIC has the right, at that point in time, to pull the money back, if they want to, potentially under the PNA agreement.

In addition, it effects that rights of potential purchasers -- I'm sorry, potential creditors of WMB, not WMI, if in fact these were assets of WMB, not assets of WMB not accounts that were at WMBFSB as the debtors claim.

THE COURT: Well let me ask a question, if it is determined that they are not deposit accounts, did JPMC buy them?

MR. SACHS: JPMC purchased all -- essentially all assets. So depending on what they are, yes, they probably purchased whatever they are. However, there are different consequences that could flow from the determination as to what they are. So let me give you a for example, Your Honor.

The 3.7 billion dollars that the debtors throw away and say, oh, this is just the -- that's grandma's checking account at WMBFSB. Well they're substantial issues. That's not grandma's checking account.

This was something that they claimed to be a deposit account that they, in the week leading up to receivership, purported to create for the first time by book entry transfer of funds that have to be done and corrected in three or four different steps. Corresponding with an immediate offset of a corresponding book entry transfer that immediately loaned the supposed funds back to a different institution.

There's substantial issues as to what that is and where those funds, if there are funds at all, are. If those

funds were the funds of -- the assets of WMB, as opposed to assets at WMBF -- or a deposit account at WMBFSB, that could have a significant impact on everyone's rights with respect to that, including JPMorgan Chase. And one of the reasons that we filed an interpleader claim is to be sure that nobody is subjected to conflicting liabilities.

The FDIC is one such party. But going back to the issue, why do they have -- this is an ongoing receivership by the FDIC for this -- this is not like Rosa, something that was in the past and was overdone. This is a case with an ongoing receivership by the FDIC of this institution.

And any determination which was required for the determination of the turnover action must determine whether these were or were not assets of the institution. That's an essential requirement of a determination of this.

It by definition has to implicate the FDIC's interests, because that has to be determined to resolve this claim.

But let me go on and readdress one other -- two other issues. You asked, aren't they just asking for damages. Well that's not what they asked for in the other action. If you in fact look at the proof of claim that in fact they filed in the administrative process, and, Your Honor, I should step back a second. We have an active, ongoing administrative process going on here.

They're coming to you and asking, Your Honor, we want these "deposit" accounts. Well they're already raised an issue administratively for the deposit accounts and they've challenged that in the DC action. At this point in time, their claim to those deposit accounts has been disallowed. They have no claim for those deposit accounts, unless and until they get the determination of the FDIC overruled in the District Court in D.C. Because otherwise you would be saying the provisions of Firrea have no impact whatsoever.

They went and claimed these deposit accounts as theirs. They did file a proof of claim, and it was disallowed.

Now I'm not telling you they may not succeed in the D.C. action. But you can't independently circumvent that action in order to separately adjudicate that. But look at their claim. If you look at their proof of claim, which has been submitted to Your Honor, under the deposit claims they specifically say, they recite the conflicting issues and they say --

THE COURT: Give me a cite. And is this attached to your --

MR. SACHS: Well let me tell you where these different things are. They're in different places, Your Honor. The proof of claim at one place is exhibit 4 to the FDIC's motion

THE COURT: I have it.

MR. SACHS: And the D.C. complaint is exhibit 1 to the FDIC's motion.

THE COURT: Okay.

MR. SACHS: And, in fact, the D.C. complaint largely cribs the administrative claim. But what they seek -- they do seek damages as an alternative relief. But what they seek is to have their claims re-adjudicated in that Court. And if you look at their claims, and I'm reading now, the deposit account portion of it is paragraph 43 through 46.

And it talks in there about, and let me just find it.

"Without prejudice to WMI's position that it is a depositor..."

THE COURT: Where are you reading --

MR. SACHS: I'm sorry, I'm reading at paragraph 45, Your Honor.

THE COURT: Okay.

MR. SACHS: Of -- and, again, this is paragraph 45 of the proof of claim.

THE COURT: I have it.

MR. SACHS: (Reading)

"Without prejudice to WMI'S position that it is a depositor of JPMorgan Chase, claimants hereby assert a protective claim for the outstanding balance on each of the debtor deposit accounts."

And then it goes on from there.

So they are asserting a claim to ownership of the deposit accounts in the administrative proceeding. That claim then was disallowed. And that's what they're claiming in the turnover action, we own the funds in the depositor accounts.

But it's alleged deposit accounts. That claim was disallowed. In the D.C. action, which is exhibit 1 to the FDIC's motion. They seek a de novo determination of the disallowance of that claim. And, alternatively, that's Count 1, and alternatively in Count 5 they seek to require the FDIC to redetermine their claims.

That's Count 5. And so to say that they were seeking in the D.C. action and through the claims process solely damages against the FDIC, is a mis-characterization of the scope of what they are asking for.

THE COURT: Well, wait a minute, I'm looking at Count 5, and it seems to deal with the tax refunds. Am I at the wrong exhibit? I'm sorry, I'm on exhibit 2. Sorry.

MR. SACHS: Count 5 declaration that the FDIC receivers disallowance is void. Sorry, it's page 27 --

THE COURT: I have it. All right.

MR. SACHS: Again, if Count 1 and Count 5, Count 5 the end says:

"Therefore, the FDIC receivers disallowance should be declared void, and the FDI receiver should be required to reconsider plaintiffs proof of claims."

And, again, the proof of claim raises directly the issue of, is this a deposit account, who owns it, if it is, etcetera.

All of those issues are common to the two proceeding. When we get to the issue of the bar and the stay, we can address that more fully. But in terms of looking at whether the FDIC has an interest as these things, it directly is implicated, because the turnover action rests fundamentally upon a determination of what this is, and that it belongs to the debtors in this case.

And that directly impacts what is already at issue in the proof of claim process, both administratively and in D.C. For that reason it implicates the bar, but in terms of commonality and interest it directly relates to that issue, as well.

And I think on this motion, I'll sit down and let Mr. Califano speak further. Unless you have any further questions for me.

THE COURT: No more.

MR. CALIFANO: Your Honor, if I may. I, you know, I argued intervention, Mr. Carlinsky argued stay. I still haven't even gotten a chance to argue my stay motion.

THE COURT: Yes --

MR. CALIFANO: There are a number of things that he had said that are just plain wrong. And I'd like to address

it, but I don't know if you want to address it in the context --

THE COURT: I want to deal only with the motion to intervene first. Okay. Are you done --

MR. CARLINSKY: I was going to ask Your Honor if I can respond to the remarks that we've just heard, very, very briefly. There are three points that I'd just like to point Your Honor to.

THE COURT: Yes.

MR. CARLINSKY: Thank you, Your Honor. First of all, I think as Your Honor can appreciate, and as the FDIC itself in its brief at page 3, it's opening brief, admitted, the D.C. action was filed by the debtors because it was required to.

In fact the FDIC's exact words were:

"as they were required to do under Federal law." We filed that action because the proofs of claim were disallowed. Had we not filed that action, we would have run the risk of forfeiting claims and been prejudiced. Why did we file that action, Your Honor? Because the FDIC in its disallowance letter, inciting among the reasons why it disallowed the claims, it said, you're suing the wrong party.

It's a third party you need to sue, i.e. JPMC. This is the FDIC's notice of disallowance January 23rd, 2009. And it says, "The receiver has determined to disallow your claim for the following reasons."

And among it is, "They appear to assert claims against a third party."

THE COURT: Well that's only one of the reasons cited.

MR. CARLINSKY: Well -- yes, it is. But the only third party that we could think of that they were referring to here is JPMC.

THE COURT: Well, I mean, they disallow it for other reasons.

MR. CARLINSKY: Yes. And I recognize this is probably something called boilerplate. But so the claim is disallowed, we filed the D.C. action to preserve our rights. And, in fact, it was a place holder. It was a place holder filed by us. We turned to the FDIC and we basically said, take as long as you want, six months, whatever you need, we really weren't planning on moving forward.

This is the Court of exclusive jurisdiction. This is where we sought to proceed. And then, the other point I would make that Mr. Sachs highlighted for the Court, but just so it's not lost, in the proof of claim, we couldn't be more clear. We said, and this is at paragraph 45 that was read to the Court.

"Without prejudice to WMI's position that it is a depositor of JPMorgan Chase, claimants hereby assert a protective claim."

A protective claim. We did what we had to do

responsibly as fiduciaries.

Now we're somehow being told, you have to proceed in that Court and will be penalized for having filed in that Court. And the last thing I would remark on, Judge, is what we heard from JPMC's counsel right now is a preview --

THE COURT: I'm not hearing the -- I'm hearing the intervention. Okay.

MR. CARLINSKY: I'll sit down.

THE COURT: Does the FDIC want to respond on --

MR. CALIFANO: Yes. Your Honor, I think Mr. Carlinsky just made my case. I mean, just like the FDIC doesn't want to interfere in the administration of this bankruptcy case, this is not the place for it to be determined, with all due respect, as to whether the FDIC's disallowance of the claim was proper.

Yes, we said they had to file a claim. They had to, under Federal law. They had to file a lawsuit, after the disallowance, they had two place where they could file it properly.

One is the District of D.C., one was the District of Washington. That is the law, Your Honor. It's not -- we're not trying to trap them. It's the law. It's Firrea. There is subject matter jurisdiction limitations. Whatever reservation of rights they put in their proof of claim, that doesn't matter, Your Honor.

This goes to subject matter jurisdiction. They are trying to implicate the determination that the FDIC made, they're trying to implicate the purchase and assumption agreement.

They're not prejudiced. This isn't a due process issue. They have a forum for this to be determined. They recognized that they had a forum. It's the District of D.C. And in that District of D.C. complaint with respect to the deposit, and this is as I -- as Mr. Sachs said, exhibit 1 to our complaint. And at paragraphs 47 through 50, there are allegations regarding the deposit, and the allegations with respect to the deposit reference at paragraph 48 the purchase and assumption agreement and the transfer. Your Honor, this is -- the deposits are at issue.

We've talked about the 9.5 rights. And what Mr. Kirpalani said about the 9.5 rights and FSB, this is the ultimate issue. But I don't want to get into the ultimate issue. But as we put with our reply, Your Honor, it's attached to our reply as the debtors own submission, which shows, not 240 million in tax related payments, but 3 billion. And one other fact, Your Honor, that should probably weigh in whether we have an interest in these deposits, regardless of whether they're nominally at FSB or WMB, that transfer from WMB to FSB allegedly happened three days before the receivership.

And we're not even sure whether it happened. Okay?

That's a fact that will be determined. Where that fact will be determined or should be determined is the District of Columbia District Court. That's the statutory scheme, Your Honor.

I will address the cases in connection with the motion for a stay. But I do want to say, Mr. Carlinsky said we changed our argument because we missed the Rosa case.

Our opening brief, at page 7, cites the Rosa case.

THE COURT: All right. We're getting far afield from the motion to intervene, aren't we?

MR. CALIFANO: Yes, Your Honor.

THE COURT: All right. Let me just say with respect to the motion to intervene, the parties really went afield. But the standards, as I understand it, for mandatory intervention are whether the motion was timely, whether the movant has an interest in the adversary, whether the disposition of the adversary may impair the movant's ability to protect that interest, and whether its interests are adequately protected by others already in the action. I find that is timely.

It was filed shortly after the adversary was. The parties were put on notice that the motion would be filed. The question of whether or not the FDIC has an interest in the adversary, I think is close one. This is an adversary dealing with ownership of property claimed to be property of the estate. Which is not in the possession of the FDIC, but is in

the possession of an assignee of the FDIC.

Nonetheless, the FDIC asserts that its interest is in protecting the jurisdictional reach of Firrea, it is a Government agency that is governed by Firrea. I think really the -- there is enough to state that it has an interest generally in the proceeding.

Its interest in protecting Firrea -- the reach of Firrea may not be adequately protected by JPMorgan, which is a private party and has interests of its own.

And even though JPM is adequately and vigorously defending this action, I think that there may be a question of whether or not JPM's private interests would extend to protecting the public interest issues that the FDIC seeks to protect.

So I will grant -- find that mandatory intervention is applicable and will grant the motion. Alternatively, it was argued, although not today, but in the pleadings, that permissive intervention may be appropriate because the FDIC has a claim which shares a common fact or law question with this action. It is a Government agency and the action does implicate a statute it is administering and whether intervention will delay the action.

I think permissive intervention clearly is found here for the reasons stated above. So I will grant the motion to intervene for the sole purpose of prosecuting the action for a

stay of the turnover proceeding. And I think that's how the FDIC limited it. Have the parties finished their arguments for the motion for stay, or is there more?

MR. CALIFANO: Your Honor, I -- it's my motion, I didn't get a chance to argue it so --

THE COURT: I understand.

MR. CALIFANO: So if you don't mind.

THE COURT: You may.

MR. CALIFANO: Thank you, Your Honor. Your Honor, as we all know, on September 25th the Office of Thrift Supervision closed WMB and appointed the FDIC as receiver.

Almost immediately thereafter, the FDIC entered into the purchase and assumption agreement with JPMorgan Chase. Under which, JPMorgan Chase purchased substantially all of WMB's assets and assumed most liabilities. Everything, I submit Your Honor, in these two adversary proceedings relates to that transaction.

The procedural history here, Your Honor, is that on December 30th, the debtor filed a proof of claim in the receivership that is still pending. The receivership's pending, not the proof of claim. And we talked about that and in connection with the turnover action.

But, Your Honor, the proof of claim not only addressed the turnover action and the deposits, it related to everything which is part of WMB's proofs of claim.

There was the inter company loans, the inter company receivables, the tax claim, the capital contribution claim, the trust preferred claim, the preference claim, the allegation that the sale itself was improper. The deposit claim we talked about. And the employer -- employee/employer related costs and insurance claims.

Thereafter, on January 23rd, and we talked about that also, the FDIC disallowed that claim. And whether that's boilerplate or not, or whether there's a meaning in that, hopefully, that will be decided by the District Court.

On March 20th, as the debtors were required under Firrea, and, you know, it's -- when Mr. Carlinsky talked, and I don't want to talk about his mother, when he talked about his mother's $20 claim.

Well, first of all, if the FDIC had a claim against Mrs. Carlinsky, or whatever your mom's name is, then she would have had to file a proof of -- then she would have been subject to the deposit claim.

THE COURT: Now if you had a claim against her, or if she had a claim against you?

MR. CALIFANO: No, he's talking about the 9.5, then she would have been subject to 9.5.

THE COURT: If she had a claim against you?

MR. CALIFANO: No if the FDIC -- he walked through the deposit definition in 9.5, then she would of been subject

to it, as ridiculous as that -- as his example is. But, Your Honor, the debtors filed the proof of claim, they complied with Firrea. They filed the proof of claim, and then they filed the litigation that they needed to, to contest that disallowance for the proof of claim.

In that District Court action they asserted the capital contribution claim, the trust preferred securities claim, the taxes, the dissipation of WMB's asset, the deposit claims, inter company loans, inter company receivables, and improper asset sales.

Thereafter, JPMorgan Chase filed an adversary proceeding. And I don't think they should have filed that adversary proceeding here. That's why we're seeking to stay that.

In that case, they asserted entitlement to the trust referred part of our sale. The tax attributes deposit accounts, goodwill litigation, various other assets.

THE COURT: Well let me ask you a question. Do you think that JPMC could have filed a claim against the FDIC for the assets that it alleges it bought from you?

MR. CALIFANO: Well it filed -- it filed the claim against WMI. Could they have intervened in the District Court action which is pending? They did intervene -- I'm sorry, they did intervene, Your Honor. They have sought to intervene in that pending action.

THE COURT: But in the absence of that, did they need to, if the debtor had not filed a claim with the FDIC but simply filed this turnover action here, would JPM -- and an action or its counterclaim against all the other assets, would JPMC have had to filed a claim in the first instance to the administrative process against the FDIC?

MR. CALIFANO: No, Your Honor, because there isn't an issue. Do they have a potential indemnification claim under the purchase and assumption agreement? Yes, they have a potential indemnification claim that's under the purchase and assumption agreement.

Because they recognize, or at least I believe because they recognized, that the transaction was at issue, the very transaction was at issue, they sought intervention in District Court action. That's pending.

So on April 27th, debtors filed the turnover action, relates the deposits. We've talked about how the deposits were implicated in the proof of claim and in the District Court action. Then they filed counterclaims in the JPMorgan Chase action, which seek avoidance recovery of the capital contributions, we've heard that before.

The trust preferred securities, once again. The preferential transfers. They seek to avoid the PNA transaction entirely, which is something they sought to do in the proof of claim and the District Court action. And they seek relief

against JPMorgan Chase, including the inter company loans, which were subject of the proof of claim and the District Court action. So as I said, Your Honor, their own submissions show this all relates to the purchase and assumption transaction.

The statute that's implicated, Your Honor, is 12 U.S.C. 1821. And I have the same problem as Mr. Carlinsky, I can't find the jump. But I believe it's (d)(13)(D). And that provides:

"Except as otherwise provided in the subsection, no Court shall have jurisdiction over any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the corporation has been appointed receiver.

"Including assets which the corporation may require from itself as such receiver. Or any claim relating to any act or omission of such institution or the corporation as receiver."

So, Your Honor, clearly we're talking about a dispute over assets which JPMorgan Chase believes were purchased under the purchase and assumption agreement. And an attack on actions that were taken by the FDIC in its role as receiver.

THE COURT: Well let's first focus on jurisdiction over property in the FDIC receivership. The property is no longer there. And do you not agree that the courts have held that once the property leaves the receivership and is assigned

to a third party, the Firrea jurisdictional bar no longer applies.

MR. CALIFANO: Your Honor, the cases that were cited by Mr. Carlinsky say something like what he's arguing, but they don't' say what he's arguing.

And if you look at the cases that they rely on, and if you look at the decisions in National Union and Village of Oakwood, the jurisdictional bar is not that narrow, Your Honor.

Heinrich's was a case where a private party purchased a note. It was a quiet title action afterwards. And that private party sought to assert the Firrea bar.

That doesn't apply to an attack on a transaction. And that's what we have here, Your Honor. And it's not even that you have to read between the lines. In the proof of claim in the District of D.C. action, they attacked the transfer, the very transfer of the assets.

That is a claim relating to an act or omission of such institution where the corporation is receiver. And they're not just seeking damage --

THE COURT: Well I think their action is against JPMC, and their action asserts that it was the actions of JPMC, not the FDIC, that caused their harm. Not a claim against the FDIC.

MR. CALIFANO: In their counterclaims they are. But they made the very same claim against the FDIC --

THE COURT: In the D.C action.

MR. CALIFANO: In the D.C. action.

THE COURT: Well that claim is not before me.

MR. CALIFANO: Your Honor, but the claim that is before you --

THE COURT: Yes.

MR. CALIFANO: -- is potentially inconsistent, and it relates to the actions and it's -- they're asking you to make a determination as to the actions of the FDIC.

THE COURT: No, they're asking me to make a determination as to the actions of JPMC.

MR. CALIFANO: Your Honor, you can't -- you can't separate the two. You can't bifurcate the two. Because if the transaction was a fraudulent transfer, as they're alleging, okay, then the FDIC was party to that fraudulent transfer, which is why they made the claims in the District Court action.

It goes to the actions that the FDIC took. It goes to the transfers that the FDIC took. It has an impact on the FDIC through the indemnification claim, Your Honor. And we have the very same -- not just the very same facts, not just the same facts, we have these same facts and the same legal theories being asserted by the debtor here, and by the debtor in the district Court action.

THE COURT: But it's against two different parties.

MR. CALIFANO: It is against two different parties,

Your Honor. But that's not, you know, as we've cited in the cases, that's not dispositive of the issue of the First Filed Rule, Your Honor.

But --

THE COURT: Well are we on the First Filed Rule?

MR. CALIFANO: No, I'm just saying --

THE COURT: Or Firrea bar --

MR. CALIFANO: But I'm just talking about, they still are -- they still implicate the actions. It doesn't have to be. Our reading of the statute in Village of Oakwood Homes which we cited, a Sixth Circuit case, which came out after Rosa doesn't require that the FDIC be a defendant.

In Village of Oakwood Homes we have the -- almost the very same facts that we have here where a claim was asserted against an assuming bank. That implicates the actions of the FDIC, Your Honor. And it implicates, in our case, our potential indemnification claim.

It's not remote. They're asking this Court to rule on, with JPMorgan Chase as the nominal defendant, the very same facts and claims they're seeking to assert in the District Court action against the FDIC.

This, you know, it's not as limited as Mr. Carlinsky said. The statute does not limit itself to claims against the receiver. It limits -- it covers claims related to any act or omission of such institution, or the corporation as receiver.

And I think this issue is put to bed in Village of Oakwood Homes which is a recent Sixth Circuit decision. This is not a remote -- you have to remember the cases that the debtors are citing, there's a remote connection between the cause of action against the non-debtor party or the assuming bank, and the actions of the FDIC.

What is being faced here, Your Honor, and the implication, not just in this case, but the implications with respect to the actions of the FDIC, are very broad and very far-reaching. And the prejudice to the debtor is minimal here, Your Honor. They're not being denied their day in Court. They're being -- what we're asking is that they litigate these issues in the District Court, as opposed to litigating these issues here. Which is what Firrea says it must do.

Now --

THE COURT: Well talk about the deposit accounts. Are you suggesting that Firrea bars any action by any customer regarding a deposit account?

MR. CALIFANO: No, Your Honor. But what Firrea --

THE COURT: Why here?

MR. CALIFANO: It doesn't bar it here. It bars it in the Bankruptcy Court here. What -- they've already made the claim in the District Court, they don't lose their claim to the deposits if you stay the turnover action.

They've asserted the claim --

THE COURT: But is that true under Firrea, or are you now on the First Filed Rule?

MR. CALIFANO: No, it's both, Your Honor.

THE COURT: How -- how does Firrea --

MR. CALIFANO: I already -- okay, well the connection with Firrea, as the debtors have recognized, in the allegations from the complaint that I read to the Court.

They recognized the FDIC asserts an interest in those deposits. The FDIC's interest -- potential interest in those deposits, which will be an ultimate issue to determined at some point, relates to its role as receiver.

There was a reservation, a carve-out from the deposits language, of funds owed to a party who has obligations to the FDIC. That's in the purchase and assumption agreement.

We've asserted a proof of claim here. They are potentially liable to us. Potentially, we have an interest in those deposits in our role as receiver. Under Section 9.5, we have the right to direct JPMorgan Chase, and whether the stay applies or not, we could be in here, Your Honor, fighting the stay on that. I want the Court to recognize, we have that 9.5 right.

We have not asserted that 9.5 right. Because we do not want to interfere with the administration of this bankruptcy case. Btu there are claims that are to be administered in the receivership, and to be administered under

Firrea.

They made a claim in the receivership to those deposits. We disallowed it. That's being litigated in the District Court. The deposits are an asset which the FDIC and the debtors recognize, there's no issue, they acknowledge we have asserted an interest in those deposits. That will be -- I don't want to go into the ultimate issues and the base for that. Mr. Kirpalani did, I think he was -- I just -- I think he wasn't on all fours with the facts, we could fight about that some other time.

But the deposits are at issue in our receivership, Your Honor. They clearly are at issue. Made the proof of claim, we denied it, they filed the District Court action.

THE COURT: But are they at issue only because you assert setoff rights?

MR. CALIFANO: No. They're at issue because they asserted a right to them and we denied that right. So the --

THE COURT: But --

MR. CALIFANO: It's not just --

THE COURT: Okay. I understand.

MR. CALIFANO: You understand what I'm saying? It's administering a claim. They asserted a right, we disallowed it, they filed the District Court action. That's the FDIC's claim process, that's what Firrea provides. And they -- and I want to make clear, the prejudice to them is minimal, Your

Honor.

Nobody is saying that the FDIC has the absolute right there's no -- it's not subject to judicial review. There is no due process argument here. Firrea, though, provide -- and in National Union the due process argument is dealt with under the facts, and in National Union they rejected the Rosa -- the very Rosa interpretation, and without belaboring it, it's in our reply brief. The very Rosa interpretation that the debtors are putting forth, that was rejected by the Third Circuit subsequently in National Union.

The Village of Oakwood case, that determined the issue as to whether the FDIC needs to be a defendant. But, Your Honor, we need to keep in mind there is a statutory scheme. The statutory scheme requires in the receivership to file a proof of claim.

The FDIC can allow it or disallow it. The District Court ,if it is disallowed, the claimant has the right to seek de novo review. Okay. So it's de novo review of the disallowance and of the claims which underlie it.

They have taken advantage of that right. That case is pending in the District Court. They are not being denied their day in Court, Your Honor. What we have here is the debtor not being happy with Firrea, not being happy with the way it works. Saying, I know I'm in the District Court, I know I have to be in the District Court, but I really don't want to

be in the District Court, I want to file a turnover action. I want to file a turnover action against another defendant, and then that may or may not moot the District Court action.

What that would require, Your Honor, that if their turnover action goes forward on these sort of terms, that's going to require the FDIC now to make a lift stay motion and start fighting over the very thing that Mr. Rosen talked about. We don't want to do that.

We haven't done it for months. We came in here and the very first appearance, when the JPMorgan Chase stip was on, and we said, we're fine with the deposits going, as long as our rights are preserved, we don't want to interfere.

That fell by the wayside for reasons that are not, you know, not clear to us, but it's not our issue. But, Your Honor, we are here to protect our statutory framework. And Firrea provides for a claims process. They may not like the claims process, but, you know, what they're -- they have to go to their congressman, it's not here.

There is a claims process, they've recognized the claims process, they've made the very same claims. And it's every claim in the counterclaims, it's the deposits claim and the turnover, they've made those claims here. We're not seeking dismissal.

Your Honor, what we are are seeking is that this litigation, which shouldn't be here, is stayed while we

determine what happens in the District Court litigation.

There's no prejudice to them. And also, Your Honor, there's, you know, the only Court that can really adjudicate the interests of all the parties here, is the District Court of the District of Columbia.

The FDIC is a defendant in that litigation. We're part of that litigation, we're litigating it with the debtors. All right? JPMorgan Chase has sought to intervene. We don't know whether that intervention will be granted or not. But if Your Honor was concerned about that intervention, you could transfer these actions to the District of Columbia.

The fact that -- there is some very significant policy concerns here, Your Honor. And it's not just Firrea. And it's not just the fact that we could have inconsistent rulings here, Your Honor. We have a debtor who's not happy with Firrea, follows Firrea and then tries to find another back door avenue. We have a place for this litigation to be determined. We have a place where all the parties could be present.

And that's where these issues need to be determined. We cannot have two separate courts dealing with the very same operative facts and the very same legal theories where one -- you know, without all the parties. It just doesn't make sense. And talk about effective administration of the estate, I can't see how the estate is better administered by having a lawsuit

proceed with estate assets, where the Court really can't grant compete relief.

Because not all the parties would before Your Honor. And where it's fatally flawed on a subject matter jurisdiction basis, and I go back to this is subject matter jurisdiction. The parties can't waive it, the parties can't consent to it. Firrea is jurisdictional Your Honor. What I'm asking, give them their day in Court. But their day in Court is not here, their day of Court is in the District of Columbia.

Thank you.

THE COURT: Thank you. Yes.

MR. SACHS: Again, Your Honor, Robert Sachs on behalf of JPMorgan Chase. Let me start -- I'd like to address both the jurisdictional issue and the first filed issue, as well, and the principals there. But let me start with, again, a question that you asked, because I think -- I think the premise of your question was incorrect. And your question was, isn't the action here different from -- the claim against JPMorgan Chase different than the claim against the FDIC, because the claim here is based upon JPMorgan Chase's conduct, not based upon the conduct of the receiver.

And the answer is no. The claim here against JPMorgan Chase, in substantial part, is not based upon JPMorgan Chase's conduct at all, other than that it is asserting that it is the owner of property.

The issue is identical in both cases. The issue is, was this property of WMB, the bank for which the FDIC is receiver, or was this property at the time of receivership of the holding company?

The claims here asserted by WMI, the debtors, are that it was their property. The claims that are being asserted by JPMorgan Chase, and perhaps the FDIC as to certain issues, is, no, this was the bank's property. If that issue needs to be resolved in order -- it is the dispositive issue in all of the claims, whether asserted against JPMorgan Chase, or whether asserted against the FDIC in the claims process and the receivership.

If the property is determined to have been not the property of the bank, then it's arguably the property of the debtors.

If it's determined to have been the property of the bank, which is the current state of affairs at the moment given the disallowance of the claim, then it is not property in which the debtors have any interest and it is the property we allege of JPMorgan Chase. So that is at the core, it is a common issue at the core, it is the dispositive issue at the core of both sets of claims.

THE COURT: Well if you put it that way, then don't I have exclusive jurisdiction to determine what is property of the estate?

MR. SACHS: No, Your Honor. In fact, it's been determined and I'd refer -- it's addressed here, as well, the Amsave (phonetic) case addresses it directly. It's cited in the brief. That is the issue under -- Firrea, there is general bankruptcy exclusive jurisdiction, Firrea is a later enacted statute that gives specific authority and exclusive authority for determining what is the property of -- again, looking again at 1821(d)(13)(D), it gives exclusive jurisdiction, again, a later enacted statute, very specific, enacted with the backdrop of bankruptcy in mind, it gives exclusive jurisdiction to the FDIC, the receiver, followed by a claims process that limits you to two courts, District of D.C., or the home Court for the institution, for any action, and then we've talked about 1 and 2.

And that includes any action seeking a determination of rights with respect to the assets of any depository institution, i.e. with respect to the rights with respect to the assets of WMB and --

THE COURT: That is in receivership.

MR. SACHS: It is in receivership. But it is right now.

THE COURT: The assets are.

MR. SACHS: No, no, no. Let's read what it says, Your Honor, because that's not correct. And, again, that's been -- there is a receivership -- let's be clear here, there

is a receivership, it is pending. So WMB is in receivership. Each claim asserted by the debtors, whether asserted against JPMorgan Chase, or against WMB, the receiver, is dependent upon a determination as to whether a particular asset, let's use the deposit account since -- the accounts that they claim are deposit accounts.

There's a substantial question as to whether if these are deposited accounts and if there are funds in those accounts, whether those funds were in fact the property of the debtors, i.e., the holding company parent, or the property of the bank. For example, are they tax funds in those accounts that belong to the bank.

That is a determination that must be made under Firrea, given both the pendency of the receivership, and, I would suggest, Oakwood as well, Your Honor, which I'll address in a moment specifically, because it is an action seeking a determination of rights with respect to assets of any depository institution.

THE COURT: Well you're suggesting that so long as it involves an asset that was owned by a depository institution that is in receivership, jurisdiction lasts forever. But wouldn't that make the last clause of the first paragraph superfluous? Because it says, "including assets which the corporation, the FDIC, may acquire from itself as such receiver."

Why would that be there, if jurisdiction remained as long as the asset was in the depository institution from the beginning?

MR. SACHS: I'm not saying that forever that it matters. But I am saying that while, as in this case -- let's step back a minute and look at what they're -- involve in this case there is an ongoing administrative proceeding. There is both the -- there is a Firrea proceeding that is ongoing as to these assets. Your Honor, at the moment, they filed a claim to these very assets that was disallowed. If Your Honor were to take concurrent jurisdiction over the same claim that must, under Firrea, be adjudicated in D.C., you are raising starkly the possibility of inconsistent rulings.

Let's assume, for a moment, that in the proceeding in D.C. they proceed and it is determined there that the supposed 4 billion dollars in deposit accounts in fact are accounts that include 3 billion dollars in tax refunds that belong to WMB, not to WMI, no matter how WMI want -- the debtors want to characterize it.

You are suggesting that you could independently determine that issue and reach a different conclusion. And that is exactly what Firrea is designed to prevent. To prevent any other Court from adjudicating the question of whether something is or is not an asset of the institution over which the FDIC has put in receivership.

And in this case, there is going to be a determination in D.C. as to each and every one of these issues. And, again, the claims against JPMorgan Chase are founded upon a determinant -- a requirement that a Court determine that these were assets of WMI, not assets of WMV, and, therefore, and therefore not transferred to JPMorgan Chase. So looking at their adversary complaint, and looking at the D.C. complaint, for example, the taxes issue.

They seek a determination in D.C. that the taxes belong to them. They seek a determination in their counterclaims in the adversary proceeding here that the taxes belong to them. The same determination that is required to be made.

And under 1821(d)(13)(D), that is a determination that must be made through the exclusive jurisdiction of Firrea. It goes to each and every asset practically that is in their counterclaim. Trust preferred securities. They seek a determination in the D.C. action, and through their proof of claim that that is -- those are assets that belong to them, and that they're entitled to that determination in the counterclaims here. They simply seek the same determination, and then say, and because JPMorgan Chase has it, they have to give it back to us.

But it is founded upon the threshold determination that this was an asset of theirs, as opposed to an asset of

Washington Mutual Bank, the subsidiary at the time of receivership.

So each and every one of their claims, Trust Preferred Securities, the accounts, employee benefit plans, inter company payables and receivables, contributions, and then vendor contracts, as to who owns vendor contracts. Each and every one is identical and is founded upon for resolution, the identical factual and legal determination.

And if --

THE COURT: Then if you felt that the jurisdictional bar of Firrea required that all issues be decided by the D.C. Court, why did you file your adversary asking me to determine these issues?

MR. SACHS: We actually didn't, Your Honor. In the adversary we filed, the first request we made is that these issues in our request for relief, we claim that these issues should be resolved by the D.C. Court. And solely to the extent they are not resolved by the D.C. Court, should they be put here for resolution by Your Honor.

There are what I would call a few cats and dogs that are not at issue. None of the big stuff we're talking about that are at issue. And of course we were under time lines to file claims to protect our interest. But, fundamentally, in filing the adversary proceeding, our first request, our fundamental request is that these issues should be resolved, to

the extent they are disputed, by the Court in D.C. as part of Firrea's process. And only to the extent they are not resolved there, or in light of the outcome there, should there be a determination here.

I mean, Your Honor, going on, just one more, they claim, you asked Mr. Califano about it, they attack the transaction by which the receiver -- the PNA transaction. They claim it is a fraudulent conveyance. They claim it was an improper transaction.

What could be -- you can't adjudicate just -- the transaction is at issue. And what could be clearer under 1821(d)(13)(D), it's exclusive jurisdictional bar as any claim relating to any act or omission of such institution or the corporation as receiver.

They are challenging the act of the receiver in electing to sell assets and liabilities to JPMorgan Chase under the PNA agreement on certain terms and conditions. They challenge the terms and conditions.

That is squarely, there's no jurisdiction in this Court to determine that claim. It's in their proof of claim. It is in the D.C. action. And it is -- there couldn't be anything that is more squarely within the scope of the jurisdictional bar than that.

Every single one of their claims, again, rests foundationally upon a determination as to whether something was

or was not an asset of the bank at the time of receivership, and/or the conduct of the FDIC in deciding what to do with the assets of the receivership institution, WMB, and, therefore, falls squarely with 1821(d)(13)(D).

There's never been, not withstanding what you've heard from the other side, there's never been a case like this. There's no case where somebody is -- a debtor is simultaneously pursuing a claim under Firrea, through Firrea's 1821(d)(13)(D) claim process, and trying to circumvent that claim simultaneously to have the same issues resolved by a different Court that it prefers.

It simply prefers to have the Bankruptcy Court resolve it, as opposed to having the D.C. Court, where they filed the action, resolve it. But it's never been done before. There is no case along those lines.

The cases that are cited involve factual circumstances that are entirely at odds here. The only one that is even remotely close is the Village of Oakwood case, Your Honor. And in that case, it's a case where the Sixth Circuit said, of course the bar applies to claims against the successor, the people who stand in the shoes of the FDIC who acquire the assets from the FDIC.

Because, if not, it would undermine the entire foundation of the Firrea bar, because you could simply -- nobody would enter into a PNA transaction, because they would

be subject to all the claims that Firrea requires be brought against the receivership. So every claim could be brought against the person who is the successor to the interest of the receiver. They said -- they almost laughed at the argument that it didn't apply in that case. And it was, again, the same sort of thing.

They tried to circumvent the Firrea bar by a bunch of unsecured debt holders, by arguing in that particular case that by suing only the successor bank under the PNA. And the Sixth Circuit said, no, you can't do that. But Rosa, again, an entirely different case, limited to a narrow section of Firrea relating to the claim section of Firrea, overruled in connection with other aspects of the decision, as well, but involving a receivership that had been over for years, and years, and years.

We have an ongoing, current receivership in this case by the FDIC, and we have an ongoing claims process in this case, which the debtors have initiated by filing their claim. The debtors didn't have to file a claim against the FDIC and the receivership. If they didn't think they were jurisdictionally required to do so under Firrea, they could have elected not to do it.

But they did, because they believed and knew they were jurisdictionally required, and that's where they have to litigate this issue.

Let me move on, if I could -- and in terms of just efficiency and sense, the D.C. Court is the only Court that can resolve all of these issues. There are these limitations as to imposed by Firrea on adjudicating these issues as to whether thee are or are not assets of the bank.

And, as I say, that's going to be outcome determinative for the claims, whether they're asserted against the FDIC or asserted against JPMorgan Chase. If the Court in D.C. determines that the trust preferred securities are the property of WMI and were not the property of Washington Mutual Bank at the time of receivership, then we have no claim to those assets directly as against Washington Mut -- the debtors in this case, because they weren't the property of the FDIC to transfer to us.

And our rights are only derivative of the rights that the FDIC had, which is why everything implicates the rights of the FDIC in this case. But the only Court that can determine that in one forum and avoid risking inconsistent adjudications is the D.C. Court. That's where this belongs.

Your Honor has three alternatives. And let me segue in, if I could for a moment, into the question of the First Filed Rule. Which, of course, as Your Honor's aware, is a discretionary issue, but one that is founded in equitable -- strong equitable concerns of having efficient litigation, avoiding duplication and avoiding inconsistent results.

That the Court that first acquires jurisdiction be the one that resolves the case. The D.C. Court is the one in this particular case that should, not only because it is the first to have acquired jurisdiction over the issues here, but it is the only Court that can give complete relief to everybody in a single forum, given the Firrea jurisdictional limitations that exist in any other Court.

If you look in this particular case, if you are not to -- Your Honor has the discretion to stay, transfer or dismiss the adversary proceedings here. In furtherance of that, the FDIC has requested a stay.

We have suggested that the proper -- a preferable course may be to transfer these actions to D.C., so they can all be adjudicated together. But either way, the principles that are applicable are one in the same.

They are the efficiency, avoiding duplication and avoiding inconsistent results. All of those principles are applicable here in spades. If the Court does not combine these cases, there is the fundamental probability or possibility of -- even if you could avoid the jurisdictional bar, you're talking about the possibility of two different courts resolving the very same legal and factual issues and coming to inconsistent adjudications.

This is about as clear a case as there could possibly be for exercise of that equitable discretion to put all of

these cases in one place so that the underlying factual issues will be resolved one time, by one Court, with one set of discovery, binding all of the appropriate parties in a Court that indisputably has jurisdiction over all of the claims, including claims for and against the FDIC.

THE COURT: Well, but it currently doesn't have all the parties. Your motion to intervene hasn't been granted yet, has it?

MR. SACHS: It has not been ruled on, Your Honor, but there, again, there are two ways to deal with that. One, if Your Honor were to stay this in favor of that, that clearly is something that would be of relevance to the Court there. Number two is, you could transfer these actions to D.C. and thereby have all the parties there.

And the third is, I assume, at some point in time, the FDIC could bring us in as a third party in that case, if appropriate to do so.

So I don't think there's any serious issue that are -- we will not have a way into that forum, Your Honor. And, again, you can transfer this and there's no issue, at that point in time. The only reason we are not a party there is because the debtors have objected to us being a party.

Nobody else has objected. The debtors are the ones who are preventing us from being a party there. The debtors are the ones who seem to want to litigate the same case in

multiple forums. They don't want -- they don't like Firrea. They don't like the limitations Firrea imposes upon them. And they want to be in different forums. And they have -- they're the only ones who have objected to our participation in that case.

So I think there's a substantial likelihood that we will end up in that case eventually. I can't explain why that Court hasn't ruled on it. We've tried to find out what's going on there, with limited success.

The Court there doesn't always have hearings on motion. Generally does not have hearings, so we don't know when the Court will rule. We've asked for a prompt ruling, we've conveyed that request.

But, again, we are the ones arguing that this case should be adjudicated in that forum, because it is the only forum. And having this adjudicated in multiple places imposes all of the risks. But the First Filed Rule and the general equitable principles that underlie it, are designed to prevent. And so, either way, Your Honor, we think that both jurisdictionally this must be resolved in D.C., given the limitations imposed jurisdictionally by Firrea.

Or even if Your Honor did not want to rely upon that, that these cases should go there to have a single, consistent adjudication as to whether the assets at issue, the same assets in both claims, are the assets of WMB or the debtors.

Because that is outcome determinative as to all of these claims. Thank you, Your Honor.

THE COURT: Thank you.

MR. CARLINSKY: I scribbled a lot of notes, so I'm going to try to cover as much as I can. I may jump around, Your Honor. Mike Carlinsky, again. Let me first just pickup on the last point that Mr. Sachs was mentioning, which is the D.C. action.

That D.C. action is filed under Firrea. It is a limited action. And it is an action where the Court has limited jurisdiction. We oppose the intervention. Who knows, maybe Mr. Sachs has a crystal ball, but we think that there is a serious issue whether Chase could ever intervene there, because it is under Firrea, and Firrea is limited to claims against the FDIC.

But I don't profess to predict what's going to happen there. What I will say Your Honor that's critical here is, we did not file a claim against the FDIC in Washington for the deposits.

As I read before, we filed a protective claim that said, in the event this Court, or in the event we somehow have lost our rights to the deposit, we are preserving that claim. So I think with respect to the deposits, it is truly a misnomer to suggest we filed a claim there.

Mr. Sachs made the point that on the deposits, the

core issue, and I tried to quote him exactly, was, or is, was this the property of WMB, or was this the property of WMI? Your Honor made the point, isn't that right in my wheelhouse, in the exclusive jurisdiction of this Court. Answer, yes. But more fundamentally, why can't that issue, which is a factual issue, which, frankly, as Mr. Kirpalani will talk about after, is before the Court, what is so complicated about that issue that is Court is incapable of deciding that issue?

That's a simple one, that's a simple one. Now, more broadly, what we have heard is Firrea, Firrea, Firrea, as if, my God, this statute is there and no one can move, we're frozen in place by Firrea.

Let's remember why Firrea was enacted, and I won't tread over old ground. But it was enacted so that, when the FDIC takes over an institution, and it's in that crisis mode, it's not attacked from all sides and having to defend itself in litigations all over the world.

That's not this case. And more importantly, we saw the cases. Rosa is good law. And Hudson, which is after National Union, tells us exactly what Rosa stands for. There was a suggestion made, Rosa is a very different case. The receivership was long over.

I urge the Court to read Rosa. Not only was the receivership of the two -- the first two institutions not over, but the Third Circuit commented, by the time the case came to

Court, the Third Circuit, the third institution was in receivership.

Yet, the Third Circuit says in Rosa, we look at the jurisdictional bar issue at the time the complaint was filed. Doesn't matter to us that today this case -- this company is in receivership.

The question was at the time the complaint was filed, was it in receivership? No. The answer was clear. Therefore, no jurisdictional bar.

Your Honor asked another question, although I think Mr. Califano didn't quite get it. The question was, and I don't mean to -- I think there was a sort of --

MR. CALIFANO: You meant it in a nice way.

MR. CARLINSKY: I meant that in the nicest way. Think about it. Again, I hate to use my mother's example in vain, but right now, there are depositors out there all over the land that have what they think are accounts at JPMorgan Chase. What happens if depositor goes to the bank and says, give me my deposit.

And Chase says, what deposit? You don't have a deposit here. You had a capital contributions, or whatever the answer is. Are we seriously contending that because those assets have their lineage from a failed institution, that those depositors either have their claims barred because they didn't go through Firrea, or they have to file in the D.C. Court?

It's absurd. And those cases recognize it's absurd. Let me say a word, then, about the Oakwood case, which we've now heard, Oakwood, Oakwood, that's the solution. Oakwood's a Sixth Circuit case, so obviously it's not binding authority.

But, more importantly, here's what happens in Oakwood. First of all, the assets in question -- and let me take a step back. The plaintiffs in Oakwood are raising breach of fiduciary duty claims against the FDIC about creating a sham bank. The opinion says so.

The assets, which are the subject of the action, never get sent to the depository institution that's not in receivership.

So what the plaintiffs do, because the plaintiffs in that case failed to go through the administrative process, so the bar would stand in contravention, unless they can find a way outside the bar.

So they sue a bank not in receivership. What the Sixth Circuit says is, ut-uh, that's too cute. Your claim, and the Court says it plain as day, it says, even though the claim is against the FDIC for a fraud, and more importantly, the assets at issue never left the FDIC to go to this bank, we're not going to allow you to bring a claim against an institution where the assets never left the FDIC's possession.

So it is a very different case. The bar applied there because the Court says, this is really about the assets

still in receivership, still in a institution in receivership.

Your Honor, so the jurisdictional bar, I hope to give the Court comfort, doesn't apply. There is no Firrea mandate here that says, Judge, you can't act. And we urge the Court to go forward.

Now we get to the issue of first filed. Again, we are somehow being asked, in essence, to be penalized because we file an action in D.C., as we were required to do. Now this isn't a case of first filed. The typical first filed case, as Your Honor I'm sure knows, is Carlinsky sues Califano in D.C. Califano turns around and sues Carlinsky here and is trying to get the second Court to move in advance of the first Court.

We filed the D.C. action, as a protective measure. But we want to proceed, we're the plaintiff there, but we want to proceed here with our claim.

And the easiest one is the deposit claim. Because it's bound up in D.C., it is here, it is a core -- it is within the exclusive jurisdiction of this Court. And our turnover proceeding is a core proceeding of this Court.

The last point I would make is, Judge, we heard there's no prejudice -- there's no prejudice. Well let's just pack up and we'll all go to D.C.

And Chase, which of course did file an adversary proceeding here, did file 40 proofs of claim months before that here, Chase, too, is saying, yeah, let's all go to D.C., what's

the prejudice?

Well there's prejudice. The courtroom is filled with creditors. And the creditors are saying, give us our money back. And what Chase wants to do, because the longer they hold onto those deposits and pay no interest, the longer they benefit, and the worse we are.

And so there is prejudice. And the last point I would make is, in the D.C. action, we also heard a comment, I'm sort of going back to something that Mr. Califano said. The whole shooting match could be heard down in D.C. Well, Judge, they're talking out of both sides of their mouth.

Because what they did in D.C., the FDIC, they filed a motion to dismiss, and they say your claims, meaning WMI, your claims, the so called claims we -- the whole thing could be decided down there.

Your claims, other than the ones for which you submitted proofs of claim, all ought to be dismissed, because they're all barred from -- barred under Firrea. So what they're doing is, they are prejudicing us. They're prejudicing us be delaying us, they're prejudicing us by trying to send us to a Court where there are these motions pending.

We belong here, this Court has exclusive jurisdiction over the assets. And we respectfully urge the Court to deny the stay motions, let's move forward and let's get, at least to the issue of the turnover of the deposits, so that we can get

money into the estate and we can start to prepare for distributions to the creditors who are prejudiced.

Thank you very much, Your Honor.

THE COURT: Thank you.

MR. STRATTON: Good afternoon, Your Honor. David Stratton for the Committee.

Your Honor, I'd like to offer the Court some thoughts on the three volumes of briefing on this issue. And what I'll try to do is focus on some issues which I think should be helpful, or I hope will be helpful to Your Honor in deciding the stay issue, which is really what is before us.

The first point I'd like to address is whether or not the Court should decide the motion now. And it touches on the issue Your Honor raised about -- and Chase and FDIC have raised about, can the Court down there grant complete relief.

Chase is not a party to that litigation. The Court may decide, because it's really an appeal from the denial of the claim, that Chase doesn't belong in that litigation because it's an appellate procedure involving the FDIC, and the debtors are not a pool party where everybody who thinks they might have a claim to some of the assets in the receivership, who were not in the receivership, depending on what the deposits end up being, should become a party and get -- so that the matter gets completely out of hand.

The other reason why I think Your Honor might want to

hold your hand on this issue, is that it's not clear what that litigation's going to look like when all is said and done.

As I understand it, the Galvaston action, which was the subject matter of some discussion in the context of the 2004 motion the debtors file, the FDIC has filed a motion to transfer venue of that case back to D.C.

Now if we start piling all this litigation together, the concern I would have, and I hope Your Honor shares this concern, is that we're going to have a morass, a Gordian knot of mythical proportions, which will takes years, and years, and years to cut through, to the detriment of the creditors of this estate.

And I'm going to talk about that issue a little while later. With respect to the second point, Your Honor, it's the jurisdictional issue. And I'd like to refer to the FDIC's memorandum of law in support of it's motion to stay, which was filed on June 1st.

This looks to me like a two-party dispute. Chase says it bought a bunch of assets out of the receivership, or assets which weren't in the receivership, in the case of the savings bank, and we don't want to lose track of that sight -- or point, as Mr. Kirpalani has noted for us, but Chase says, we bought a bunch of stuff. The debtor says and the Committee says, no, you didn't.

The deposits are ours, the tax refunds are ours, so

on, and so on, and so forth. It's a two-party dispute. And the FDIC, when they filed their memorandum of law, agreed with that position. And I refer Your Honor to page 1, at the very outset of their papers the FDIC wrote, and I'm going to come back to this quote in connection with another point.

"Disputes concerning the ownership of assets and assumption of liabilities between the debtors and JPMorgan Chase, JPMC, have been a centerpiece of these Chapter 11 cases since their filing. The two adversary proceedings that are the subject of this motion to stay..."

And now I'm going to skip over an indented phrase or a phrase they've used.

"...reflect the parties' latest attempts to seek a determination of their respective rights to certain disputed assets."

It's a two-party fight. If Your Honor has the ability to resolve those issues, it's at the very core of what this Court does. That is, the Court determines, not everyday, but on a regular basis, what the assets of the estate are, and what the assets of the estate aren't. That's the fundamental jurisdictional grant that congress gave this Court. And the Court should not give it up lightly, or at all, just because the FDIC says you should, or because the FDIC would like to read Firrea so broadly as to provide, as Mr. Carlinsky argued, that from now on, forever, a year from now, two years from now,

three years from now, if someone says to Chase, oh, by the way, I'd like my deposit back, Chase says oh, no, no, no, you didn't file a claim in the FDIC receivership proceeding, so your claim's barred, or the only place you can try to get your money back is in a lawsuit against, not us, but the FDIC in the District of Columbia, or where the bank had its headquarters.

That's not, I think, a proper reading of the statute, and the cases don't seem to agree with that.

On a narrower basis, with respect to the deposits at the savings bank, as opposed to the bank that was in a receivership, there is absolutely no basis to argue that Firrea precludes this Court's exercising jurisdiction over that deposit. It was never in a receivership.

And the bulk of the deposit, we believe, was in that account. Now people may take issue with that, and they may say, well there's this issue and that issue. But that issue -- those issues for Your Honor to decide. There is no Firrea overhang here. And when I read the papers, the 40 some odd papers that were filed by Chase and the FDIC Monday night on this issue, they don't address it.

Or the FDIC says "The FDIC receiver will reserve its arguments as to this assertion for another day."

Well, today's the day. I'm sorry, but they if want to stay the proceeding, they've got to carry the burden as to their jurisdiction over this asset. They don't have any.

So at least as to that, Your Honor can and should deny the stay motion. As to the rest, I think it's a two-party dispute, and Your Honor can and should assert your jurisdictional prerogatives and say, you know what, I can do this, I can do this promptly, and I'm going to do it.

Let's talk about promptly. Because the parties have discussed, and Mr. Carlinsky discussed briefly, the issue of prejudice. But we represent the creditors and we've got a courtroom full of them

And I'd like to talk a little more about that. The FDIC, in its reply brief, makes what I view to be an incredible assertion, and I'm quoting.

"The FDIC receiver's motion if granted will not delay or stall these bankruptcy cases, as the debtors assert."

And then Chase says in its brief:

"A stay would in no way prejudice the debtors."

I would submit to Your Honor that that conclusion is impossible to sustain. Both the FDIC and Chase ignore the point made in the debtors brief, and I'm referring -- I'm referring to page 30 of the debtors' opposition to the stay motion, in which the debtor refers to a statistic, which I think we need to keep front and center in these deliberations. And I'm reading now.

In 2008, the median time from filing to the commencement of trial for civil cases commenced in the District

Court for the District of Columbia, was greater than 3 years.

And they cite for that proposition the 2008 Federal Court management statistics, U.S. District Court judicial caseload profile. Three years. That means, for the next three years, we'll have litigation, upon litigation, upon litigation.

I could recite for Your Honor the multiplicity of litigation that Chase has sparked in this case. They even opposed the imposition of a bar date as to themselves.

And they continue with their motion to withdraw the reference, which basically is that, if we lose here, we'll just ask the District Court to give us the same result.

So we'll have tons of litigation in the District Court, we won't get the trial for three or more years, and, meanwhile, what's happening here? Well money's gone out the door like crazy to professionals. We can't begin to imagine what the hourly rate for the professionals in this courtroom is.

Two, the administration of this estate will come to a screeching halt, because all the assets of this estate, for the most, part are at issue. Chase is saying, they're all ours, and the estate's saying, no, they're not. They belong to us.

So we won't be able to propose a plan that has any kind of sense to it. A disclosure statement would -- how do we write a disclosure statement? We don't know what you're going to get, and we don't know when you're going to get it.

But you'll get it when we know what it is. That doesn't work. And so, at the end of the day, these creditors, and the thousands of other creditors in this case, will sit there and wait, and wait, and wait as the estate gets a little bit smaller and a little bit smaller each day through the costs of administration.

And they may get some money four or five years from now. And that to me, plain and simple, is prejudice. And that in fact is my primary concern about this whole mess.

Let me talk about one last point, and I call it the bankruptcy issue. I've touched on it a little bit, but I think it goes to both the jurisdictional issue that -- the Firrea argument that the FDIC and Chase makes, and also to the first filed.

And by way -- in context, by way of background, I'd like to focus on a couple of things. This bankruptcy was filed last September, the day after the receivership was imposed and the assets were sold to Chase.

As I've already indicated, the FDIC has conceded that, from the day this case was filed or shortly thereafter, disputes between the estate and JPMC have been at the centerpiece of this case.

Chase has filed a proof of claim. It tried to get a different bar date, or no bar date, but it was forced to file a claim and it did file a claim. It also filed an adversary

proceeding, which in many ways is a mirror image of its claim.

It's a little odd, they said here are your claims one through, whatever. And then when they filed a lawsuit saying, these are our claims, decide them, Judge.

I'm not sure why they did that, and I'm not going to speculate. The FDIC has filed a claim. The debtors filed a turnover action. The turnover action, at least with respect to the motion to dismiss, has been briefed. The debtors have filed a motion for summary judgment in the turnover action.

Those deposits, that four billion dollars, how many cases do we ever have with billions of dollars to fight over? And maybe that's part of the problem. Four billion dollars, that's the centerpiece of this estate.

And once that's determined, and especially if the debtors, as we believe they are, are correct that that 4 billion dollars belongs to this estate, we can move forward with a Chapter 11 plan and confirmation, all the while respecting the FDIC's rights with respect to setoff, and whatever rights it asserted in its claims, because those aren't new issues.

Creditors have setoff rights all the time. Creditors file proofs of claim all the time. And those issues can be addressed in the context of a plan.

So where does that -- where am I going with this argument? Well, first, I think, and the FDIC has more or less

admitted, that this bankruptcy proceeding, not the litigation in the District of Columbia, but this very bankruptcy proceeding, is really the first proceeding in which these issues were put before a Court. It's the first filed action. Second, it's a fundamental, fundamental precept of bankruptcy that you submit yourself to the jurisdiction of a Court when you file a proof of claim.

It's so fundamental, that it trumps a creditor or an individual's right to a jury trial. How can it not also trump the Firrea jurisdiction given to the FDIC? And the debtors address that issue in their papers, and I won't go into that in any detail here.

The last point on this argument, Your Honor, I'd like you to consider is this, and this is the sort of bankruptcy lawyer talking. We won't know what the assets are for years. We won't be able to put a plan together. The estate will be diminished. Your Honor will be giving up jurisdiction that's clearly given to you by the Bankruptcy Code and Title 28. Creditors rights will be prejudiced because of the delay, and because of the effect on the administration, the size of the assets, just through erosion, through payment of fees and expenses.

Based on that, I would respectfully request that Your Honor first has the discretion to decide whether or not to stay this matter, and Your Honor exercise that discretion to deny

the stay.

If Your Honor has any questions, I'd be happy to answer them.

THE COURT: No. Thank you.

MR. STRATTON: Thank you,

MR. O'CONNOR: Your Honor, my name if Paul O'Connor. And a pro hac vice application has been filed in the Court earlier this week. We represent -- I represent Washington Mutual note holder's group, which collectively holds at least 3.3 billion dollars of value of outstanding debt securities of the debtor Washington Mutual.

We've submitted a statement pursuant to Section 1109 of the Bankruptcy Code in opposition to the motions filed by JPMorgan and FDIC that have been argued here today.

And I don't want to belabor any of the points that have been made. We obviously associate ourselves and join with the remarks that have been made by the debtor and for counsel for the Committee.

However, there are a couple of points I would like to make. And that is, first, as the holder of 3.3 billion dollars in the face mount of WMI debt, we are obviously the principal stakeholder in this -- these Chapter 11 cases.

We have a real interest in the outcome of this estate and ensuring a maximum value for creditors. Second, the real issue that we're all arguing about here today, is what to do

with this 4.4 billion dollars in deposits at JPMorgan. And as others have said, and I'll reiterate here today, those are core assets of the estate. Those are the assets of the estate.

There's really -- there's other stuff to argue about, but without those assets being decided and ruled upon by Your Honor in the context of this proceedings, moving forward on plans and plan reorganizations is almost impossible.

If this matter is not dealt with in this Court, resolving these Chapter 11 cases, in our view, will fundamentally be impossible. And I do want to also point out that the prejudice to creditors from the delay that's likely to come if we are sent to D.C. is significant.

And since we're all here and the assets can be dealt with here, we think they should be dealt with here.

Finally, you know, I think it's also important to point out that there are two adversary proceedings that we're dealing with here today. One of which is an adversary proceedings that JPM brought.

They chose this forum. They picked it. They filed the papers here, and then the debtor responded with some counterclaims. And now we're hearing arguments that having picked this forum, the debtor having then filed counterclaims in that, that somehow or another, because they were forced by statute to file a more limited pleading in D.C., they should be prohibited from going forward in the proceeding that JPM filed

here.

And we think ultimately that's an argument that doesn't hold together. And so we'd urge the Court to hear this matter and to decide these matters and not to stay or dismiss them. Thank you.

MR. SACHS: Your Honor, could I indulge you for just a couple of seconds to let Ms. Feldstein respond to a few jurisdictional issues that have been raised?

THE COURT: Sure.

MR. SACHS: Thank you, Your Honor.

MS. FELDSTEIN: Good morning, Your Honor. Hydee Feldstein of Sullivan and Cromwell appearing on behalf of JPMorgan Chase. And I rise very briefly principally to address some of the jurisdictional issues raised by Mr. Stratton and by Mr. O'Connor.

As a preliminary matter, we did file this morning a response to the note holders papers asking that they file a Bankruptcy Rule 2019 statement. And I would ask that the the Court at least take that into consideration. We have not formally moved at this time, I will acknowledge that.

But the Court can also on its own initiative, either request that they file it, or at least take that into consideration in hearing the note holders' arguments.

The other issues I'd like to talk about very briefly. I stood before you in October in connection with a stipulation

for deposit accounts. And on behalf of JPMorgan Chase, I made two points to the Court. One was that we did not think that possession of funds, to the extent funds existed, was really the issue.

That the issue to us was twofold. One was, we had not determined what JPMorgan Chase's rights in and to those funds were. And we did not wish to prejudice our right to those funds, which is why the original stipulation had a full blown deposit account agreement with post petition setoff rights associated with it.

With that basis, we were prepared to take into account and defer all of the ownership issues. So contrary to everybody's assertions, we haven't been sitting here trying to "hang onto the money," but we have been trying to preserve our own rights in and to those funds.

The second point that I would make to the Court is, we said to you back in October, we do not want to be subjected to double jeopardy. Whatever happens here, Your Honor, whatever the funds are, that which is ours ought to belong to us, and we ought not to have to pay twice. I would point out to the Court that the D.C. action was filed on Friday, March 20th. Our adversary proceeding before this Court, which asks in the first instance to be sure that whatever rights there are in the assets at issue in D.C. go to the D.C. Court, was filed on March 24th.

We had to file that in order to stave off the very concern that we had expressed to you back in October. We did not want to be in the position where JPMorgan Chase's rights with respect to these assets were subject to competing and potentially inconsistent determinations.

We did not want to be in a position where our liabilities, because, Your Honor, to some extent the deposit account, is also arguably a liability of either the receivership estate as successor to the depository institution, or of JPMorgan Chase.

We did not want to be in a position where those liabilities could be inconsistently determined, or determined twice. I understand that the creditors of this estate would like to take the money and run. They'd like to say, thank you, JPM, pay it over to us and you worry about all these other assets.

There's 4 billion in trust preferred securities. There's at least 3 billion in tax refunds, by their own admissions. I understand that claims to 4.4 billion, or 3.7 billion, depending upon what you look at, in deposit in deposit accounts, or book entry transfers, or offsetting liabilities, or master notes, or whatever they are, is a lot of money.

But is not all the money that's at stake in this proceeding, or in the D.C. action, Your Honor. And at the end of the day, that's the problem. The problem is, that as I have

said to you for 8 months now, JPMorgan Chase is to some extent, Malcolm in the Middle.

So long as our rights are adjudicated in a single forum, where we're not subject to inconsistent determination, where all parties with claims against us can be bound by that determination, and where in that forum we are in a position to protect our rights as the legitimate purchaser from an assignee of the FDIC, that's what's important.

I want to move very quickly, Your Honor, we did file a motion to withdraw the reference last night. We did that largely due to the counterclaims that were filed before this Court by the debtors, or by the very concern that we had that, if the stay motion was not granted, we would be a position where we were, again, in two forums on the same issues and subject to inconsistent determinations.

We have accompanied that withdrawal with a request to transfer this litigation over to the D.C. action. And if you can indulge me for a moment, the issue of the deposit account is a simple one. Is addressed at some length in the withdrawal of the reference papers,

It's not a simple determination, Your Honor. WMI was the holding company of two depository institutions, and itself subject to banking laws and principles, including sections 23(a) and 23(b), limiting affiliate transactions with its depository institutions. Both WMB and WMBFSB were subject to

lending limits. They were subject to rules and regulations regarding safety and soundness. There were all kinds of principles under Title 12, not just with respect to, what did the FDIC have at the time that the receivership receiving was commenced, and not just with respect to, what did JPMC acquire. But in untangling the Gordian Knot that is already before this Court, Your Honor.

There is a Gordian Knot. And the question is, will it be all in one forum, or is it going too be kind of split up and we're going to be dealing with Gordian Knots in two different forums, or three different forums, where people can be subject to inconsistent determinations.

But the under raveling of that very tapestry itself requires consideration of Title 12. There's no way around it, Your Honor. There's two competing insolvency regimes. There are in fact principles that govern the insolvency of a depository institution.

To give you just an example. The deposit accounts here, to the extent they were provided by book entry transfer to create a so-called demand deposit account, under the FDIC's insurance program today, checking accounts that are demand deposit accounts are insured without limitation.

So by a stroke of the pen, and by somehow creating an inter company obligation that's called a demand deposit account, WMI is contending that by book entry transfer, if a

holding company did it today as to a depository institution, it could put the full faith and credit of the FDIC and our taxpayer dollars at risk. And, Your Honor, I submit to you that the determination of those accounts simply can't be made without regard to Title 12.

And for that reason, we filed our motion to withdraw the reference. And for that reason, it would be appropriate to simply put this matter over to the D.C. Court for its consideration, as it seems to be the only Court that has complete jurisdiction and can afford complete relief to the parties.

Does the Court have questions of me?

THE COURT: Well you say it has complete jurisdiction, but is that clear after Rosa?

MS. FELDSTEIN: I think, Your Honor, that if this matter were transferred to the D.C. action, yes, it has in -- there's in personam jurisdiction, there's in rem jurisdiction, and there's subject matter jurisdiction.

I would submit to the Court that the D.C. Court has subject matter jurisdiction to determine what were the assets of the depository institution, which this Court does not. It has in rem jurisdiction over those assets, to the extent that they are here as a successor, we are here as a successor and a purchaser from the FDIC.

And it would have in personam jurisdiction over us.

We've effectively have consented to be part of that action and have asked to be part of that action by our motion to intervene.

We are not going to attempt to contest that Court's jurisdiction...

(12:39:35 Recording stops - 12:55:58 Recording Resumes)

THE COURT: All right.

MS. FELDSTEIN: Thank you very much. I'm going cede to Mr. Califano.

THE COURT: Okay.

MR. CALIFANO: Your Honor, I'd like to open by pointing out the jurisdiction is not exclusive when the ownership of assets is at stake. And the question of whether 1334 trumps Firrea, that's already been addressed.

And at page 17 of our reply brief, we address that case and we address that issue, and we cite the cases.

But what I would like to do, Your Honor, is reconcile the -- the question of Rosa and National Union, because I think there's been some confusion created.

And the fact is, Your Honor, if you track the cases and the actual language of the statute, it is clear that Rosa and Henrich and those cases don't apply.

And one thing we need to keep in mind, when we're looking at these cases, is that this is not a tangential attack on a transfer that somehow was related to the receivership.

This is the central act of the FDIC as receiver.

As we said, they came in as receiver, they took over and immediately sold the assets. Substantially all the assets then JPMorgan Chase assumed substantially all the liabilities.

THE COURT: But let's go to the history of Firrea and, when the RTC in earlier days the assets of the bank were held for some time. And really wasn't Firrea to prevent the lawsuits and interference with the receivership? And can you extend the jurisdiction by transferring those assets, the first day?

MR. CALIFANO: We're not extending the jurisdiction, okay.

THE COURT: Well you're seeking to extend it to any claims against JPMC.

MR. CALIFANO: But it's not, Your Honor. Because the claims, as we've said throughout --

THE COURT: Are identical.

MR. CALIFANO: -- they've made claims about the actions of the receiver. The claims that they're making against JPMorgan Chase are the flip side of those claims. We're -- if you think about the history behind Firrea, Your Honor, we're right now in a situation which is as bad, if not worse, than then.

And right now the FDIC is selling banks. They seize banks, they sell banks.

There needs to be a market to assume the liabilities. There needs to be buyers. Those buyers need finality, much like a 363 buyer who comes into the Bankruptcy Court needs to know that there is finality. So there are the same, if not stronger policy considerations now. But when you look at Rosa, Your Honor, Rosa was dealing with the first clause of 1821(d)(13)(D)(i). Any claim or action for payment from. Okay? The National Union case, the other cases deal with -- the language, or any action seeking a determination of rights.

Now the Third Circuit in National Union looked at the issue and said, does the claim that is at issue need to be a claim against the FDIC as receiver that would be part of the administration process for the bar to apply.

Because there's a narrow universe of claims, as opposed to any action with respect to determination. And if Your Honor will allow me, the Third Circuit said in National Union:

"In Rosa we indicted that there was an interrelationship between the jurisdictional bar contained in Section 1821(d)(13)(D), and the administrative claims procedure contained in 1821(d)(3), (d)(5) and (d)(6). By characterizing the jurisdictional bar as a statutory exhaustion remedy."

Meaning creditors had to exhaust their claims by going first to through the receivership. Surely that characterization is accurate as to a claim, i.e. an action

asserting a right to payment.

In the portion of the opinion characterizing the jurisdictional bar as an exhaustion requirement, the Rosa Court addressed only claims, as opposed to the any action language contained in 1821(d)(13)(d)(1), stating that subsection (d) of 1821 provides for de novo District Court jurisdiction only after the filing of a claim with and the initial processing of that claim by the RTC.

But Rosa did not address or decide the interesting issue, which is still an open question, whether the class of actions addressed by the administrative claims procedure is smaller than the class of actions addressed by the jurisdictional bar.

And the Third Circuit went on to rule, Your Honor, that the bar of 1821(d) is larger, the universe of actions that are effected, is larger than simply those claims which need to be asserted in the receivership.

That's what National Union did, that's what Rosa means. Your Honor this is an attack on -- this is a lawsuit, which is an action seeking a determination of rights with respect to the assets of any depository institution for which the corporation has been appointed receiver.

And it is a claim relating to any act or omission of such institution, or the corporation as receiver. It falls right within the jurisdictional bar.

They can't circumvent the jurisdictional bar by bringing an action against JPMorgan Chase. That is the -- and in the counterclaims that is the mirror image of the claims in the receivership. It is the mirror image, it is against JPMorgan Chase, as opposed to the FDIC.

But it goes to the core of the actions of the FDIC as receiver. With respect to the reference to the motion to dismiss in D.C., that's not really -- we did make a motion to dismiss, but we did not move to dismiss any of the claims that relate to the receivership proof of claim.

We did not move -- we moved to dismiss claims which we believe are improper, but we did not move to dismiss any claims which relate to the proof of claim they filed and receivership claim. They're ancillary claims that we moved to dismiss.

Also with respect to the statements that we've heard about the Bankruptcy Court, 1821 is very clear, Your Honor. It says any Court -- I'm sorry, it says no Court can review the actions of the FDIC as receiver other than the District Court in the two choices of venue. Where the bank was situated, or in the District of D.C.

There's no exception for Bankruptcy Courts. and there's a bankruptcy District of New Jersey case, cited in our reply brief, which addresses that, Your Honor. And with respect to, you know, going back to Mr. Carlinsky's mother,

once again, and I'm sorry. But that issue, that's a red herring, because that only relates to the FDIC's exercise of 9.5. So she would only be denied her deposit if the FDIC had previously exercised its 9.5 right. It's not every depositor, everywhere.

But, Your Honor, if you look at the cases, if you look at Rosa, if you look at Oakwood, this issue is resolved. The fact is, this is an attack, whether the FDIC is a nominal defendant in the adversary proceeding or not, this is an attack on the actions of the FDIC.

They have their forum, the forum is not here. Thank you.

MR. CARLINSKY: Your Honor, I will be ever so brief. First, I think it's obvious that all of the parties are before this Court. The FDIC filed proofs of claim. JPMorgan has filed proofs of claims and an adversary proceeding. And the debtors are here.

This Court can afford full relief. The second point I want to make is, Mr. Califano says that the claims here represent a central attack. Well how is the deposit claim, which JPMorgan itself described as a question of, was it an asset at one institution, verse the other?

Any kind of central attack, as if that would even be relevant in connection with the jurisdictional bar, but saying so doesn't make it so. The question on the deposits is a

simple one. It will be a -- one that it may be bound up in some facts, but it is a simple one that has nothing to do, frankly, with an attack on the FDIC.

I want to just give the Court one more piece of comfort as to what Rosa stands for, what National Union stands for, and then Hudson, which is after National Union, and I read the Court the quotes earlier from Hudson, which is the latest of the three pronouncements. And Hudson is clear that the jurisdictional bar is limited to a claim against the institution in receivership, or the receiver itself, period, end of story.

And that is absolutely crystal clear in Hudson, which the FDIC simply ignores.

National Union dealt with the question of whether a debtor to the failed financial institution which had brought a declaratory judgment claim against the receiver, was barred under Firrea. And ultimately, in that particular case, the Court actually didn't reach the decision, it simply found that the failure to file proofs of claim barred the debtor's claim.

National Union, quite honestly, Judge, is an irrelevant case on the issue before the Court. And, as I say, the answer is clear from Rosa and the later case which is Hudson. Lastly, the only comment I have to finish on is, I didn't realize we would be arguing the motion to withdraw the reference, and I'm not going to respond to the substantive

assertions.

I just want to make the observation, which I'm sure is not lost on Your Honor, that to file a motion to withdraw the reference at midnight on the night before this hearing, in a case in which you've been a party for months and months, and have filed proofs of claims and your own adversary proceeding, and now to stand up, as they do in their papers and say, Judge, it wasn't until like a week ago that the scales fell from our eyes, and we realized that, you know, the issues we asserted as Chase and the counterclaims that you asserted and the turnover proceeding, it just struck us that these are all bound up in Federal law, so let's withdraw the reference.

To me, this was the most transparent gamesmanship that I've seen in a while, and it just reflects, (a) their lack of conviction in their arguments, and, (b) an inexplicable desire to run from this Court and to ultimately bind us up in more, and more, and more delay. Thank you, Judge.

THE COURT: Thank you. All right. Well let me issue my ruling with respect to this. First, I do not find Firrea is a jurisdictional bar to the debtors' claims to property that is no longer in the hands of the FDIC as receiver, but are in the hands of JPMC. I think that's clear from the Third Circuit law, which is binding on this Court.

Hudson made it clear that Firrea only bars claims against a receiver or an institution in receivership. The FDIC

argued this same point in the Henrich case in the Ninth Circuit, arguing before the Supreme Court that Firrea is not applicable to a suit against a private party assignee of assets from FDIC.

And I'm not prepared to find that the Firrea bar, bars any claims, or any dispute over what assets were transferred. And I just don't think that, despite the FDIC's predictions, I don't think that it is going to cause institutions not to deal with the FDIC.

I think the Firrea jurisdictional bar is limited. And simply is not applicable to the turnover action where the debtor asserts that it has title to funds in the possession of JPMC.

Similarly, to the extent in the counterclaims in the JPMC adversary, the debtor is asserting a claim against JPMC to assets that the debtor claims are property of the estate, for various reasons, and I won't get into the legal theories, I think that Firrea does not bar it.

With respect to the First Filed Rule, I don't think it applies in this case, either. The two actions are not between the same parties dealing with the same claims.

The action in the D.C. Court is between the debtor and the FDIC, and involves claims the debtor has against the FDIC, which it could not bring here, because they must be brought in the D.C. Court.

The actions here involve claims against JPMC, which is not an institution in receivership. And while they may be similar, or based on the same facts, they are distinct claims against distinct parties. And, therefore, I'm not inclined, under the First Filed Rule to defer to the D.C. Court.

As much as I might wish to defer to another Court, unfortunately, I do have exclusive jurisdiction to decide what is property of the estate. If I determine that the property at issue is property of the estate, then this Court has exclusive jurisdiction over that property, and over claims, counterclaims, other claims against the estate.

If I determined it is not property of the estate, I may, in my discretion, defer to the District Court, or to any other Court to decide the countervailing claims to that property. But I think, in the first instance, I have to decide whether what the debtors are asserting is that they own the property, or whether the debtors simply assert a claim against a party.

So I'm going to deny the motion to stay the turnover action and the JPMC actions. I guess we have to then go onto what's next.

MR. CLARKE: Your Honor --

THE COURT: Yes.

MR. CLARKE: -- my name's John Clarke, I'm Mr. Califano's partner from DLA Piper, counsel for the FDIC

receiver.

THE COURT: Yes.

MR. CLARKE: The FDIC receiver believes that Your Honor's ruling implicates subject matter jurisdiction concerns and is appealable as of right. But in the alternative, the FDIC receiver respectfully requests that the Court certify this ruling for an interlocutory appeal pursuant to 1292(b), because it involves a controlling question of law as to a substantial disagreement may exist.

And we would like to take an immediate appeal of that decision to the District Court.

THE COURT: Response?

MR. CARLINSKY: Your Honor, I would think that if there is a 1292 motion being brought, it ought to be briefed. I'm just stating that there is a significant issue as to which there is disagreement doesn't make it so.

And I would respectfully ask that Your Honor setup a briefing schedule. It may be expedited, and we don't have objection to that, but let's do it right. And let's do it right, and let's do it on the papers. And my suggestion would be, if they want to file the brief, we'll take 5 days to respond, and then Your Honor could decide that issue, whether it's going -- whether the Court's going to certify the issue for immediate appeal.

MR. CLARKE: Your Honor, if I might be heard in that

regard. If it's the Court's preference to review papers on the issue we would be -- we would be happy to submit briefs on the question of whether this is a controlling question of law as to which there's a substantial ground for difference of opinion.

However, Your Honor, for reasons that have already been set forth in our reply brief in this matter, National Union, respectfully, governs the question of whether the jurisdictional apply -- the bar applies in an action that seeks to determine rights with respect to assets of the receivership.

In National Union, the Court limited Rosa very expressly.

THE COURT: Well I'm not going to hear argument. I will allow the parties, I think nothing that would prejudice the parties is going to occur, even in addressing the following motions. So I will allow the parties to brief the issue.

MR. CLARKE: Thank you, Your Honor. We would be prepared to submit a brief within 7 days, if the debtors would be willing to abide by a similar schedule.

THE COURT: All right.

MR. CARLINSKY: That sounds fine, Your Honor.

THE COURT: All right.

MR. CARLINSKY: That's reasonable.

MR. KIRPALANI: Good afternoon, Your Honor. Susheel Kirpalani, again, from Quinn, Emanuel on behalf of Washington Mutual. Your Honor, I'd like to argue our motion for

reconsideration of Your Honor's permitting JPMorgan Chase to have its motion to dismiss heard, frankly, prior to our motion for summary judgment. And as Your Honor knows, we were in the middle of drafting our opposition to JPMorgan Chase's expedited motion when the order was entered.

And I don't think that anybody's saying we sat on our rights. I think it was just a question of two days was what we needed to file our papers. I think, Your Honor, the issue comes down to a pretty simple one, and I'm not going to spend too much time going through what I know Your Honor knows from the Lexington Insurance case, which is, upon a motion to dismiss a turnover action on the basis at 542(b) is susceptible to a judicial gloss that says, a disputed contract right, or a disputed debt doesn't fall within 542(b), that those cases that deal with the issue, there must actually be a bonafide dispute, a legitimate dispute.

And what JPMorgan Chase is doing instead, is asking Your Honor to close one eye to read just the motion to dismiss and just the complaint and their spin on it, and because they say so, and because they stand up here and they say things like, Ms. Feldenstein (sic) -- Feldstein said, that, Your Honor, WMI was a holding company of a bank that was -- two banks that were regulatory deposit institutions, and, therefore, they're susceptible to all sorts of interesting Federal laws, etcetera.

Ultimately, Your Honor, there's been no fact whatsoever as to a dispute as to the debt.

And I think, what was really driving me nuts sitting through the argument, Your Honor, is, if Your Honor employs the analysis that you did in Lexington Insurance, or if you do the analysis that Judge Walsh has done in several decisions, or Judge Farnan, as well, in looking at turnover actions and whether or not they are susceptible to motion to dismiss, or whether in fact that motion to dismiss is tantamount to a motion for summary judgment.

Because you will look at the circumstances. I think Your Honor just needs to look at the single account statement that JPMorgan has been sending the debtors since the bankruptcy filing.

And if Your Honor, if I could just approach, because I think it's germane, and it's really the document, it's one piece of paper that --

THE COURT: Well is it attached to your complaint?

MR. KIRPALANI: It is attached to our motion for summary judgment. It is germane to the complaint. It is the statement that says, this is the debt that's owed, Your Honor.

And it's attached to the complaint, as well.

THE COURT: Yes. I have that.

MR. KIRPALANI: Did you have it?

THE COURT: Yes.

MR. KIRPALANI: Okay. Your Honor, just looking at page A38, which is exhibit B to Dorian Logan's affidavit, but I know it's also attached to the complaint. It says right there on the top, "Chase, deposit accounts now held by JPMorgan Chase Bank."

The statement covers the period March 1st to March 31st, 2009. The beginning balance is 3.6 billion dollars, and the ending balance is a little more than 3.6 billion dollars. This is the document, Your Honor, this is not a lease that Your Honor had in Lexington Insurance where there was really a legitimate dispute as to what the security deposit was intended to cover and not intended to cover.

Whether the landlord actually had damages claims against the debtor that it would seek to hold those deposits and not turn them over.

The only dispute, Your Honor, that anyone has raised with any legitimate --

THE COURT: Well now you're arguing your motion for summary judgment, aren't you? Let's talk about whether the standard on a motion to dismiss is the same as the standard for summary judgment. And I don't think it is.

MR. KIRPALANI: I think it's extremely close, Your Honor. And I do think that courts have said, and I can summarize those cases, Your Honor, but even Your Honor's decision in Lexington Insurance went outside and looked at --

THE COURT: I looked at the lease that was attached to the complaint.

MR. KIRPALANI: Well so if Your Honor did the same thing here, there is no dispute, Your Honor, correct?

THE COURT: All right. So now you're arguing the motion to dismiss. But let's go back to, are the standards the same? I think they're not. I think with a motion to dismiss, I only look at the complaint.

MR. KIRPALANI: Your Honor, I think Your Honor on a Rule 12(b)(6) --

THE COURT: I can, but, their motion to dismiss did not include documents outside of the record.

MR. KIRPALANI: No, it did not, Your Honor.

THE COURT: So --

MR. KIRPALANI: But it didn't include anything, other than we believe there's a dispute, Your Honor. And if Your Honor were to hold that a turnover action under 542(b), which the statute simply says it's a matured payable on demand debt, attached to our complaint is a deposit statement saying 3.7 billion dollars is on deposit from this debtor. And JPMorgan's counsel can stand up and say, Your Honor, we dispute that that money is actually owed.

And the dispute, just to be clear, is two types. One dispute is, we have setoff rights. Well we know that doesn't count. Right, Your Honor, because the statute itself says

setoff rights are part of -- it's gone up to the Supreme Court. That's part of a 542(b), so I don't think that's really relevant.

We don't have to spend a lot of time on that for the motion to dismiss. The other one is, there could be something in the way that the accounts were setup.

THE COURT: Now you're arguing the motion to dismiss, again. I want you to focus on, aren't they two different standards.

MR. KIRPALANI: I think -- well I think, Your Honor, the standard for determining whether or not our complaint satisfies a turnover action, should be limited to what the complaint says.

THE COURT: Agreed.

MR. KIRPALANI: The complaint does not deviate from the statement that there is a mature, payable on demand, deposit. And the account statements indicate that there is a mature, payable on demand, deposit.

And those statements have been sent to the debtor since the beginning. And when we tried to use our ATM card, JPMorgan Chase said, no, not for you.

THE COURT: That would be a lot of 20 dollar bills, wouldn't it.

MR. KIRPALANI: We'll take it, Your Honor. All right. So I think that ends the analysis with respect to

whether or not what they have filed can be sustained as a motion to dismiss. If Your Honor were to take any kind of credit, or give credence to any of the statements of JPMorgan Chase that the way the account was setup, which are unsworn statements of counsel in a brief, no business person, even though they've had several months to try to find that business person, and they employ every single one of them, except Dorian Logan, nobody wants to come forward and swear before Your Honor that there's actually a legitimate dispute.

There's no dispute, Your Honor. Even the proof of claim that JPMorgan Chase filed in this Court says, the tax refund payments that were paid post-petition went to WMI's account. That's one of the accounts, Your Honor, that we're talking about.

There's no dispute that this is a turnover. That's exactly what the Court -- what the Bankruptcy Code contemplated for this type of action. And just to give Your Honor some comfort, I was struggling a couple of days ago with, why is there all this disputing over whether turnover is the right statute, or whether, as Your Honor found in Lexington Insurance, the obligation to pay a contract claim.

Why is there a dispute over whether it should be under 542(b), or the others. I went back and I looked at some of the cases from the mid-eighties, as to where all of this came from.

And I think, Your Honor, and Your Honor probably knows this, because Your Honor was practicing at that time, is it's the Marathon Pipeline issue. It started there, Your Honor. And I think it's important, even though it doesn't apply here, because of course JPMorgan filed a proof of claim, 40 of them, the FDIC filed a proof of claim. JPMorgan then sued us in this Court.

There's no question that Your Honor has jurisdiction over these issues. There's no question, this is not a case where a debtor is trying to find a disputed accounts receivable, in some location out in Nevada, and say, ah-ha, we've got core jurisdiction, we're going to drag that creditor -- the account debtor, rather, in here, and we're going to try and collect and have Your Honor rule on the issue under 28 U.S.C. 157.

Your Honor, this is an adversary proceeding. There's no procedural defects with the type of proceeding we're using. This is a turnover. I think the issue's pretty straightforward, Your Honor.

THE COURT: Thank you.

MR. CLARK: Good afternoon, Your Honor, Bruce Clark for JPMorgan Chase. I'm going to try to deal with the question that Your Honor asked, and try to focus on, which is, are the standards the same or are they different?

In their brief on this issue the debtors say it's

just two sides of the same coin. I submit that is not the case, and that has been resolved fully by Your Honor, the Third Circuit, and the Seventh Circuit.

The Third Circuit in BTW decided which of three different District Court standards they would apply. One out of Hawaii, one out of Colorado, which said it's pretty much the same as summary judgment, which the debtors papers recite to you. And then another case called Lau (phonetic).

And what the BTW court did, the Third Circuit did, was say we're going to follow what the Seventh Circuit did in a case called Busik (phonetic). And the Seventh Circuit in Busik analyzed these three different cases, and they came out saying that the right standard is the Lau case.

And what they said there was, under the Lau standard, the Bankruptcy Court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. That's what you cited in the Lexington case. They went on to say, "However, the statute does not require the Court to determine the outcome of any dispute, only its presence or absence. Only a limited analysis of the claims at issue is necessary."

In the Lexington case, the plaintiff -- I sort of hesitate to tell you what happened in your own case, but the way I read it, the plaintiff came in and said, I filed a turnover complaint, I didn't say there was a dispute, therefore

that's the end of it.

And then the defendant came in and put some papers in and pointed to the lease that was attached to the complaint, and said, no, here's this issue and there's that issue. And the plaintiff came back, the debtor came back, the trustee came back and said, well now they've taken it outside a motion to dismiss, you have to treat it as a summary judgment motion.

And Your Honor said, that's not right, I can decide short of a summary judgment motion whether or not a motion to dismiss is appropriate. The trustee is wrong, and I go the other way.

I'm paraphrasing.

THE COURT: Well wasn't it --

MR. CLARK: So I'm saying is, they're two different issues.

THE COURT: -- wasn't it clear that from the complaint and the attachment to the complaint on the face of the lease there was a dispute as to the security deposit. It did not say trustee debtor gets the security deposit back in every circumstance.

MR. CLARK: I think, under the circumstances of that case, where they filed that paper with the complaint, that was among the sources you could look at in reaching the decision about which standard to apply. Just as, in this case, you can look at the papers that have been filed and the claims that

have been made, you're entirely permitted to do that. And understand what this is about.

This isn't about accounts. If, at the end of the day, we have at JPMorgan Chase 6 accounts, the debtors could care less. It's about the money. It's about the funds. And there are very substantial issues about millions of dollars, maybe all of it. Maybe all of the 3.6 billion. And you're entitled, in fact I think you're required to look at what the disputes are that have been raised by various parties in the pleadings that are before you, either directly in your Court or by way of exhibits to the papers that have been filed.

And to say that, in this midnight raid, that there was a 3.67 billion dollar transfer on paper, not a penny moved, immediately after the OTS came in and said, you folks have a liquidity problem, we're worried about your safety and soundness, then a day or two later they say, well we can't move the funds, we're going to leave them right there, but we're going to setup paper that says, we're transferring the money from one bank to the other, and then we're going to loan it back to the bank that the OTS says they're worried about.

And they come in and say, there's no dispute, there's no issue. This is the only circumstance anybody would try to say that you've got a 3.7 billion dollar issue, and you don't have to look at the facts.

THE COURT: Well, in a motion to dismiss, I am

limited to the facts as stated in the complaint, though, aren't I?

MR. CLARK: I believe you're also entitled in a turnover action to look at the materials that are available to you to determine whether or not there is a dispute. I mean, what Your Honor is positing -- suppose in the Lexington case the trustee had come in and said, I want this property, I'm entitled to it, there's no dispute about it.

I think your question assumes that would be the end of it, and I think that's not correct. I believe you are entitled to, in fact I think you must, look at the facts that are in the area that you can explore, without turning it into a motion for summary judgment. And that includes the papers filed by the FDIC. The papers filed by the debtors themselves, where they call these assets disputed assets.

THE COURT: Well if I'm going to look at any facts outside of the four corners of the complaint, don't I have to look at all of them? And doesn't that convert it to a motion for summary judgment?

MR. CLARK: No. Because the difference is between deciding whether or not there is a dispute and resolving the issue on the merits, we are not saying in moving to dismiss the turnover action, that on the merits the rights to those monies are going to be decided in that decision.

That has to be decided somewhere, we thought D.C.,

Your Honor disagrees, but it's got to be decided somewhere, but not on a turnover action.

The turnover action issue was whether or not there is a dispute, and there are so many papers before you where the debtors have admitted there's a dispute, where the FDIC has claimed the funds, it's -- even the bond holders at the bank level have put in papers saying that this had to be a fraudulent conveyance, that this had to be a violation of banking law. To take 3.7 billion out of one bank and move it to another.

THE COURT: But see, even if I go to those facts, those facts don't deal with the title which a turnover deals with. Title to property, they don't contest that the title is in the name of the debtor. There may be claims for fraudulent conveyance, or other improper actions by the debtor, but they don't even go to title.

There's not, for example, anything in the motion to dismiss to suggest that, on the face of the bank statement it's clear there's a dispute as to who is the deposit account holder.

MR. CLARK: That bank statement is one piece of paper.

THE COURT: Yes.

MR. CLARK: One piece of evidence that they're entitled to use to the extent that the laws of evidence permit

it, when the ultimate issue is to be decided. It has nothing to do with deciding whether or not a turnover action is appropriate.

What they're claiming, what they want you to decide, are issues about the funds that are in those accounts. And they want to do it by way of turnover, without the FDIC, without the receivership, just them and JPMorgan.

And they want to make it as simple as they can, that's why they went through the turnover procedure.

THE COURT: Yes.

MR. CLARK: That is not permitted in these circumstances, where you have so many disputes of such importance. And all you're deciding on the motion to dismiss is that that's the wrong procedure. You can't use the turnover procedure to do it.

And I believe that's what the law requires.

THE COURT: Well turnover procedure, you say it's simple. It does not preclude arguments regarding entitlement to that property.

MR. CLARK: Well if there is --

THE COURT: I'm not deciding by dealing with a motion to dismiss that in fact the debtor has title to that property and is entitled to it under 542. I'm only, in a motion to dismiss, to look and see if there is facially a dispute as to title.

MR. CLARK: And, Your Honor, I submit you can't conclude otherwise, when you look at what has been put before your Court in connection with these proceedings relating to those various accounts and the money in them. I mean --

THE COURT: But in a motion to dismiss --

MR. CLARK: Yes.

THE COURT: -- think I'm precluded from considering other things.

MR. CLARK: You see, I think what you're coming back to is how does the Court deal with a question on a motion to dismiss about whether or not there's a dispute? And you're saying in effect, if the plaintiff comes in and says, there is no dispute, their complaint says in a couple of places, no, there's no dispute we get the money.

THE COURT: And there is no facial dispute, then, no, I don't say they get the money, I say I deny your motion to dismiss and we'll have a full evidentiary hearing, or motion for summary judgment to decide if in fact, notwithstanding the four corners of the complaint, who has title to that property.

MR. CLARKE: I submit, Your Honor, you don't get that far when the disputes are as patent as they are here. Because if there's a dispute, there's a line a mile long of cases that say that you don't use 542, and your case is one of them.

THE COURT: But where in the depository account documentation or the complaint is the dispute evident?

MR. CLARK: It doesn't have to be just in the complaint, that's what I'm saying.

THE COURT: Where is it? Where is it?

MR. CLARK: All right. JPMC, the bank itself has filed a claim specifically to 234 million dollars in tax refunds that were put into these accounts post-petition. They are tax refunds which are property, were property of WMB and were sold to JPMC.

We have reason to believe there are millions of dollars in addition to that. That's one specific transaction, one transfer we know about.

THE COURT: All right. Let's talk about it. You filed a proof of claim that says that. But that deals, again, not with title to the deposit account. It deals with what is in that.

MR. CLARK: Which is what we're fighting about. I mean, if it were simply title to the deposit account without any funds being transferred because of title, which is not what they want --

THE COURT: Well let's talk about --

MR. CLARK: -- I mean, obviously it's the money.

THE COURT: Let me give you an example. Title to real estate is in the debtor's name, and the debtor files, you know, a turnover action because possession is in somebody else's name.

Do I dismiss that because the person in possession says, well, wait a minute, title, you know, was fraudulently conveyed to the debtor, and you can't use a turnover action to do that, you've got to look at the underlying things. Dismiss this adversary.

MR. CLARK: You would dismiss the turnover if there was a legitimate dispute along the lines you're describing.

THE COURT: But, again, on a motion to dismiss, I'm limited to what the complaint says, aren't I?

MR. CLARK: I don't believe that's true when you're talking about materials that are in the Court's files of which you can take judicial notice, which raise the disputes, the legitimate disputes to these amounts. And they are not just JPMorgan claims, they are claims that were raised by the FDIC and by the bond holders at the bank level with regard to potential fraudulent conveyance claims.

I mean, the way this money -- strike money, the money was not moved, the way the paper was moved in the days before their receivership, has got to open up a host of questions about whether or not that was valid.

About whether any transfer that can be upheld occurred. It's remarkable that --

THE COURT: But your putting it in a pleading and saying that this is what happened, is not enough.

MR. CLARK: It's --

THE COURT: Otherwise, there could never be a turnover action.

MR. CLARK: It's enough to show -- it's enough to show that there's a dispute, a legitimate dispute.

THE COURT: If that were enough, there could never be a turnover action.

MR. CLARK: Well, I mean, people have got to be able to sustain what they have in these pleadings that they put in.

THE COURT: But I'm not going to have an evidentiary hearing to determine whether you're correct, or the debtors are correct as to the source of those monies.

MR. CLARK: Nor should you. Because of the existence of the dispute, you should require them not to use Section 542 for whatever claim they have.

Because turnover only applies when there's no dispute and you can't be limited --

THE COURT: But, no, then every turnover -- there would never be a turnover. If there were no dispute the debtor would not have to file a lawsuit.

MR. CLARK: I think what Your Honor is saying is the converse of that. If they come in and they file a pleading that says there is no dispute, then they get to have a turnover action.

THE COURT: No, unless on the face of their claim there appears to be a dispute. They cannot, for example, come

in and claim title to property where it says it's in the name of the debtor and somebody else. They can't come in and say -- claim we have sole title to that property.

If on the face of their claim the dispute is evident, I think turnover is not applicable.

MR. CLARK: Your Honor, what -- I think I'm back to saying the same thing, that if in fact they plead purely, so that there is nothing that they follow up with in the complaint, they don't make a mistake and say, by the way, there's another claim over here, then they get to pursue their turnover proceeding.

I mean, in the D.C. action, in the complaint that they filed, they said they acknowledged, I think it was paragraph 168, they said, we understand that both JPMC and the FDIC have claims that they may file, that they may pursue with regard to the deposit accounts.

And, therefore, we are filing this particular section of our complaint to resolve that dispute. That's what they said in Federal Court in D.C. And what Your Honor's saying is, I just can't take any account of that.

And I don't think that's the rule.

THE COURT: In deciding whether a turnover action is appropriate.

MR. CLARK: Yes.

THE COURT: Certainly on the merits of who has actual

title to the deposit account, that is relevant.

MR. CLARK: I think it's relevant on the turnover procedure, as well. Because if it's that clear that there's a dispute here, then I think Your Honor should require them not to use a turnover procedure, but to follow other procedures.

THE COURT: All right. Did I interrupt, and did you have more?

MR. CLARK: I think, you know, I tried to only do the standards question, but, Your Honor and I, between us, got onto the merits of dismissal, as well.

THE COURT: That's all right. The other side did, as well.

MR. CLARK: Thank you.

THE COURT: Anybody else on that? Any reply? Well, let me do this, I am going to deny the motion to reconsider, because I think they are two different standards. The standard to dismiss must only look at the four corners of the complaint and attachments, while summary judgment, obviously, can consider matters outside the complaint.

So I think it is appropriate to deal with the motion to dismiss first, rather than together with the debtors' motion for summary judgment. However, I will deny the motion to dismiss the complaint, because I think that in deciding such a motion, even of a turnover action, I'm limited to the four corners of the complaint and its attachment.

And it is not evidence from this -- the complaint and the attachments that there's any dispute as to the title to the account -- excuse me, deposit accounts. Obviously, I'm not deciding a disputed issue, and that may be disputed by the filing of an answer. I think I can predict that.

But this is different from the Lexington Healthcare case, where the dispute was evident from the debtor's complaint and attachments. It is not simply enough to say there is a dispute to preclude a turnover action. Otherwise, there could never be a turnover action.

So I will, as I say, deny the motion to dismiss the complaint.

MR. ROSEN: Your Honor, if I may, can we prepare four very simple orders based upon the record and send those to opposing counsel and to the Court?

THE COURT: You may.

MR. ROSEN: Thank you.

THE COURT: I think we're done today.

MR. CARLINSKY: The one additional issue, Your Honor, is in light of the motion to dismiss being denied, do we need a schedule for the opposition on the summary judgment motion, which is currently an open motion?

THE COURT: Yes.

MR. CARLINSKY: We can work that out --

THE COURT: Why don't you work that out. I think --

yes.

MR. CARLINSKY: Yes, Your Honor.

THE COURT: And just also to let the parties know, I do have the matter of the 2004 under advisement, and I expect to issue a ruling today.

We'll stand adjourned.

(Court adjourned)

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C E R T I F I C A T I O N

I, Josette Jones, court app roved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

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JOSETTE JONES DATE

DIANA DOMAN TRANSCRIBING

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)
Debtors	:	Jointly Administered
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Plaintiff,	:	
v.	:	
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	Adv. Proc. No. 09-50551 (MFW)
Defendants for all claims,	:	**Oral Argument Requested**
-and-	:	
FEDERAL DEPOSIT INSURANCE CORPORATION,	:	
Additional Defendant for Interpleader Claim	:	

(Caption continued on next page)

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

WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP., *Plaintiffs,* v. JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, *Defendant.*	:	Adv. Proc. No. 09-50934 (MFW) **Oral Argument Requested**

JPMORGAN CHASE BANK, N.A.'S STATEMENT IN SUPPORT OF APPEAL UNDER THE COLLATERAL ORDER DOCTRINE OR, IN THE ALTERNATIVE, BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO APPEAL

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Dated: July 10, 2009

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OTHER AUTHORITIES

Pursuant to 28 U.S.C. § 158(a)(1), Appellant JPMorgan Chase Bank, N.A. ("JPMC") submits this statement in support of its appeal under the collateral order doctrine or, in the alternative, for leave to appeal under 28 U.S.C. § 158(a)(3) and Federal Rule of Bankruptcy Procedure 8003 from the orders identified in JPMC's Notice of Appeal ("Orders").[2]

INTRODUCTION

This appeal arises from the single largest bank failure in United States history and the efforts of the Federal Deposit Insurance Corporation (the "FDIC") as receiver to address that bank failure in accordance with the powers granted to it by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA"), through enforcement of a jurisdictional bar enacted by Congress, codified at Sections 1821(d)(13)(D)(i) and (ii) of Title 12, to ensure that failed banks are resolved efficiently, effectively, finally, and without the burden of

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[2] The Orders were issued in connection with two adversary proceedings: *JPMorgan Chase Bank, National Association* v. *Washington Mutual, Inc.*, Adv. Pro. No. 09-50551 (MFW) (the "JPMC Adversary Proceeding") and *Washington Mutual, Inc.* v. *JPMorgan Chase Bank, National Association*, Adv. Pro. No. 09-50934 (MFW) (the "Turnover Proceeding") (collectively, the "Adversary Proceedings"), pending in the Chapter 11 cases jointly administered as *In re Washington Mutual, Inc.*, Case No. 08-12229 (MFW). JPMC is appealing the orders issued by the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on June 24, 2009, and entered on the docket on July 6, 2009, (a) denying JPMC's motion to dismiss the Debtors' turnover action, and (b) denying JPMC's and the FDIC's motions to stay JPMC's Adversary Proceeding and to stay and/or dismiss Debtors' Turnover Proceeding, to the extent that those denials were based on the Bankruptcy Court's conclusion that the FIRREA jurisdictional bar does not apply to bar those proceedings. The debtors in these cases are WMB's prior owners—the holding company Washington Mutual, Inc. ("WMI") and its subsidiary Washington Mutual Investment Corp. (collectively, the "Debtors"). The Orders, as well as the official transcript of the June 24, 2009 hearing ("Tr."), are attached to JPMC's Motion for Leave to Appeal.

the duplicative litigation and collateral attacks that are at issue in these Adversary Proceedings.

On September 25, 2008, the FDIC was appointed receiver for Washington Mutual Bank ("WMB"). In accordance with its powers as receiver, the FDIC sold substantially all of the assets and significant liabilities of WMB to JPMC. The FDIC also instituted the FIRREA-mandated claims process—the exclusive process for resolution of claims involving WMB's assets, the acts of WMB, and the acts of the FDIC as receiver for the failed bank. Debtors (the former owners of WMB) initially brought their claims relating to the FDIC receivership as part of this claims process. The FDIC disallowed Debtors' claims and Debtors appealed the FDIC's disallowance in an action they commenced against the FDIC in the U.S. District Court for the District of Columbia (the "D.C. District Court"). *Washington Mutual Inc.* v. *FDIC*, No. 1:09-cv-00533 (RMC) (D.D.C.) (the "D.C. Action"). The D.C. District Court was the only court in the country (other than the district court in WMB's principal place of business) that could hear Debtors' appeal because FIRREA specifically divests all other courts of subject matter jurisdiction to hear claims seeking a determination of rights with respect to failed bank assets or relating to any act or omission of the failed bank or the FDIC as its receiver.

Nonetheless, Debtors reasserted their receivership claims as claims and counterclaims in the Adversary Proceedings. This appeal concerns the ability of Debtors, the former owners of WMB, who have availed themselves of the FIRREA claims process, to challenge the acts of the receiver, make claims to assets that were seized by the receiver, and seek review of their FIRREA claims in parallel bankruptcy proceedings despite the jurisdictional bar imposed by FIRREA. The FDIC and JPMC moved to stay

or dismiss Debtors' claims before the Bankruptcy Court, as barred by FIRREA. At a hearing on June 24, 2009, the Bankruptcy Court denied these motions on the ground that FIRREA's jurisdictional bar did not divest it of jurisdiction. The Bankruptcy Court incorrectly ruled, against both the FDIC and JPMC, that it has jurisdiction to adjudicate claims by Debtors against JPMC (a) as to the adequacy of the terms on which the FDIC disposed of receivership assets to JPMC, and (b) as to ownership of specific assets (i) that Debtors have already claimed in the FDIC's receivership of WMB, (ii) where Debtors' claims to those assets were disallowed by the receiver, and (iii) where Debtors are simultaneously seeking to overturn the disallowance of their claims to these assets in an action they properly commenced in the D.C. District Court, in accordance with FIRREA's claims process.

The Bankruptcy Court's unprecedented ruling effectively eviscerates the "Limitation on judicial review" that Congress imposed in Section 1821(d)(13)(D) of FIRREA. The Bankruptcy Court's determination that it has the authority to adjudicate whether the terms of the FDIC's sale of receivership assets to JPMC was somehow inadequate is squarely at odds with FIRREA's express prohibition against judicial review outside of the receivership claims process of "any claim relating to any act or omission of . . . the [FDIC] as receiver." 12 U.S.C. § 1821(d)(13)(D)(ii). And the Court's ruling that it has jurisdiction to consider Debtors' claims to ownership of assets that are already the subject of identical claims by Debtors in the receivership claims process runs headlong into FIRREA's prohibition against review of "any claim or action . . . seeking a determination of rights with respect to the assets of any depository institution for which the [FDIC] has been appointed receiver."

That Debtors pleaded their claims against JPMC as the acquirer of assets from the FDIC as receiver does not change this result. Debtors' claims against JPMC are dependent entirely upon a determination of whether, as between the FDIC and Debtors, the claimed assets were the property of the FDIC's receivership of WMB. JPMC is the purchaser of assets from the FDIC. JPMC has no more and no less than what the FDIC seized and sold to it. An attack on JPMC's ownership of these assets is thus a thinly veiled attack on whether the assets were seized by the FDIC as receiver of WMB. The Orders effectively authorize a party whose claims have been disallowed by the FDIC and who has sued the FDIC under FIRREA to nonetheless mount a collateral attack on the same transaction by seeking recovery of the assets seized and sold by the FDIC from the third-party purchaser rather than the seller.

FIRREA divests the Bankruptcy Court of jurisdiction to entertain these claims, and both Adversary Proceedings should have been stayed, dismissed or transferred to the D.C. District Court, where jurisdiction to determine these matters exclusively exists.

QUESTIONS PRESENTED

The Bankruptcy Court's Orders present two important controlling questions of law that are issues of first impression in the Third Circuit, the proper resolution of either of which requires reversal of the Bankruptcy Court:

> 1. Does FIRREA's jurisdictional bar preclude the Bankruptcy Court from exercising subject matter jurisdiction over claims regarding the scope, validity or avoidability of a sale by and actions of the receiver for a failed depository institution under Title 12 of the U.S. Code, as against a purchaser from the FDIC?

2. Does FIRREA bar these Debtors, who have availed themselves of the FIRREA claims process, whose claims have been disallowed, and when their appeal of that disallowance is pending before the D.C. District Court, from bringing separate claims, this time as against a purchaser from the FDIC, to collaterally attack in the Bankruptcy Court the disallowance of their claims?

SUMMARY OF ARGUMENT

1. The answer to both of the questions presented is yes. FIRREA divests the Bankruptcy Court of jurisdiction to hear these claims.

2. The Bankruptcy Court's Orders contradict the plain language of FIRREA. The Orders contradict the most recent and relevant Court of Appeals opinion—which squarely rejected claims against a third-party purchaser from the FDIC.

3. The Orders also wrongly accept that a claim against a purchaser of assets from the FDIC can stand where a claim against the FDIC would not be permitted. Whether asserted against the FDIC or JPMC, all of Debtors' claims are subject to FIRREA's jurisdictional bar as they seek a substantive judicial determination of rights in WMB assets or they "relat[e] to an act" of the FDIC as receiver for WMB. 12 U.S.C. § 1821(d)(13)(D).

4. For these reasons, JPMC's appeal seeks as relief reversal of the Orders, dismissal of Debtors' Turnover Proceeding for lack of subject matter jurisdiction, and a stay of JPMC's Adversary Proceeding.

5. JPMC appeals the Bankruptcy Court's Orders on two bases. *First*, the Orders are immediately appealable under the collateral order doctrine because they conclusively determined the disputed question of jurisdiction, which is an important issue completely separate from the merits of the action, and are effectively unreviewable on

appeal from a final judgment. *Second*, even if JPMC could not appeal under the collateral order doctrine, leave to appeal the Orders should be granted because a controlling question of law is involved for which there is substantial ground for difference of opinion, and an immediate appeal would materially advance the ultimate termination of the Adversary Proceedings below.[3]

BACKGROUND AND NATURE AND STAGE OF PROCEEDINGS

A. The Parties

1. The FDIC

The FDIC is the agency of the United States government based in Washington, D.C. that is charged by law with administering the Federal Deposit Insurance Act and the federal bank deposit insurance system. (A72-A73, D.C. Action Compl. ¶ 2.)[4] Under FIRREA, the FDIC is authorized to act as receiver of failed banking

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[3] On June 23, 2009, JPMC filed a Motion for Withdrawal of the Reference of the Adversary Proceedings as well as a proposed Motion to Transfer Venue of the Adversary Proceedings to the D.C. District Court. If granted, these motions would effectively transfer Debtors' claims in the adversary proceedings to the same assets already at issue in Debtors' D.C. Action to the D.C. District Court—the one court all parties agree has jurisdiction to adjudicate ownership of those assets.

[4] JPMC respectfully requests that the Court take judicial notice of the contents of the documents contained in the attached Appendix in Support Appeal Under the Collateral Order Doctrine and the Motion of JPMorgan Chase Bank, National Association, in the Alternative, for Leave to Appeal (the "Appendix"), consisting of pleadings and related documents filed in the D.C. Action and the FDIC receivership process. *See Southmark Prime Plus, L.P.* v. *Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991) (noting that pursuant to Federal Rule of Evidence 201(b)(2), "the Court can take judicial notice of the contents of court records from another jurisdiction," including the "briefs and petitions of the parties."). *See also United States ex rel. Geisler* v. *Walters*, 510 F.2d 887, 890 n.4 (3d Cir. 1975) (stating that the court "of course" takes judicial notice of the briefs and petitions in other actions); *Lopez* v. *Howard*, No. 06-2361, 2007 WL 708989, *1 (3d Cir. Mar. 9, 2007) (taking judicial notice of court records as to litigation events). Parenthetical page references bearing the prefix "A__" are to the indicated pages of the Appendix.

institutions and take all steps necessary to address the issues raised by the failure of a particular institution. The FDIC is given the exclusive power to administer the claims process set forth in FIRREA for resolving claims against, or ownership of and other rights in the assets of, a failed banking institution, as well as all other claims "relating to" the FDIC's acts or omissions as receiver of a failed institution. 12 U.S.C. § 1821(d)(6), (d)(13)(D). In addition, the FDIC alone has the power to sell some or all of a failed institution's assets to private third parties. 12 U.S.C. § 1821(d)(2)(G).

2. WMI

WMI was a savings and loan holding company incorporated in Washington State and the former owner of WMB and WMB's subsidiaries. (A73, D.C. Action Compl. ¶ 3.) As the parent of WMB, WMI was subject to the directives of federal banking regulators and responsible for the safety and soundness of WMB. On September 25, 2008, WMB became the largest bank in U.S. history to fail, putting at risk the funds of over 13 million depositors and the jobs of over 43,000 employees. (A118, JPMC Adv. Compl. ¶¶ 25-26, 29.) The day after the FDIC's seizure of WMB, Debtors filed their voluntary petitions with the Bankruptcy Court.

3. JPMC

JPMC is a national banking association organized under the laws of the United States with its principal place of business in Columbus, Ohio. (A351-A352, Debtors' Counterclaims ("Counterclaims" or "Cntrclm.") ¶ 10.) On September 25, 2008, JPMC purchased from the FDIC substantially all of the assets of WMB pursuant to a Purchase and Assumption Agreement, Whole Bank ("P&A Agreement") (A1-A44) in a

transaction that imposed no costs on the FDIC's deposit insurance fund or U.S. taxpayers, and realized more than $1.8 billion for the receivership estate.

B. FIRREA

FIRREA and the powers that legislation vests in the FDIC are at the core of this appeal. Congress enacted FIRREA in 1989 in response to the savings and loan crisis. FIRREA is codified in Title 12 of the U.S. Code. *See* H.R. Rep. No. 101-54(I) (1989), *reprinted in* 1989 U.S.C.C.A.N. 86 (the "Congressional Report"). As the Third Circuit has explained, "FIRREA was in fact passed to give the [FDIC acting as] receiver *extraordinary* powers" to deal with the crisis posed by failure after failure of savings and loan institutions nationwide. *Nat'l Union Fire Ins. Co.* v. *City Sav., F.S.B.*, 28 F.3d 376, 388 (3d Cir. 1994) (emphasis added). The purpose of FIRREA was to enhance the powers of the FDIC and to make the resolution of failed financial institutions more efficient and less costly. *See* Congressional Report at 86, 97, 103-04. Holding companies of regulated thrifts, banks and other depository institutions—such as WMI—accept the risk that their interests in their banking subsidiaries will be forfeited in the event of seizure by the Office of Thrift Supervision ("OTS") and the FDIC. That risk and the regulatory restrictions that ownership of insured deposit-taking institutions entails is the very predicate for owning banking subsidiaries whose businesses benefit from the federal deposit insurance program.

FIRREA also sets out the exclusive mechanism for adjudicating claims against or involving assets of a failed institution or relating to the acts of the failed institution or the receiver. The FIRREA jurisdictional bar provides in full:

(D) Limitation on judicial review

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> > (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
> >
> > (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D).

Under 12 U.S.C. § 1821(d)(6)(A), the only court in which a claimant may seek review of its claims is "the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim)." Claimants may seek such judicial review only after the claims have been first disallowed by the FDIC. *Id.* The decision by Congress to limit the number of courts to which a claimant could seek review is a key aspect of the regulatory scheme and is intended to protect the receivership process so as to enable the FDIC to carry out its duties in resolving failed banks quickly, efficiently and with finality and, in so doing, protect depositors, the deposit insurance fund, and the broader economy from harm. *See* Congressional Report at 86, 103-04.

C. WMI Fails to Operate WMB in a "Safe and Sound" Manner and a Receiver is Appointed

Throughout 2008, the OTS developed mounting concerns over the ability of WMI to operate WMB in a safe and sound manner. (A350, A353, A355-A356, Cntrclm. ¶¶ 2, 19, 23-25.) On September 25, 2008, the OTS determined that WMB was "in an unsafe and unsound condition" and closed WMB. (*See* A355-356 ¶ 25 (citing

A45-A47, OTS Order 2008-36 at 2).) That same day, OTS issued an order directing the FDIC to take possession of WMB in a receivership proceeding under 12 U.S.C. § 1821. (A350-A351 ¶ 4.) Upon its appointment as receiver, the FDIC succeeded to "all rights, titles, powers, and privileges" of any "stockholder" or "depositor" of WMB with respect to WMB or any of WMB's assets. 12 U.S.C. § 1821(d)(2)(A).

D. The FDIC and JPMC Execute the P&A Agreement

Also on September 25, 2008, JPMC and the FDIC entered into the P&A Agreement, by which the FDIC transferred its interests in WMB's assets to JPMC. (A1-A44, P&A Agreement.) Specifically, pursuant to Section 3.1 of the P&A Agreement, the FDIC sold to JPMC "all right, title, and interest of the Receiver [*i.e.*, the FDIC] in and to all of the assets . . . of [WMB] whether or not reflected on the books of [WMB] as of Bank Closing." (A13, § 3.1.) In addition to paying more than $1.8 billion in cash, JPMC assumed billions of dollars in former WMB liabilities, at no cost to the FDIC. JPMC also assumed the financial risks associated with the assets purchased, the long-term value of which may not be determinable for some time, including mortgage assets that have been at the center of the recent financial crisis. In stark contrast to other bank failures, the FDIC's sale of the assets and liabilities of WMB stands as a hugely successful transaction for the government and the taxpayers because it involved no financial assistance from, or cost to, the FDIC's Deposit Insurance Fund, the United States Treasury or any other agency, and no loss to depositors or interruption in their access to their deposit funds.

E. WMI Asserts Claims Pursuant to the Exclusive FIRREA Claims Process

Pursuant to FIRREA, following the seizure of WMB and the sale of WMB's assets to JPMC, the FDIC established a claims process for the administrative

review of "any claim against a depository institution for which the Corporation is receiver." 12 U.S.C. § 1821(d)(6)(A)(i). On December 30, 2008, Debtors availed themselves of that exclusive process by filing a proof of claim with the FDIC (A48-A70), asserting billions of dollars worth of claims to over a dozen categories of WMB assets seized in the receivership, including claims of ownership to or to recover the very assets put at issue by Debtors in the D.C. Action and over which the Bankruptcy Court, by the Orders from which this appeal is taken, has now found that it (rather than the D.C. District Court) has jurisdiction.[5]

F. The Receiver's Disallowance and Debtors' D.C. Appeal

On January 23, 2009, the FDIC, as receiver, disallowed all of WMI's claims, including its purported "Deposit Claim." (A71, FDIC Notice of Disallowance of Claim.) Thereafter, on March 20, 2009, WMI filed the D.C. Action (A72-A110, D.C. Action Compl.), specifically alleging that its claims arose under the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811 *et seq.*, and that 12 U.S.C. § 1821(d)(6) as amended by FIRREA conferred both subject matter jurisdiction and proper venue upon the D.C. District Court.[6] (A73, *id.* ¶¶ 5-6.)

In its appeal to the D.C. District Court, WMI re-asserts nearly verbatim each of the claims originally asserted in its December 30, 2008 proof of claim filed with the FDIC, once again claiming ownership of billions of dollars of assets seized by the

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[5] A list and a description of the Debtors' claims filed in the D.C. Action and asserted in the Adversary Proceedings, attached as Exhibit A, demonstrates that they are in substance the same claims.

[6] Section 1821(d)(6)(A) of Title 12 provides that a claimant whose claims have been disallowed by the FDIC "may request administrative review of the claim . . . ."

receiver and demanding either their return or compensation. (*Compare* A48-A70, FDIC Proof of Claim, *with* A72-A110, D.C. Action Compl.) The D.C. Action also asserts additional new claims against the FDIC, such as a claim for conversion, a Fifth Amendment takings claim, and a claim for damages allegedly incurred because the FDIC sold WMB's assets to JPMC for less than fair value. (A95-A97, D.C. Action Compl. ¶¶ 81-95.)

On June 11, 2009, the FDIC moved to dismiss the newly asserted claims made by WMI in the D.C. Action for lack of subject matter jurisdiction under 12 U.S.C. § 1821(d)(13)(D) because WMI failed to previously raise these claims in FIRREA's exclusive claims process. However, the FDIC has not moved to dismiss WMI's appeal of the FDIC's disallowance of WMI's claims to various WMB assets, which FIRREA provides are subject to *de novo* review by the D.C. District Court. 12 U.S.C. § 1821(d)(6)(A).

On March 30, 2009, JPMC moved to intervene as a defendant in WMI's D.C. Action in order to protect its interests in the assets put at issue in WMI's complaint. On April 30, 2009, the FDIC notified the D.C. District Court of its support of JPMC's motion to intervene as of right, stating its view that "many of the factual and legal issues raised by the complaint in this action may implicate JPMC's interests under the [P&A Agreement]." (A199-A201, FDIC Resp. in Supp. of JPMC Mot. to Intervene.)

WMI not only had failed to name JPMC in the D.C. Action initially but also opposed JPMC's intervention, specifically urging the D.C. Court to take a broad reading of the jurisdictional bar provision of FIRREA, 12 U.S.C. § 1821(d)(13)(D), drawing special attention to its directive that "no court shall have jurisdiction over . . .

any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver." (A220-A221, WMI Opp'n to JPMC Mot. to Intervene.) The District Court has not yet ruled on JPMC's motion to intervene.[7]

G. WMI's Bankruptcy and Duplicative Claims Against JPMC

Following the OTS's seizure of WMB, WMI filed a voluntary petition for Chapter 11 bankruptcy on September 26, 2008. WMI subsequently listed billions of dollars of assets on its schedules of purported debtor property, notwithstanding that such assets were (i) identified by the FDIC to JPMC as assets of WMB, (ii) seized by the FDIC, (iii) sold by the FDIC to JPMC under the P&A Agreement on September 25, 2008, and (iv) the subject of the FDIC's disallowance of WMI's proof of claim and (v) also the subject of Debtors' claims in the D.C. Action seeking to overturn the disallowance and assert ownership of the assets. On March 24, 2009, the week after WMI filed the D.C. Action, JPMC commenced its Adversary Proceeding against WMI in order to protect its interests in the assets put at issue by Debtors in the D.C. Action and to protect against possibly inconsistent rulings. (A111-A177, JPMC Adv. Pro. Compl.)

As a threshold matter, with respect to the assets at issue in the D.C. Action filed by WMI, JPMC specifically asked the Bankruptcy Court for the following relief: "a declaratory judgment determining that Debtors must proceed with any claim to assert ownership of or interest in [the particular asset category] through the District Court Action it chose to commence." (*E.g.*, A162, *id.* ¶ 183.) Alternatively, to the extent the

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[7] On June 3, 2009, several institutional holders of senior notes issued by WMB also moved to intervene as defendants in the D.C. Action. Their motions to intervene are also pending.

D.C. Action is not dispositive, JPMC asked the Bankruptcy Court to reject WMI's claim to ownership of any assets sold to JPMC by the FDIC. (*E.g.*, *id.*)

Debtors' response to JPMC's Adversary Proceeding seeking to send the dispute back to the D.C. District Court (where the appeal of the disallowance is properly pending) was two-fold. *First*, WMI filed its Answer and Counterclaims in JPMC's Adversary Proceeding, all of which either duplicate or else directly relate to claims already on appeal in the D.C. Action. (*See* Exhibit A.) *Second*, Debtors filed a purported turnover action in the Bankruptcy Court against JPMC apparently to try to separately adjudicate issues relating to the disputed intercompany accounts that Debtors contend represent nearly $4 billion in supposed "deposit liabilities" assumed by JPMC under the P&A Agreement and already at issue in Debtors' pending "Deposit Claim."[8] (*Compare* A178-A198, Turnover Compl. *with* A87-A89, D.C. Action Compl. ¶¶ 47-50.) Since the "Deposit Claim" has already been disallowed by the FDIC and is on appeal in the D.C. Action, it is that Court that has exclusive jurisdiction to determine these issues. On May 13, 2009, JPMC moved to dismiss Debtors' purported Turnover Action, arguing both that Debtors had failed to state a claim for turnover as a matter of law in light of the pending disputes over the disputed accounts, and "for lack of subject matter jurisdiction in this [Bankruptcy] Court to the extent the Disputed Accounts are at issue in the D.C. Action or subject to the receivership process." (A251, JPMC Open. Br. in Supp. of Mot. to Dismiss at 11 n.3.) As JPMC explained:

> The procedures set forth in Title 12 of the United States Code govern "any claim or action for payment from, or any action

[8] JPMC has disputed the extent to which these accounts were or are deposit liabilities at all and, if they are, who has rights to any funds on deposit.

> seeking a determination of rights with respect to, the assets of any" failed depository institution or "any claim relating to any act or omission of" either a failed institution or the FDIC as its receiver. 12 U.S.C. §§ 1812(d)(13)(D)(i), (ii). This jurisdictional bar operates in actions against a bank purchasing assets out of the receivership process because, to "permit claimants to avoid [the jurisdictional bar] by bringing claims against the assuming bank . . . would encourage the very litigation that FIRREA sought to avoid." *Village of Oakwood* v. *State Bank & Tr. Co.*, 539 F.3d 373, 386 (6th Cir. 2008).

(*Id.*)

On June 1, 2009, the FDIC as receiver filed two motions challenging the Bankruptcy Court's subject matter jurisdiction to hear the claims raised in both Adversary Proceedings. JPMC separately filed its own motion to stay the Turnover Action, adopting in full and incorporating by reference the arguments set forth by the FDIC challenging the Bankruptcy Court's jurisdiction in light of the FIRREA jurisdictional bar.

With respect to Debtors' turnover proceeding, the motions to stay or, in the alternative, to dismiss, were based on the plain language of FIRREA. The FDIC moved on the basis that FIRREA "provides that 'no court shall have jurisdiction over . . . any claim or action for payment from, or any action seeking a determination of rights with respect to the assets of' any failed financial institution or over 'any claim relating to any act or omission of such institution or the Corporation as receiver.'" (A418, FDIC Mot. to Stay or Dismiss, at 5 (quoting 12 U.S.C. § 1821(d)(13)(D)). In addition to the violation of both prongs of FIRREA's jurisdictional bar, the FDIC objected to the Turnover Action as potentially compromising the FDIC-Receiver's rights under Section 9.5 of the P&A Agreement, which grants the FDIC discretion to direct JPMC to withhold any deposit balance. (A421-A422, *id.*)

The FDIC agreed with JPMC that "it is of no moment that the adversary complaint was filed against JPMC and not the FDIC-Receiver" in light of the Sixth Circuit's 2008 decision in *Village of Oakwood*, which expressly "considered and rejected the argument that claims against the assuming bank were not "claims against a depository institution for which the [FDIC was] receiver," concluding that "[t]he problem with this novel argument is that all of their claims against [Purchasing] Bank are directly related to acts or omissions of the FDIC as receiver of [Failed Bank]." (A419-A420, FDIC Mem. at 6-7 (quoting *Village of Oakwood*).) As both the FDIC and JPMC explained, FIRREA presents a particularly insurmountable bar here because Debtors had availed themselves of the right to review by the D.C. District Court. As specifically explained in the context of the deposit claim:

> [Debtors] already raised an issue administratively for the deposit accounts and they've challenged that in the DC action. At this point in time, their claim to those deposit accounts has been disallowed. They have no claim for those deposit accounts, unless and until they get the determination of the FDIC overruled in the District Court of D.C. Because otherwise you would be saying the provisions of FIRREA have no impact whatsoever.

(Tr. 25:2-9; *see also* Tr. 45:11-47:8.)

The FDIC also filed a motion to stay JPMC's Adversary Proceeding, including Debtors' counterclaims, in light of FIRREA's jurisdictional bar. The FDIC noted in that motion that "JPMC's complaint seeks declaratory relief from this Court that simply determines that the disputed claims to ownership should be decided by the District Court presiding over the Debtors' action against the FDIC-Receiver," while also observing that "Debtors' recently filed counterclaims not only challenge the entire P&A Agreement as a fraudulent transfer, but also assert a number of claims against JPMC that

the Debtors already have asserted against the FDIC-Receiver in their district court action." (A407, Mem. of Law in Support of Mot. of FDIC to Stay, at 9.) As such, the FDIC concluded that "[w]ithout question, in both proceedings the parties are seeking a 'determination of rights with respect to assets' of WMB," and their claims "relat[e] to any act or omission of such institution or the [FDIC] as receiver." (A408, *id.* at 10.)

ARGUMENT

At a hearing held on June 24, 2009, the Bankruptcy Court issued its rulings orally, from the bench at the conclusion of arguments, holding that:

> First, I do not find FIRREA is a jurisdictional bar to the debtors' claims to property that is no longer in the hands of the FDIC as receiver, but are in the hands of JPMC. I think that's clear from the Third Circuit law, which is binding on this Court.
>
> *Hudson*[*United Bank* v. *Chase Manhattan Bank of Connecticut, N.A.*] made it clear that FIRREA only bars claims against a receiver or an institution in receivership. The FDIC argued this same point in the *Henrich* case in the Ninth Circuit, arguing before the Supreme Court that FIRREA is not applicable to a suit against a private party assignee of assets from FDIC.
>
> And I'm not prepared to find that the FIRREA bar, bars any claims, or any dispute over what assets were transferred. And I just don't think that, despite the FDIC's predictions, I don't think that it is going to cause institutions not to deal with the FDIC.
>
> I think the FIRREA jurisdictional bar is limited. And simply is not applicable to the turnover action where the debtor asserts that it has title to funds in the possession of JPMC.
>
> Similarly to the extent in the counterclaims in the JPMC adversary, the debtor is asserting a claim against JPMC to assets that the debtor claims are property of the estate, for various reasons, and I won't get into the legal theories, I think that FIRREA does not bar it.

(Tr. 93:19 – 94:18.)

JPMC appeals the denial of its motions. To the extent the Court determines that JPMC cannot appeal under the collateral order doctrine, JPMC respectfully requests that the Court certify the "Questions Presented," raised above, *supra* pp. 4-5, for interlocutory appeal.

I. THE ORDERS ARE IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

The Orders are immediately appealable under the collateral order doctrine.[9] The collateral order doctrine "relaxes the strict standard of finality by permitting us to entertain appeals from certain orders that would not otherwise be appealable final decisions." *Martin* v. *Brown*, 63 F.3d 1252, 1258 (3d Cir. 1995). As the Third Circuit has explained:

> For an order to be appealable under [the] collateral order doctrine, it must satisfy a three-pronged test:

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[9] The Court could also find that the Orders are appealable as of right as final orders. 28 U.S.C. § 158(a). The Third Circuit determines whether a bankruptcy order is final by "pragmatically[] looking at the effect of the [lower] court's ruling.'" *In re Brown*, 916 F.2d 120, 123 (3d Cir. 1990) (quoting *In re Christian*, 804 F.2d 46, 47-48 (3d Cir. 1986)); *In re B.S. Livingston & Co.*, 186 B.R. 841, 849 (D.N.J. 1995) (same). Applying this required "pragmatic" approach, district courts have found that where, as here, a "Bankruptcy Court's order den[ied] Appellants' challenge to its jurisdiction[, that order] was final under 28 U.S.C. § 158(a) and that this [District] Court has jurisdiction over the appeal." *Medford Village E. Assocs., LLC* v. *Medford Crossings N. LLC*, Civ. No. 08-4803, 2009 WL 1687165, at *4 (D.N.J. June 15, 2009); *In re B.S. Livingston*, 186 B.R. at 849-50. *But see In re Natale*, 295 F.3d 375, 380 (3d Cir. 2002) ("[I]n assessing the finality of a bankruptcy court order adjudicating a specific adversary proceeding, we apply the same concepts of appealability as those used in general civil litigation.") (quoting *In re White Beauty View, Inc.*, 841 F.2d 524, 526 (3d Cir. 1988)). Indeed, as the court in *B.S. Livingston* explained, the Third Circuit's pragmatic "rationale is particularly apt" where, as here, a Bankruptcy Court has rejected a challenge to its subject matter jurisdiction.

> First, the order must "conclusively determine the disputed question." Second, the order must "resolve an important issue completely separate from the merits of the action." Third and finally, the order must be "effectively unreviewable on appeal from a final judgment."

Praxis Props., Inc. v. *Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 54 (3d Cir. 1991) (permitting immediate appeal pursuant to collateral order doctrine of denial of FDIC motion for a stay pursuant to FIRREA) (quoting *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 276 (1988)) (citations omitted in original).

A. The Bankruptcy Court Orders Conclusively Determined the Jurisdictional Issue

The Orders satisfy the conclusiveness prong of the collateral order doctrine, which distinguishes between "two types of orders: those that are 'inherently tentative' and those that, 'although technically amendable, are made with the expectation that they will be the final word on the subject addressed.'" *Praxis*, 947 F.2d at 54-55 (quoting *Gulfstream Aerospace*, 485 U.S. at 277); *see also Martin*, 63 F.3d at 1259 (conclusiveness prong concerns whether "[any] further consideration [of the issue] is contemplated by the district court"). Here, the Bankruptcy Court's Orders rejecting the FDIC's and JPMC's challenge to its subject matter jurisdiction were intended to be the final word on the issues presented.

According to the Bankruptcy Court, it was "clear" that the FIRREA jurisdictional bar "simply is not applicable" to the Adversary Proceedings below to the extent the claims relate to assets sold by the FDIC to JPMC. (Tr. 93:19-23.) Nothing in the Bankruptcy Court's ruling indicates or even suggests that "[any] further consideration [of the issue] is contemplated by the district court." *Martin*, 63 F.3d at 1259. To the contrary, the Bankruptcy Court's rulings rejected in their entirety the arguments

concerning FIRREA presented by both the FDIC and JPMC, making clear that the issue of the jurisdictional bar's applicability to the proceedings below was "for all intents and purposes finally resolved." *Praxis*, 947 F.2d at 56. Borrowing from the Third Circuit's reasoning in *Praxis*:

> We can perceive of no circumstances under which the [lower] court would revisit the legal question that [the parties] now appeal[] to this court. Because the [lower] court undoubtedly expected its order . . . to resolve forever [the question of subject matter jurisdiction in light of the FIRREA bar], we conclude that the "conclusiveness" prong of the collateral order doctrine is satisfied.

Id.

B. The Scope of the FIRREA Jurisdictional Bar is an Important Issue

The Orders also meet the "important issue" prong of the collateral order doctrine because, "completely separate from the merits," the Orders raise issues that "are important in a jurisprudential sense," *Nemours Found.* v. *Manganaro Corp.*, 878 F.2d 98, 100 (3d Cir. 1989), because they "present[] . . . serious and unsettled question[s]," *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982) (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949)). The Third Circuit's collateral order analysis in *Praxis*—which concerned whether FIRREA obligates a district court to "grant a receiver's request for a 90-day stay," or whether such a stay is "discretionary"—is informative here. *Praxis*, 947 F.2d at 56. In accepting the appeal under the collateral order doctrine, the *Praxis* court focused on the "serious and unsettled question[s]" regarding application of FIRREA and the obvious importance of the FIRREA framework to protecting the national economy:

> Congress has emphasized the importance of [the receiver's] duties in reestablishing a firm foundation under the thrift

> industry. In so doing, Congress also recognized that [the receiver] may find litigation stays necessary tools to facilitate fulfillment of that statutory mandate. Moreover, there is widespread public concern about the costs—including legal costs—of administering the thrift industry recovery program. With the district courts split and [the receiver's] performance of its duties so vital to the economy, we conclude that this appeal presents an issue that is "important enough in a jurisprudential sense to require an immediate interlocutory appeal."

Id. (quoting *Nemours*, 878 F.2d at 101).

The Orders at issue here are the first to permit a party whose claims have been disallowed by the FDIC and who has sued the FDIC as part of the FIRREA claims process to proceed with a collateral attack on the same transaction to seek recovery of assets sold by the FDIC from the purchaser rather than the seller. No reported decision has addressed such a situation or permitted a litigant to so circumvent or disregard the FIRREA claims process. As a result of the Orders, duplicative, parallel proceedings raising the same issues regarding hundreds of billions of dollars worth of assets seized and sold by the FDIC are pending in two different courts. The duplicative proceedings not only may result in inconsistent judgments, but they also have effectively granted WMI an alternative avenue of appeal of the FDIC's disallowance of their claims, notwithstanding Congress' clear intent to the contrary. 12 U.S.C. § 1821(d)(6)(A)(ii).

As a result, this appeal manifestly presents an issue that is "important enough in a jurisprudential sense to require an immediate interlocutory appeal." *Nemours*, 878 F.2d at 101. While this would be true at any time, this conclusion is all the more obvious in light of the fact that over fifty banks have failed in just the last six months—twelve in just the two weeks that have passed since the Orders issued. The Orders' limited (and erroneous) application of FIRREA will likely have a substantial

impact on the FDIC's ability to manage through this unprecedented wave of bank failures.

C. The Orders Can Be Reviewed Completely Separate from the Merits of the Adversary Proceedings

The "separateness" requirement of the collateral order doctrine is also met here. This "requirement derives from 'the principle that there should not be piecemeal review of steps toward final judgment in which they will merge.'" *Praxis*, 947 F.2d at 56-57 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1, 12 n.13 (1983)). An issue on appeal is not "separate" for purposes of this prong where it will "involve considerations enmeshed in the merits of the dispute." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527-28 (1988).

Here, review of the Orders merely requires a determination of the intended scope of Section 1821(d)(13)(D). JPMC and the FDIC maintain that by its plain terms, Section 1821(d)(13)(D) divests the Bankruptcy Court of jurisdiction to hear the claims pending below because those claims (i) manifestly seek a determination of rights with respect to the assets of a failed banking institution and (ii) relate to the actions of the failed institution and the FDIC as receiver for that institution. Resolution of this threshold jurisdictional question is manifestly "separate" from any consideration of the merits of the claims pending in the Bankruptcy Court. *See Praxis*, 947 F.2d at 57 (finding that the "separateness" prong was satisfied because the appeal sought proper interpretation of "[t]he controlling statutory language," not consideration of the merits).

D. Failure to Review the Bankruptcy Court Orders at This Time Renders the Orders Effectively Unreviewable

The final prong of the collateral order doctrine requires that the lower court's order be "effectively unreviewable on appeal from a final judgment" if not reviewed at this time. *Gulfstream Aerospace Corp.*, 485 U.S. at 276 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). To be appealable under the collateral order doctrine, an order must "be such that review postponed will, in effect, be review denied." *Zosky* v. *Boyer*, 856 F.2d 554, 561 (3d Cir. 1988).

Here, there can be little doubt that forcing JPMC and the FDIC to wait for review of the Orders until after the conclusion of trials on the merits and the entry of final judgments in the proceedings below in order to determine whether those proceedings were even authorized "will, in effect, be review denied." *Id.* The issue is whether those proceedings should even occur. Failure to review the Orders will effectively afford Debtors a second avenue to pursue their appeal of the FDIC's disallowance, notwithstanding Congress's clear intent that Debtors only be permitted under FIRREA to obtain *de novo* judicial review in the D.C. District Court. Moreover, failure to review the Orders will result in two separate proceedings on virtually identical claims and effectively ensure that Congress' purposes in imposing the jurisdictional bar will be frustrated. As the Third Circuit has itself explained, FIRREA is intended to ensure that the FDIC is not "burdened by complex and costly litigation" to ease "the costs—including legal costs" of resolving failed banks efficiently and expeditiously. *Nat'l Union*, 28 F.3d at 388; *Praxis*, 947 F.2d at 56. The protections Congress enacted in FIRREA would be "'irretrievably lost' absent immediate appeal." *Van Cauwenberghe*, 486 U.S. at 524; *see also Praxis*, 947 F.2d at 60 ("Once [the receiver's] request is denied

and the litigation proceeds apace, [the receiver] incurs the very costs that section 1821(d)(12) was intended to forestall . . . .").

II. ALTERNATIVELY, THE COURT SHOULD GRANT LEAVE TO APPEAL

In the event the Court determines that the Orders are not final orders appealable as of right or immediately appealable under the collateral order doctrine, JPMC respectfully submits that leave to appeal those Orders should be granted. Pursuant to 28 U.S.C. § 158(a), "[t]he district courts of the United States shall have jurisdiction to hear appeals . . . with leave of the court, from interlocutory orders and decrees, of bankruptcy judges." Because Section 158(a) itself furnishes no guidance as to when district courts should hear interlocutory appeals, courts in the Third Circuit apply the criteria of 28 U.S.C. § 1292(b) to determine whether to accept an appeal from an interlocutory order of a bankruptcy court. *See In re Sandenhill, Inc.*, 304 B.R. 692, 693-94 (E.D. Pa. 2004). Under the requirements of Section 1292(b), an interlocutory appeal should be allowed if "(1) a controlling question of law is involved; (2) the question is one where there is a substantial ground for difference of opinion; and (3) an immediate appeal would materially advance the ultimate termination of the litigation." *In re EDP Med. Computer Sys.*, 178 B.R. 57, 60 (M.D. Pa. 1995) (citing 28 U.S.C. § 1292(b)). Once "the statutory criteria are met," there is a "duty of the district court . . . to allow an immediate appeal to be taken." *Ahrenholz* v. *Bd. of Trs. Of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000); *see also First Am. Bank of N.Y.* v. *S.W. Gloves & Safety Equip., Inc.*, 64 B.R. 963, 967 (D. Del. 1986) (citing *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974)).

A. JPMC Has Proposed a Controlling Question of Law for Certification

An order involves a controlling question of law "if, on appeal, a determination that the decision contained error would lead to reversal." *In re Sandenhill*, 304 B.R. 692, 694 (E.D. Pa. 2004). "'[C]ontrolling' means serious to the conduct of the litigation, either practically or legally." *Bradburn Parent Teacher Store, Inc.* v. *3M*, No. Civ. A. 02-7676, 2005 WL 1819969, at *3 (E.D. Pa. Aug. 2, 2005) (quoting *Katz*, 496 F.2d at 755). "To establish that an order contains a controlling question of law, it must be shown that either (1) reversal of the bankruptcy court's order would terminate the action, or (2) determination of the issue on appeal would materially affect the outcome of the litigation." *North Fork Bank* v. *Abelson*, 207 B.R. 382, 389 (E.D.N.Y. 1997).

Here, there can be no reasonable dispute that the Orders involve a controlling question of law—namely, whether the FIRREA jurisdictional bar applies to claims asserted against a third-party purchaser of failed bank assets from the FDIC where those claims mirror claims already asserted against the FDIC as receiver in pending FIRREA litigation in an appropriate district court. If this Court were to determine that the Bankruptcy Court erred and the FIRREA jurisdictional bar did apply, this would require not just reversal of the Orders, but also dismissal of Debtors' Turnover Proceeding for lack of subject matter jurisdiction and stay of the JPMC's Adversary Proceeding.[10] FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). This outcome is

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[10] Although the Orders disposed of three motions styled as motions to dismiss and stay, all parties and the Court addressed those motions for what they were—direct challenges to the Bankruptcy Court's subject matter jurisdiction in light of FIRREA's jurisdictional bar warranting dismissal if that bar was found to apply.

undoubtedly "serious" to the proceedings below, both "practically" and "legally." *Bradburn Parent Teacher Store*, 2005 WL 1819969, at *3. The question presented in these appeals is thus clearly "controlling."

B. There Are Substantial Grounds for Difference of Opinion

"[A] substantial ground for difference of opinion 'must arise out of genuine doubt as to the correct legal standard.'" *In re Powell*, Civ. A No. 06-4085, 2006 WL 3208843, at *2 (E.D. Pa. Nov. 3, 2006) (quoting *P. Schoenfeld Asset Mgmt. LLC* v. *Cendant Corp.*, 161 F. Supp. 2d 355, 360 (D.N.J. 2001)). "For example, there are substantial grounds for difference of opinion when the issue is 'difficult and of first impression.'" *North Fork Bank*, 207 B.R. at 390 (quoting *Klinghoffer* v. *S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990)). Here, there are substantial grounds for disagreement because the Bankruptcy Court decided the questions presented without the benefit of any authority directly on point, broke with the most relevant Circuit Court opinion, and misconstrued how Third Circuit precedent should be extended given the unique facts presented.

To begin, although JPMC and the FDIC respectfully submit that the motions should have been granted based solely on a reading of the plain language of FIRREA, no case in the Third Circuit—or in any other court of which JPMC is aware—has directly addressed whether a party whose claims have been disallowed by the FDIC as part of the FIRREA claims process, and who is appealing that disallowance before the appropriate District Court, may proceed with parallel litigation against a third party that attacks the merits of the disallowance. Indeed, it appears that no court has considered whether FIRREA bars claims against a third-party purchaser of failed bank assets from

the FDIC where those claims are essentially duplicative of claims against the FDIC in a pending FIRREA action relating to the same assets and the same actions of the FDIC. This is not surprising given that the plain language of FIRREA makes it clear that the Bankruptcy Court does not have jurisdiction to hear these claims, by providing that "no court shall have jurisdiction over . . . any action seeking a determination of rights with respect to[] the assets of any depository institution for which the Corporation has been appointed receiver . . . or any claim relating to any act or omission of such institution or the Corporation as receiver." 12 U.S.C. § 1821(d)(13)(D).[11]

In addition, the Orders are at odds with the most recent and relevant case from the Courts of Appeals addressing the question whether FIRREA applies to claims against a third-party purchaser of assets purchased from the FDIC. In *Village of Oakwood*, certain uninsured depositors of a failed bank did not avail themselves of the FIRREA process and instead asserted claims against the third-party purchaser of the failed bank's assets from the FDIC. 539 F.3d at 376. The Sixth Circuit held that such claims are covered by the plain language of Section 1821(d)(13)(D) as "directly related to acts or omissions of the FDIC as the receiver of [the failed bank]" and further concluded

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[11] *See also FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 136 (3d Cir. 1991) ("We[, the Third Circuit,] have specifically held that the jurisdictional bar of 12 U.S.C. § 1821(d)(13)(D) extends to actions seeking a determination of rights with respect to a failed bank's assets."); *Freeman* v. *FDIC*, 56 F.3d 1394, 1401 (D.C. Cir. 1995) ("Our sister circuits have broadly applied the § 1821(d) jurisdictional bar to all manner of 'claims' and 'actions seeking a determination of rights with respect to' the assets of failed banks, whether those claims and actions are by debtors, creditors, or others."); *Nat'l Union*, 28 F.3d at 393 ("The above language bars jurisdiction over . . . a claim relating to any act or omission of such [failed bank] institution or the [FDIC] as receiver."); *Village of Oakwood*, 539 F.3d at 386 (barring claimants' litigation for lack of subject matter jurisdiction under FIRREA because "all of their claims against the [acquiring bank] are directly related to acts or omissions of the FDIC as the receiver of [the failed bank].")

that "permit[ting] claimants to avoid [the] provisions of (d)(6) and (d)(13) by bringing claims against the assuming bank . . . would encourage the very litigation that FIRREA aimed to avoid." *Id.* at 386 (internal quotation marks omitted). The Bankruptcy Court Orders reached the opposite conclusion from the Sixth Circuit, ruling that claims against an assuming bank are permitted, even when those claims are already being pursued as against the FDIC in the exclusive FIRREA process. This evidences a substantial ground for difference of opinion.

Further, the Bankruptcy Court's Orders misapplied Third Circuit precedent to the facts presented. In support of its holding, the Bankruptcy Court relied primarily on *Hudson United Bank* v. *Chase Manhattan Bank of Connecticut, N.A.*, 43 F.3d 843 (3d Cir. 1994).[12] The Bankruptcy Court misread *Hudson* as making "it clear that FIRREA only bars claims against a receiver or an institution in receivership." (Tr. 93:24-25.) *Hudson*, however, did not even involve the question whether the FIRREA jurisdictional bar applies to claims against a third-party purchaser of assets from the FDIC. Instead, the opinion turned on whether "the *venue provision* in [FIRREA], 12 U.S.C. § 1821(d)(6), appl[ies] to an action which is brought against *the receiver* for wrongs allegedly committed by the receiver rather than *the failed institution*." *Hudson*, 43 F.3d at 846 (emphasis added). In determining that the venue provision also did apply to an action brought against the receiver, the Third Circuit did not address, nor was it required to address, whether the jurisdictional bar applied to claims brought against the

[12] In briefing the motions, *Hudson* was not even cited by the Debtors for any purpose. The only reference at all to *Hudson* in any briefing was a passing reference to the case in a footnote in the FDIC's brief for another purpose entirely. Thus, the Bankruptcy Court's reliance on the case as the primary support for its decision is surprising.

third-party purchaser of assets from the FDIC in that case. Rather, with respect to the claims against the third-party purchaser of assets that were before the *Hudson* court, the court affirmed the district court's transfer of that entire case—*including the claims against the third party purchaser*—to the proper court under the FIRREA venue provision. *Id.* at 849-50.

The Bankruptcy Court also referred to the Ninth Circuit's decision in *Henrichs* v. *Valley View Development*, 474 F.3d 609 (9th Cir. 2007), in its ruling, and heard argument concerning the Third Circuit's decision in *Rosa* v. *Resolution Trust Co.*, 938 F.2d 383 (3d Cir. 1991), and other early FIRREA cases. None of these decisions, however, involves the situation presented here, in which a dissatisfied FIRREA claimant has asserted duplicative claims to failed bank assets in a bankruptcy court notwithstanding the pendency of a district court action brought under FIRREA to adjudicate the same claims to the same assets. *Henrichs* is completely inapposite to the dispute here, insofar as *Henrichs* involved the improper *offensive* use of the FIRREA jurisdictional bar by a purchaser of a note from the FDIC who purported to "step[] into the shoes of the FDIC" for purposes of a collateral attack on an adverse state court judgment that did not even involve the note in question. 474 F.3d at 612-15.

The holdings in *Rosa* likewise do not support the Bankruptcy Court's Orders. In *Rosa*, unlike this case, the plaintiffs had not even availed themselves of the FIRREA claims process at all. 938 F.2d at 392 ("Plaintiffs do not contend that they have filed with a receiver any of the claims asserted in this action."). Therefore, *Rosa* does not provide any guidance as to what a court should do when presented with duplicative claims that have already been brought as part of the FIRREA claims process, disallowed

by the FDIC, and appealed to a district court with jurisdiction to hear such claims. Likewise, the holding in *Rosa* is not relevant to analysis of Debtors' claims against JPMC. At issue in *Rosa* was whether FIRREA's jurisdictional bar precluded claims asserted against a bank in conservatorship for alleged wrong doing subsequent to the bank's purchase of assets from a receiver. Said differently, the issue in *Rosa* was whether FIRREA's jurisdictional bar reached claims that did not arise from the acts of the receiver, did not arise from acts of a failed depository institution in receivership and did not arise from the underlying purchase and assumption agreement between the receiver and the purchaser. *Id.* at 393. Here, by contrast, the claims against JPMC arise solely from its participation in a P&A Agreement with a receiver, by which it acquired "assets from a failed depository institution" through the "act[s] . . . [of the FDIC] as receiver." 12 U.S.C. § 1821(d)(13)(D).[13]

Debtors' mere assertion of ownership interests in assets acquired by JPMC from the FDIC as receiver does not and cannot confer subject matter jurisdiction where

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[13] The Bankruptcy Court was also presented with arguments regarding the Third Circuit's decision in *New Rock Asset Partners, L.P.* v. *Preferred Entity Advancements, Inc.*, 101 F.3d 1492 (3d Cir. 1996), which nowhere even mentions FIRREA's jurisdictional bar, and is therefore wholly irrelevant. The sole provision of FIRREA at issue in *New Rock* was the removal provision—section 1441a(*l*)—which permits the removal to federal court of any state court action involving an institution of which the RTC is the conservator or receiver. By contrast, in *National Union Fire Insurance Co.* v. *City Savings, F.S.B.*, the Third Circuit revisited the question of the scope of the FIRREA bar, and took an expansive view of its applicability. 28 F.3d 376, 386 (3d Cir. 1994) ("[W]e reject the suggestion that the broad bar to jurisdiction indicated by the plain language of § 1821(d)(13)(D) should be strained and limited by referring to the administrative claims procedure of [FIRREA]."). The Third Circuit cautioned that courts must be mindful of the fact that "FIRREA was in fact passed to give the receiver extraordinary powers" and "[o]ne of the important goals of FIRREA is to enable the receiver to efficiently determine creditors' claims and preserve assets of the failed institution without being burdened by complex and costly litigation." *Id.* at 388.

none existed. At the moment the receivership was instituted, all of Debtors' claims arising from the receivership and the seizure of WMB's assets had to be brought in accordance with the FIRREA claims process. The FDIC's sale of the assets of the failed bank to JPMC cannot be the genesis of new claims against outside the boundaries of the FIRREA claims process. JPMC only owns what the FDIC seized and sold to it. JPMC does not own, nor does it claim to own, any disputed asset that was not an asset of the receivership estate sold to it by the FDIC. No dispute exists as to such assets that is independent of the FDIC's actions in acquiring and transferring those assets as receiver. Thus, all of WMI's claims seek a determination of rights in WMB assets or "relat[e] to an act" of the FDIC as receiver for WMB and are therefore barred by FIRREA.[14]

There are substantial and ample grounds upon which to disagree with the Orders and the Bankruptcy Court's opinion that FIRREA's jurisdictional bar does not preclude the Bankruptcy Court from exercising jurisdiction in this case, which raises issues of first impression.

C. Immediate Appeal of the Orders Would Materially Advance the Termination of the Litigation

An immediate appeal of the Orders "may materially advance the ultimate termination of the litigation" because, among other reasons, if the Bankruptcy Court erred

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[14] As the Supreme Court has observed, the phrase "relating to" has a deliberately broad and sweeping meaning. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) ("The ordinary meaning of ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with'—and the words thus express a broad pre-emptive purpose.") (internal citation omitted). In any event, Debtors have conceded that their claims regarding the Deposit Accounts "relate to" an act of the FDIC by *twice* asserting their Deposit Claim against the FDIC through the exclusive FIRREA claims process, first by submitting their claims and then by filing suit in the D.C. Action. (A63-A65, Debtors' Proof of Claim to FDIC ¶¶ 43-46; A87-A89, D.C. Action Compl. ¶¶ 47-50.)

regarding the applicability of the FIRREA bar to the Adversary Proceedings below, those proceedings must be terminated now for lack of subject matter jurisdiction. *See, e.g., In re B.S. Livingston & Co.*, 186 B.R. 841, 850 (D.N.J. 1995) ("Certainly, if the bankruptcy court lacked subject matter jurisdiction, it is far better to know that now, rather than after a trial in this matter."). Debtors will then merely be required to proceed with their claims in the first-filed D.C. Action, which they commenced in the one court no party disputes has appropriate jurisdiction.

D. "Exceptional Circumstances" Exist Warranting an Immediate Appeal of the Orders

To the extent this Court determines that JPMC must demonstrate "exceptional circumstances" warranting an immediate appeal, that requirement is amply satisfied here. There are no fewer than three separate multi-billion dollar litigations involving Debtors' identical claims to the same assets proceeding in parallel in two different fora. Those facts alone are sufficiently "exceptional" to warrant immediate appeal. *See In re EDP*, 178 B.R. at 60 (finding exceptional circumstances where appellant sought to transfer venue in light of pendency of related proceedings in target forum). Beyond the obvious waste of judicial resources and needless expense of such duplicative litigation—as well as the threat of inconsistent judgments faced by all of the parties—this multiplication of efforts threatens to directly undermine a key goal of Congress in enacting FIRREA.

As the Third Circuit has confirmed, "[o]ne of the important goals of FIRREA" is to permit the FDIC to carry out its functions "without being burdened by complex and costly litigation." *Nat'l Union*, 28 F.3d at 388. The Bankruptcy Court's Orders have effectively created a new appeal process by which dissatisfied FIRREA

claimants can avail themselves of FIRREA's "exclusive" claims procedure in the appropriate district court, while simultaneously asking a bankruptcy judge to adjudicate the same claims to the same assets, once those assets have been sold by the FDIC to a third party such as JPMC. Debtors, by attempting to end-run the FIRREA jurisdictional bar by asserting claims against JPMC, have created exactly the scenario Congress sought to avoid in enacting Section 1821(d)(13)(D). *See Village of Oakwood*, 539 F.3d at 386 (holding that permitting such an end-run "would encourage the very litigation that FIRREA aimed to avoid"); *see also Village of Oakwood* v. *State Bank & Trust Co.*, 519 F. Supp. 2d 730, 738 (N.D. Ohio 2007) ("The resulting regime would thwart FIRREA's purpose and permit creditors to evade the comprehensive administrative claims procedures envisioned by the statute." (internal quotation omitted)).

Perhaps even more importantly, the issues raised by the proposed appeal impact even more directly the basic goal of FIRREA—resolving the failure of banking institutions as quickly and efficiently as possible with the least cost to the federal government, and by extension, to the nation's taxpayers. As the district court observed in *Village of Oakwood*, permitting claimants to avoid FIRREA's exclusive claims procedure by bringing actions like those that Debtors have brought against third-party purchasers "would also create an obstacle to the FDIC's quick and successful resolution of failed banks; an assuming bank would rarely be inclined to enter a P&A agreement with the FDIC knowing that it could be taking on unidentified liabilities of undefined dimensions that could arise at some uncertain date in the future." 519 F. Supp. 2d at 738. By contrast, the Bankruptcy Court, citing no authority or other basis for its position, concluded: "I'm not prepared to find that the FIRREA bar, bars any claims, or any

dispute over what assets were transferred. And I just don't think that, despite the FDIC's predictions, I don't think that it is going to cause institutions to not deal with the FDIC." (Tr. 94:5-9.)

Since the execution of the P&A Agreement between JPMC and the FDIC, an additional sixty-four banking institutions have failed in the United States and been seized by the FDIC. (FDIC Failed Bank List, http://www.fdic.gov/bank/individual/failed/banklist.html.) Many of these have been closed permanently, because the FDIC was unable to find purchasers for their assets. As a result, the federal deposit insurance fund has had to pay out over $25 billion since September of 2008. By contrast, the P&A Agreement between JPMC and the FDIC was a transaction that involved no costs to the insurance fund or to taxpayers. Now, however, JPMC and the FDIC both face litigation on two fronts as a result of Debtors' duplicative claims—claims Congress expressly determined should only be pursuable in Debtors' D.C. Action. Debtors' actions and the litigation morass in which JPMC finds itself have not gone unnoticed by potential future purchasers of failed bank assets—at least not by JPMC. In light of these exceptional circumstances, this Court should seize the opportunity to ensure that FIRREA is properly upheld.

CONCLUSION

For the foregoing reasons, JPMC respectfully requests that this Court permit an immediate appeal of the Orders.

Dated: July 10, 2009
Wilmington, Delaware

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	Chapter 11
WASHINGTON MUTUAL, INC.,et al.	Case No. 08-12229 (MFW)
Debtors.	Jointly Administered
IN RE:	Chapter 11
WASHINGTON MUTUAL, INC.,et al.	Case No. 08-12229 (MFW)
Debtor.	Jointly Administered
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, Plaintiff,	
v.	Adv. Proc. No. 09-50551 (MFW)
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	
Defendant for all claims	Courtroom 5 824 Market Street Wilmington, Delaware
-and-	July 27, 2009 2:06 p.m.
FEDERAL DEPOSIT INSURANCE CORPORATION, Additional Defendant For Interpleader Claim	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

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WILMINGTON, DELAWARE, THURSDAY, JULY 27, 2009, 2:06 P.M.

THE CLERK: All rise.

THE COURT: Good afternoon. Mr. Rosen?

MR. ROSEN: Good afternoon, Your Honor. Brian Rosen, Weil, Gotshal, Manges, on behalf of the debtors. With me in the courtroom today for the debtors, also, Your Honor, is Mr. Matthew Curro, who will be handling some of the matters. And also the -- Michael Carlinksy from the Quinn Emanual firm.

THE COURT: Okay.

MR. ROSEN: Your Honor, we have an agenda that the Court certainly has in front of it. If I could try and rearrange it to make it easier for the Court. Your Honor, Item Number -- I believe it's Number 7 is a Motion of the Relizon Company for relief from the automatic stay. I thought it might be easier, Your Honor, to put that up front and then maybe even take Item 11, and then get to all the claims objections after that and then move on to the litigation issues.

THE COURT: That's fine.

MR. ROSEN: So if I could cede the podium then to the attorney for Relizon.

MR. GELLERT: Good afternoon, Your Honor. Robert Gellert from Eckert Seamans on behalf of Relizon and Workflow.

Your Honor, we had filed a motion for relief from automatic stay to essentially seek relief to -- you know, I guess destroy documents that we've been warehousing from someone who doesn't really -- hasn't asked for them. The debtors had responded saying this isn't their stuff, so they don't have an objection and we had sent this on notice to all the other parties who might have some interest and we had heard no response. So I didn't think that there was a -- any objection, although the debtors did file a -- I think it was a reservation of rights, so I wasn't sure if it was appropriate to file a certificate of no objection, because there was some objection out there, I guess, in some form.

So I don't know if the debtors do have an objection or I think it was just -- it's not my stuff.

MR. CURRO: Good afternoon, Your Honor. Matthew Curro, just for the record. No, the debtors don't have any objection to the relief Relizon is seeking. We simply filed a reservation of rights with respect to the claims that Relizon had filed in the case.

THE COURT: All right.

MR. GELLERT: Your Honor, I do have an order. I don't know if you wanted that --

THE COURT: Why don't you hand it up and --

MR. GELLERT: Great. Thank you.

THE COURT: -- it will be easier to get it

docketed.

All right. I'll enter the order as unopposed then.

MR. ROSEN: Your Honor, the next item we're going to be taking up then is Item Number 11 on the agenda, which is the motion of the debtors, pursuant to section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019(a), for approval of a settlement with JPMorgan Chase.

Your Honor, there was -- excuse me, a document and objection filed -- limited objection filed by a group of noteholders. They have subsequently filed a withdrawal of that objection. So currently this matter is unopposed.

Your Honor, I could go through what is in the motion, but based upon the fact that it is unopposed, I would re -- I would just rest upon the motion itself, unless the Court wants to hear more specifics about it.

I would like to note, however, certain items for the record. Specifically, Your Honor, one of the points of concern by the noteholder group was with respect to the existence of the litigation and what will be going forward with the litigation and what the respective rights of the parties are, with respect to that litigation. And as we have set forth, Your Honor, in the motion itself, and it's set forth in the agreement, which is a next -- as an exhibit to the motion, this agreement itself has no effect on the

litigation -- the pending -- what we refer to as the ERISA litigation. All of the rights of the respective parties are, in fact, intact, as they were prior to the effective date of this document.

So to the extent that there are claims of JPMorgan, they exist; to the extent that there are claims of the debtors, with respect to JPMorgan, they would continue to exist. Likewise, the respective defenses or arguments that could be raised in opposition to those claims would exist on the rights of all part -- on the sides of all parties. So, in other words, Your Honor, there is an absolute reservation of rights with respect to that, no impact from this motion.

The second point that was raised by the noteholders was a concern about the involvement of Weil, Gotshal and Quinn Emanual with respect to the resolution itself. And as we discussed with the noteholders, this was an economic agreement that was reached by the folks at Washington Mutual, Inc., as fronted by Alvarez & Marsal. And also with respect to JPMorgan Chase, Quinn Emanual was actively involved in the context of the impact on the overall JPMorgan/Washington Mutual litigation, and all parties have agreed that this was the way to proceed. Weil Gotshal’s role, as a result, was then to implement this and to file the motion with the Court.

Lastly, Your Honor, there was a concern with respect to proofs of claim that have been filed by JPMorgan Chase that include any references with respect to the savings plans themselves and a reservation of rights with respect to those savings plans, Your Honor. And while some parties have asked that JPMorgan file amended proofs of claim to delete any claims associated with the savings plans themselves, Your Honor we think it's fine as long as -- that they not do that, as long as we have on the record the fact that all claims associated with the savings plan are being resolved pursuant to this settlement, this agreement. And that therefore obviously the parties can look to these agreements and the order approving this motion, with respect to any defenses that would have to be rise -- be asserted or claims that would be asserted against those respective proofs of claim, to the extent that they remain outstanding.

And I think that would address the issue that the Creditors' Committee had with respect to the ongoing nature of those proofs of claim. With that, Your Honor, we would ask the Court to approve the motion as submitted to the Court, with no claims -- excuse me, with no objections remaining outstanding.

THE COURT: All right. Does anybody else wish to be heard on that?

MR. O'CONNOR: Your Honor, Paul O'Connor from

Kasowitz Benson on behalf of the Washington Mutual Noteholders' Group. I appreciate the comments that Mr. Rosen made, and I'd simply like to say that while we have withdrawn our objection, we specifically, in our notice of withdrawal, reserved the rights to make certain objections, certainly relating to the Weil and Quinn Emanual issues that were raised and we're reserving those as we move forward through this proceeding perhaps on other motions to approve settlements, et cetera. But, otherwise, we have withdrawn our objection.

THE COURT: Okay.

MR. STRATTON: Good afternoon, Your Honor. David Stratton of Pepper Hamilton for the Creditors' Committee.

We had raised the issue of the effect of this settlement on the Chase claim -- I think it's Claim Number 2382 that raises similar or the same issues. And just so the record's clear, to the extent they're being -- those issues raised in the claim are being settled today, then they're settled for all purposes so that we don't have to go back and re-litigate them, either through claims objections or otherwise. I think with that understanding, we're fine with the settlement proceeding as documented. Thank you.

THE COURT: Okay. Anybody else?

MR. CLARK: Good afternoon, Your Honor. Bruce Clark for JPMorgan Chase.

We agree that the agreement that the parties have entered into describes to what extent the impact on the pending litigation does or does not exist. We agree, and point out the language on the last page of the agreement, that other than resolving disputes relating to the savings plan, this agreement shall not affect or be construed to affect any other disputes between the parties. And other than as set forth in this agreement, no party shall have any liability to the other with regard to the savings plan.

And, further, with regard to the proof of claim, we will agree that it could be deemed amended as appropriate as of ten days after the effective date as defined. Thank you.

MR. ROSEN: Your Honor, all of those are in accord with what we were saying before, so we're fine with it.

THE COURT: Okay. All right, then I will enter an order approving the settlement.

MR. ROSEN: May I approach, Your Honor?

THE COURT: You may.

MR. ROSEN: Your Honor, the next items then on the agenda are the omnibus, objections to claims, I think it's 1 through 7, and Mr. Curro will be handling those, Your Honor.

MR. CURRO: Good afternoon, Your Honor. Again,

for the record, Matthew Curro, Weil, Gotshal & Manges for the debtors.

Your Honor, before the Court today are the debtor's seven omnibus objections to claims. While the debtors did receive a number of responses to these omnibus objections, we are happy to report that in a number of instances we were able to resolve them. A number of the other matters have been adjourned to a later date. As a result, there are only a few claims that are contested -- or a few objections to claims that are contested before the Court today. And so what I would propose is just to briefly run through each of the omnibus objections and then tee up the contested matters.

THE COURT: Okay.

MR. CURRO: Your Honor, again as I mentioned, we had seven total claims objections -- omnibus claims objections, which covered approximately 630 claims. And also I would note for Your Honor, in each case the debtors submitted the declaration of Michael Arco. I would just note for the Court that Mr. Arco is in the courtroom today.

The first grouping, which was the first four omnibus objections, was filed on May 29th. Those four consisted of two substantive omnibus objections and two non-substantive omnibus objections. The first two omnibus objections were generally filed with respect to claims that

on their face, the debtors did not have any legal obligation for. They were divided roughly into three categories.

The first being Washington Mutual Bank contracts. These were claims filed against the debtors with respect to --

THE COURT: Well, let's go through them one-by-one, because I have some issues with respect to --

MR. CURRO: Okay.

THE COURT: -- as well. So you want to do the first omnibus?

MR. CURRO: Sure, right. That's -- yes. so the first omnibus objection -- the first category of claims that we objected to was with respect to these WMB contract claims. And these were claims that the debtor -- claims filed against the estate on account of contracts to which the debtors were not parties, but which WMB or a WMB related entity was a party.

The second category of claim in the first omnibus objection was with respect to property tax claims. These were claims filed against the estates on account of property taxes, with respect to property that the debtors did not and do not own.

And then the last category was kind of a catch-all miscellaneous category with respect to claims that, on their face, did not assert a liability against the debtors.

Your Honor, the second omnibus objection was essentially just a spillover from the --

THE COURT: Let's go back.

MR. CURRO: Sure. Okay.

THE COURT: All right. There were some responses to the first omnibus?

MR. CURRO: There was -- I'm sorry, Your Honor, you're right. There were some responses to the first omnibus objection. For the most part, Your Honor, we were able to resolve the omni -- the responses we received. Oftentimes, the debtor -- just pull out the list of responses we received.

Your Honor, the responses that we received to the first omnibus objection, one was filed by the Los Angeles County Tax Collector, and that issue was adjourned to the next hearing. The other response was with respect to Claim 2375, which was filed by the Eric J. and Kerry L. Schindler Company, as Trustees for the Schindler Family Trust, and that issue was also adjourned until the next hearing.

Those are the only responses we received to the first omnibus objection.

THE COURT: Well, it wasn't clear to me on some of these that facially the claim is not against the debtor.

MR. CURRO: Okay.

THE COURT: With respect to Exhibit A, you say --

are these the -- yes, these are the property taxes?

MR. CURRO: Correct.

THE COURT: What evidence do I have that the property is not owned by the debtor?

MR. CURRO: Your Honor --

THE COURT: Or was not owned by the debtor during the relevant periods?

MR. CURRO: Your Honor, the debtors submitted the declaration of Michael Arco in support of the claims objections. In addition, with respect to all of the property tax claims that we objected to, in each instance the attachments to the relevant tax claim related to -- or indicated that the relevant property owner was, in fact, Washington Mutual Bank, or at least not WMI.

THE COURT: Well, that’s not true. Some of them said Washington Mutual.

MR. CURRO: That's correct, Your Honor.

THE COURT: So how do I know that that’s not Washington Mutual, Inc.?

MR. CURRO: Your Honor, all of those -- all of those claims were with respect to pieces of -- or parcels of property or other property that the debtors do not own. It’s not on the debtor’s books and records, the debtors are not the titled owner of such property.

THE COURT: And does the declaration say that?

MR. CURRO: The declaration says generally that they -- that the claims do not relate to property that is owned by the debtors. And, Your Honor, again, Mr. Arco is in the courtroom. We're happy to, you know, have Mr. Arco testify to that -- those facts.

THE COURT: Well, let's hear his -- a proffer from him at least to that effect, because it's not clear from the face of the proofs of claim.

MR. CURRO: Your Honor, excuse me one second.

THE COURT: Could the party on the phone please mute your phone, because we're getting some feedback.

(Pause in proceedings.)

MR. CURRO: Okay. Your Honor, I would offer as proffer testimony that would be given by Michael Arco, Senior Associate with Alvarez & Marsal, North America, LLC, and a current vice president of both Washington Mutual, Inc., which I will refer to as WMI, and WMI Investment Corp. Mr. Arco is present in the courtroom today and pursuant to Federal Rule of Evidence 103(a)(2), this Court may accept a proffer in lieu of his testimony.

Mr. Arco is familiar with the matters before this Court in the omnibus objections. If Mr. Arco were called to testify in support of all of the omnibus objections his direct testimony would be as follows:

Mr. Arco would testify that in his position with

the debtors he is responsible for, among other things, the claims reconciliation process. Mr. Arco would testify that he has reviewed the responses -- that he has reviewed the relevant omnibus objections and the responses thereto. Mr. Arco would testify that based on his review of available documents and information, that the first omnibus objection for this particular instance was filed with respect to claims -- specifically with respect to claims for taxes and levied against property, that such property was not owned by WMI.

With respect to the WMB contract claims, Mr. Arco would testify that he has reviewed such claims and determined that WMI and WMI Investment Corp. is not a party to such -- to such contracts and is therefore not liable with respect thereto. Mr. Arco would also testify that with respect to the remaining claims, the miscellaneous claims, that the debtors -- that such claims assert a liability that is not present on the debtors' books and records, and that the debtors do not believe they have any obligation with respect thereto.

THE COURT: All right. I'll accept the proffered testimony. And that deals with my objections and you've continued the two written objections. So do you have a form of order with respect to --

MR. CURRO: Yes, we do, Your Honor.

THE COURT: -- the claims other than the continued claims?

MR. CURRO: Your Honor, just to go back for one minute. JPMorgan filed a reservation of rights with respect to the first, second, fifth and sixth omnibus objections. I have a form of order.

In sum and substance, JPM requested a reservation of rights with respect to the orders entered on account of the omnibus objections. We've agreed with JPMorgan in principal on language to be included in the orders. We still need to finalize that language. And so I don't have a form of order that's complete, but I can -- we can submit one on certification of counsel after hearing.

THE COURT: Okay. That's fine.

MR. CURRO: All right.

MR. GURFEIN: Peter Gurfein for the Creditors' Committee, Your Honor.

I just want to clarify that I'm working with the debtors and JPMorgan on the language that was just referred to and we'll be looking at that as well.

THE COURT: Okay. Thank you.

MR. LANDIS: Your Honor, I might as well take the opportunity now at the beginning, because I think this might be a process that takes a little longer than I expected. Adam Landis for the record from Landis, Rath & Cobb on

behalf of JPMorgan Chase.

Mr. Curro is correct, we did file a number of reservations of right and we've been working with the debtors to try to resolve the issues that we've raised. In essence, there are two separate type of reservation that we're working on. I think we're down to wordsmithing and language, so that we're very clear that with respect to claims that are disallowed, the claimants can't come back against us -- against JPMorgan Chase based on anything in the disallowance of the claim or the claim objection is the one reservation.

The second reservation of rights has to do with JPMorgan's right and ability to assert claims against the estate and not have a backdoor disallowance process based on the disallowance of the underlying claim, for which JPMorgan may have rights of subrogation, may have taken an assignment, and otherwise be able to, in its proofs of claim, assert rights against the debtors.

So we've had an awful lot of discussion and back and forth up to and including just before the hearing started. And I think we're there in concept, we just need to massage the language a little bit, Your Honor.

THE COURT: Okay. Well, I'm not deciding that you are or are not liable.

MR. LANDIS: And, Your Honor, we're not asking

you to decide anything with respect to JPMorgan Chase. I think we'll leave that all for a later date.

THE COURT: Okay. Thank you.

MR. LANDIS: Thank you, Your Honor.

MR. CURRO: Okay. Thank you, Your Honor.

Moving on to the second omnibus objection. As I mentioned, the second omnibus objection is actually identical to the first. It was filed just to comply with the local rules that cap substantive claims objections at 150 per omnibus.

THE COURT: Yes.

MR. CURRO: Would Your Honor -- I can certainly offer Mr. Arco's testimony with respect to --

THE COURT: Yeah, I think you need -- you know, I don't think I got declarations with respect to either of those omnibus objections. Did you file them?

MR. CURRO: Yes. Declarations were filed with respect to each and every of the omnibus objections.

THE COURT: Well, tell me under what tab they are because I can't find them.

MR. CURRO: They should be -- I believe on the first -- the first four omnibus objections they were separate docket entries.

THE COURT: Okay.

MR. CURRO: I'll find out exactly.

(Pause in proceedings.)

MR. CURRO: Your Honor, they might be at the very back of the second omnibus objection. They may not be separately -- a separately delineated tab.

Your Honor, may I approach? We have a copy for you.

THE COURT: Okay.

MR. CURRO: Your Honor, would you like the proffer of Mr. Arco again for the second -- yeah, okay.

THE COURT: Yes.

MR. CURRO: Again, with respect to the second omnibus objection, Your Honor, I would offer as a proffer testimony that would be given by Michael Arco, manager -- sorry, excuse me, senior associate with Alvarez and Marsal North America and a current vice president of both Washington Mutual, Inc., which I will refer to as WMI, and WMI Investment Corp.

Mr. Arco is present in the courtroom today and pursuant to federal rule of evidence 103(a)(2), this Court may accept a proffer in lieu of his testimony. Mr. Arco is familiar with the matters before this Court in the second omnibus objection. And if Mr. Arco were called to testify in support of the second omnibus objection, his direct testimony would be as follows:

Mr. Arco would testify that in his position with

the debtors he is responsible for, among other things, the claims reconciliation process. Mr. Arco would testify that he has reviewed the responses -- he has reviewed the second omnibus objection, the claims objected thereto, and the responses received. Mr. Arco would testify that based on his review of available information and the relevant corporate documents, that the claims objected to therein fall into three categories.

Mr. Arco would testify that with respect to the claims designated as WMB contract claims, Mr. Arco has reviewed such claims; that such claims assert a liability pursuant to a contract, which the debtor is not liable -- or pursuant to which the debtor is not a counter-party and therefore the debtor is not liable. Mr. Arco would testify that with respect to the property tax claims, that these claims assert a liability for taxes on property that is not owned by WMI or WMI Investment Corp. And with respect to the remaining miscellaneous claims, Mr. Arco would testify that based on a review of such claims, those claims do not assert a liability against the debtors' estates.

THE COURT: All right. I'll accept that proffer and based on that, I have no further questions.

MR. CURRO: Okay. And, Your Honor, the same thing on the second omnibus objection. We will enter that order -- or submit that order on certification of counsel

after we finalize the language that's covered by the JPMorgan reservation of rights.

THE COURT: Were there any objections -- other objections to the fourth?

MR. CURRO: To the second omnibus objection, yes, Your Honor, if we can certainly take those now. There was --

THE COURT: The Travis County objection.

MR. CURRO: Actually, yes. Santa Clara County filed a response with respect to actually the debtors' first omnibus objection. It also included claims that are part of the debtors' second omnibus objection. The basis -- again, the Santa Clara County claims were property tax claims. The debtors objected to those claims because it -- they do not assert a tax liability with respect to property that the debtor has owned.

Santa Clara did file a response in which the county simply alleges that the debtors were, in fact, the owners of this subject property. Your Honor, as I stated earlier, a review of the Santa Clara County claims in this particular instance shows that each of the address -- each of the owners of property that form the basis of the Santa Clara County claims is, in fact, WMB or its related to a site or a piece of property that is not owned by the debtors.

I'm not sure if anyone from Santa Clara County is on the phone, but --

THE COURT: Is there anyone here for Santa Clara County?

MS. FLIGOR: Yes, Neysa Fligor, Deputy County Counsel, specially appearing for County of Santa Clara.

THE COURT: Do you want to --

MS. FLIGOR: And we are withdrawing our objection. Matthew and I spoke a couple of times and we were actually trying to find documents just to confirm whether WMI was in fact the true owner of these properties. And to date, we have not been able to find any documents with WMI. It either says Washington Mutual period, Washington Mutual Bank.

We still are in the process of trying to find such documents, but at this time we have not been able to find any, so we are withdrawing our objection.

THE COURT: All right. And you understand that the result of the debtors' objection is you won't have a claim against WMI?

MS. FLIGOR: Yes, Your Honor. And, you know, with that we'd actually like to reserve our rights if -- you know, as we go through the process. I know there are a couple more hearings. If we are able to find any documents showing that WMI is, in fact, co-owner, have some ownership

interest in these properties, we would like to assert the County's interest.

MR. CURRO: Your Honor, the debtors would obviously reserve all rights to object to those claims on timeliness grounds. I think the purpose of these omnibus objections is to expunge and disallow these claims. So, you know, Santa Clara is obviously entitled to file whatever they want, but we would reserve our rights to object on timeliness grounds.

THE COURT: All right. I won't make any ruling on that at this time.

MS. FLIGOR: Thank you, Your Honor.

THE COURT: All right.

MR. CURRO: Thank you, Your Honor.

The other response we received to the first omnibus objection --

THE COURT: Second omnibus.

MR. CURRO: I'm sorry, second omnibus objection was with respect to Claim 1769. It was filed by an individual claimant, Michael Kushinksy against WMI Investment Corp. Your Honor, the underlying proof of claim asserts a liability against WAMU Investments Inc., as op -- which is not a debtor in these cases, as opposed to WMI Investment Corp. As such, the claim does not assert any liability with respect to either of the debtors in these

cases and we would request that the Court disallow that claim.

THE COURT: Is there anybody appearing for Mr. Kushinsky?

All right. Based on that, I'll disallow the -- or overrule the response.

MR. CURRO: Okay.

THE COURT: All right.

MR. CURRO: Okay. I think that takes care of the responses we received for the first and second omnibus objection, so --

THE COURT: Well, your agenda said Travis County responded.

MR. CURRO: Or, I'm sorry, Travis County did file a response. They with -- they subsequently withdrew their claim. Their response was really just indicated their intention to withdraw the claim based on the debtors' objection, and they did do so.

THE COURT: Okay.

MR. CURRO: Your Honor, moving on to the third omnibus objection. The third omnibus objection was a non-substantive omnibus objection and it sought to -- objected to claims on two grounds. First were claims filed in the wrong Chapter 11 case. These were claims filed against WMI Investment Corp. that clearly asserted a liability against

Washington Mutual, Inc. and therefore the debtors sought to re-categorize such claims as filed against WMI.

The third omnibus objection also objected to claims that were subsequently amended and superseded by subsequently filed claims.

THE COURT: All right. I had no comments on this. Any objection -- any responses filed?

MR. CURRO: No, Your Honor.

THE COURT: They have not been adjourned or --

MR. CURRO: Your Honor, actually, I may have misspoke. I believe -- oh, I'm sorry. Actually, Your Honor, the WMB Bondholders did file a response to the third omnibus objection. As we indicated on our reply in the agenda, that matter was adjourned to the next hearing.

THE COURT: Okay.

MR. CURRO: Your Honor, with respect to the omnibus objection. The fourth omnibus objection was also a non-substantive omnibus objection that sought to disallow and expunge duplicative claims.

We did receive one reservation of rights from the Relizon company. Counsel -- or the Relizon reservation of rights stated that Relizon did not have any objections to the relief sought by the debtors, but requested that the debtors not be then entitled to object to the remaining Relizon claims on grounds of timeliness of filing.

We -- so Your Honor is aware, we -- the debtors also objected to a -- one of the remaining claims filed by Relizon as part of the sixth omnibus objection. That specific claim has been -- or the objection with respect to that specific claim has been adjourned until the next hearing. The debtors are in agreement, and have agreed not to object for the remaining Relizon claims on grounds of timeliness. I believe that -- I spoke -- counsel spoke and that reservation of -- on the record was sufficient.

THE COURT: Okay.

MR. GELLERT: Good afternoon, Your Honor. Ronald Gellert again. That's essentially correct, Your Honor. We had filed two claims, we amended them. We are agreeing to allow the first two claims to be expunged, but obviously we don't want them to come back on timeliness for the remaining amended claims. And those claims are being administered in their sixth omnibus objection and, I guess, yet to be filed objection for the second claim.

So we'll handle those when they come around, but that reservation is correct.

THE COURT: Sufficient. Okay.

MR. CURRO: And that is the -- those were the only responses we received to the fourth omnibus objection.

THE COURT: Well, your agenda says Mr. Stovic objected?

MR. CURRO: Oh, I'm sorry, Your Honor.

THE COURT: And Mr. Janusky?

MR. CURRO: Yeah, we did receive a few omnibus -- a few responses, but we were able to resolve those. All of the responses we received required clarification of what the debtors were seeking to do and all of the claimants agreed to the relief requested by the debtors.

THE COURT: Okay. All right then I'll enter an order --

MS. MANZER: Your --

THE COURT: I'm sorry?

MS. MANZER: Excuse me, Your Honor. This is Nancy Manzer from Wilmer Hale on behalf of the Bank Bondholders.

THE COURT: Yes.

MS. MANZER: I believe we also filed an objection to that omnibus claim objection and my understanding is that it has been adjourned.

THE COURT: All right.

MR. CURRO: That was with respect to the third.

MS. MANZER: The third and the fourth.

MR. CURRO: That -- that's right.

THE COURT: That's correct.

MS. MANZER: Yeah, you have it on your agenda for the fourth as well. I just want to make it sure -- make it

clear that we have not consented to the relief you sought.

THE COURT: All right. I think that's what the agenda says and the debtor is confirming that.

MS. MANZER: Thank you.

THE COURT: Okay.

MR. CURRO: Your Honor, moving on to the fifth and sixth omnibus objections. Again -- actually, I'll take them in order.

The fifth omnibus objection was filed on June 26th. This was a substantive omnibus objection. The debtors did receive some responses. Debtors received six responses from employee -- WMB Employee Claimants. Those responses have been adjourned until the next hearing.

And just to provide the Court with a brief overview, the fifth substantive omnibus objection objected to 125 claims that generally fell into four categories.

The first being litigation claims. These were claims that were filed on account of litigations to which neither WMI nor WMI Investment is a party, and therefore has no obligation.

Additionally, the fifth omnibus objection covered pension claims. These were claims filed by beneficiaries of the WAMU pension plan. The plan beneficiaries -- or the assets -- the pension plan assets that are set aside to cover pension plan claims are in a segregated trust. And as

such, the pension plan claimants do not have a claim against the general assets of these estates. And as such, the debtors objected to such claims seeking to disallow them in their entirety.

With respect -- another -- the next category is employee claims. A number of claims were filed on account of employment-related agreements between WMB and the respective employee. WMI was not a party to those agreements, and as such the debtors are seeking to expunge and disallow those claims.

THE COURT: Well, with respect to the latter category, I think it's not clear in many of the instances, again because it says Washington Mutual, not Washington Mutual Bank.

MR. CURRO: Right. Your Honor, these were claims that were filed by employees of Washington Mutual Bank. They were not listed on the employment records of WMI.

THE COURT: But the contract -- those based on a contract, the contract is not clear.

MR. CURRO: Your Honor, the debtors submit that the contract is clearly between an employer and an employee. And that's -- on that basis, because the employees were not -- were WMB employees rather than WMI employees, the debtors objected.

THE COURT: Okay, but you want me to determine

that Washington Mutual, Inc. is not liable? I think you're going to have to make a proffer.

(Pause in proceedings.)

MR. CURRO: Your Honor, with respect to the fifth omnibus objection, I would offer as a proffer testimony that would be given by Michael Arco, senior associate with Alvarez and Marsal North America and a current vice president of both Washington Mutual, Inc. and WMI Investment Corp. Mr. Arco is present in the courtroom today and pursuant to Federal Rule of Evidence 103(a)(2), this Court may accept a proffer in lieu of his testimony.

Mr. Arco is familiar with the matters before the Court in this fifth omnibus objection and if Mr. Arco were called to testify in support of the fifth omnibus objection his direct testimony would be as follows:

Mr. Arco would testify that in his position with the debtors he is responsible for, among others, the claims reconciliation process. Mr. Arco would testify that he has reviewed the fifth omnibus objection and the responses thereto. Mr. Arco would testify that based on his review of the available corporate documents and other information, the claims objected to pursuant to the fifth omnibus objection are not liabilities of the debtors.

Specifically, with respect to litigation claims, Mr. Arco would testify that he has reviewed such litigation

claims and that WMI and WMI Investment Corp. is -- neither of which are a party to such litigations and as such do not have an obligation for any of the underlying causes of action asserted therein.

Mr. Arco would testify that with respect to the pension claims, that he has reviewed such pension claims, and that such claims assert liabilities with respect to the WAMU pension plan. Mr. Arco would testify that the WAMU pension plan has a segregated trust, pursuant to which benefits are paid and that such claimants do not have a claim against the general assets of these estates.

With respect to employee claims, Mr. Arco would testify that he is reviewed each of the claims asserted -- each of the claims objected to in the fifth omnibus objection and that each such claim asserts a liability with respect to an employment-related agreement, including the retention agreements and other change and control agreements that the debtors are not a party to.

Mr. Arco would testify that the debtors -- excuse me, that the claimants that asserted such claims were not employees of WMI. Mr. Arco would also testify that on the debtors' books and records, such employees were expensed -- or the cost associated with such employees were expensed to WMB and not to WMI.

Mr. Arco would testify with respect to the

remaining miscellaneous claims that he has reviewed each such claim, and that each such claim does not assert a liability that is contained on the debtors' books and records and to which the debtors are liable.

Your Honor, based on that proffer, we would request that the Court enter the fifth omnibus objection.

THE COURT: Well, let's put Mr. Arco on the stand. I still have a question.

MR. CURRO: Okay.

Your Honor, the debtors call Michael Arco to the stand.

THE COURT: All right.

Please remain standing so you can be sworn.

MICHEAL ARCO, DEBTORS' WITNESS, SWORN

THE CLERK: Be seated. State your full name and spell your last name.

THE WITNESS: I'm sorry?

THE CLERK: State your full name and spell your last name for the record.

THE WITNESS: Michael Arco, Alvarez and Marsal, A-r-k-o.

THE CLERK: Thank you.

EXAMINATION BY THE COURT:

Q All right. Mr. Arko, question I have, and I --

THE COURT: Do you have the claims available for

him to review?

MR. CURRO: Sure.

THE COURT: I'll just take as an example Claim Number 106 by Michele Grau-Iversen.

MR. CURRO: Your Honor, just for the record, Ms. Grau-Iverson was one of the claims that was adjourned, but it -- the underlying agreements are in sum and substance the same. I just wanted to point that out.

THE COURT: Well, my question is this: The amendment to change and control employment agreement is signed by Washington -- by Mr. Darrell David (phonetic) on behalf of Washington Mutual, Inc, successor to Providian. And he also signed the -- yeah, the change and control -- the original change and control agreement.

THE WITNESS: Our analysis was not based on the signatory as much as did the expense hit the P&L of WMB versus WMI.

THE COURT: Well, who exactly was the employer?

THE WITNESS: The employee was -- there's -- employee was consistently paid by WMB.

THE COURT: Who was the employer? I mean, was there a written employment agreement?

MR. CURRO: Your Honor, in certain instances, some of the employees had employment agreements or change and control agreements for -- for these employees, just to

address Your Honor's point about the incorporation of the change and control, the retention agreement that forms the basis of the actual claim is separate and apart from the underlying change and control agreement. So --

THE COURT: Well, but they filed a proof of claim based on the change and control agreement.

MR. CURRO: Which -- I'm sorry, Your Honor, which claim are you referring to, for Ms. Grau-Iverson?

THE COURT: Yes.

MR. CURRO: Your Honor, I believe Mr. Darrell David signed the change and control agreement on behalf of Washington Mutual.

THE COURT: But how do I know that? Are you testifying or is the witness testifying?

MR. CURRO: No, I'm sorry. I'm just pointing out that it's in the actual proof of claim, Your Honor.

THE COURT: Yeah, and the first amendment to the change and control signed by him on behalf of Washington Mutual, Inc. I don't have the signature page on the original change and control, do I? Oh yes, I do.

Washington Mutual. So that could be anybody.

MR. CURRO: In the preamble to the change and control agreements, the preamble is that -- reads, "This change and control agreement is between a subsidiary of Washington Mutual, Inc., which is defined as the company, by

which the undersigned employee is currently employed."

THE COURT: And who would that be? That's why I'm asking you, who was her employer?

MR. CURRO: I --

THE COURT: Not who -- not on whose records it was expensed.

MR. CURRO: It's our contention that WMB was the employer.

THE COURT: And what is that based on? Was there a signed written employment agreement?

MR. CURRO: Well, I would contend it's based on the cash flow and the expense.

THE COURT: Was there a signed agreement, do you know?

MR. CURRO: Mr. Arko, was there a written employment agreement between Washington Mutual, Inc. and this respective -- clearly Washington Mutual, Inc. and this respective employees?

THE WITNESS: No.

THE COURT: There is no employment agreement?

THE WITNESS: Not to my knowledge.

MR. CURRO: Again, Your Honor, just to point out, the specific claim with respect to Ms. Grau-Iverson is not on for today.

THE COURT: Well, I have some concerns with

respect to any of the employees, to the extent they have such contracts that may be ambiguous.

MR. CURRO: Your Honor, to the -- if Your Honor still has concerns, the debtors would propose to adjourn the claims objections with respect to those change and control and retention bonus agreements to the next omnibus hearing. In the interim the debtors will file additional proof --

THE COURT: All right.

MR. CURRO: -- that such employees were not employees of WMI.

THE COURT: Okay.

MR. CURRO: Okay.

THE COURT: Thank you, Mr. Arko. You can step down.

(Witness excused.)

MR. CURRO: Your Honor, with respect to the remaining litigation claims, pension claims, and other miscellaneous claims, the debtors would rest on the previous proper -- proffer that I offered and request that the Court grant the fifth omnibus objection.

THE COURT: I will sustain those objections.

MR. CURRO: Your Honor, with respect to the sixth omnibus objection, again this was in sum and substance the same as the fifth, just with the spillover claims. The debtors, again, would propose to adjourn the sixth omnibus

objection to the extent it includes claims based on the change and control or retention agreements until the next hearing.

THE COURT: Okay.

MR. CURRO: I can certainly offer the proffer of Mr. Arko with respect to the remaining categories of claims.

The debtors did receive some responses to the sixth omnibus objection that are contested, so I'm happy to take it in whichever order Your Honor wishes.

THE COURT: All right. You may proceed by proffer.

MR. CURRO: Okay.

Your Honor, I would offer as proffer testimony that would be given my Michael Arko, senior associate with Alvarez & Marsal North American and a current vice president of both Washington Mutual, Inc. and WMI Investment Corp. Mr. Arko is present in the courtroom today and pursuant to Rule of Evidence 103(a)(2) this Court may accept a proffer in lieu of his testimony. Mr. Arko is familiar with the matters before this Court in the sixth omnibus objection. If Mr. Arko were called to testify in support of this sixth omnibus objection, his direct testimony would be as follows:

Mr. Arko would testify that in his position with the debtors he is responsible for, among other things, the claims reconciliation process. Mr. Arko would testify that

he has reviewed the claims -- he has reviewed each and every claim objected to pursuant to the sixth omnibus objection, as well as the responses thereto. Mr. Arko would testify that based on his review of available corporate documents and other available information, that the claims objected to pursuant to the sixth omnibus objection do not represent liabilities of the debtors.

Specifically with respect to the litigation claims, Mr. Arko would testify that he has reviewed each of the litigation claims, and that neither WMI nor WMI Investment Corp. is a party to such litigations, and as such does not have any liability with respect to the underlying allegations contained therein.

With respect to the pension claims, Mr. Arko would testify that he has reviewed each of the pension claims and that such claims assert a liability on account of the WAMU pension plan, for which -- excuse me, for which claims must be asserted against the WAMU pension trust, and that such claimants do not have any direct claim against the estate -- the assets of these Chapter 11 estates.

With respect to the remaining miscellaneous claims, Mr. Arko would testify that he has reviewed each claim and that has determined that each claim does not assert a liability that is either on the debtors' books and records or that the debtor is liable for.

THE COURT: All right. I had no questions with respect to either of those two categories.

MR. CURRO: Okay. Your Honor, as I mentioned, we did receive some responses to the sixth omnibus objection. And so I propose just to handle those now.

THE COURT: Okay.

MR. CURRO: The first response we received was from John S. Pereira as Chapter 11 Trustee of Maywood Capital Corp. Pursuant to the sixth omnibus objection, the debtors objected to Claim Number 2675, which was filed by the trustee for Maywood Capital, which is a Chapter 11 debtor in a separately pending Chapter 11 case. Claim 2675 is based on three adversary proceedings filed in connection with the Chapter 11 case of Maywood Capital and would seek to recover certain allegedly fraudulent transfers of Maywood Capital's property.

The debtors objected to Claim 2675 on the basis that it does not assert or name WMI as a party and that such adversary proceedings do not assert any liability against WMI. Each of the adversary proceedings seeks to recover payments made to WMB, or more specifically a WMB-related entity.

Your Honor, the Trustee from Maywood Capital did file a response, as I had mentioned. In that response the Trustee acknowledges that Maywood Capital's claim is

properly asserted, if at all, against the FDIC administered receivership of Washington Mutual Bank. The only grounds raised for denying the debtors' objection is that the -- is that such objection is premature and should await a decision by the FDIC as to whether Maywood Capital's claim will be allowed in the receivership.

Your Honor, it is the debtors' belief that a large number of claims have been asserted, both against these Chapter 11 estates and against the FDIC administered receivership of Washington Mutual Bank. It is our contention that forcing the debtors to wait for the FDIC to make a determination as to each such claim before allowing the debtors to proceed with their objection to such claims, would severely impair and prejudice our ability to efficiently administer these Chapter 11 estates.

I would also note, Your Honor, that a disallowance by the FDIC does not in any way create a fallback right of recovery against these Chapter 11 estates. Certainly if the FDIC disallows the trustee's claim, and the trustee disagrees with that, he has his statutory remedies under the banking laws, specifically 12 USC 1821, which allows claimants the option to seek administrative review of the FDIC's disallowance of a claim or commence a lawsuit to have a court determine that claim.

As such the debtors request that the Court grant

the objection and disallow and expunge Claim 2675.

THE COURT: Is there anybody here for the Maywood Corporation Trustee?

MR. FIRTH: Yes, Your Honor, this is Bill Firth for the Trustee and the Maywood Corporation.

It's our position that we have no evidence to substantiate, nor access to any documents, to confirm the debtors' assertion that the claimants were non-debtor affiliates. Additionally given that, we filed the claim with the FDIC on March 30th, and under FDIC regulations they have 180 days to make a determination of the status of that claim. We're looking at September 30th, 2009, the expiration of that 180 day period.

And I would ask the Court that we adjourn our objection until a date after September 30th, or grant the objection, expunge the Trustee's claim subject to the preservation of our right to reassert it in the event the FDIC disallows the claim.

THE COURT: Well, what evidence do you have that there is a claim against Washington Mutual, Inc.?

MR. FIRTH: During the discovery that was conducted in the adversary proceedings, we determined in the ad -- we determined that two of the adversary defendants, Providian Financial and PNC Bank, were -- their loan portfolios were acquired by Washington Mutual.

THE COURT: Okay. And what's the debtors' response to that?

MR. CURRO: Your Honor, the subject loan portfolios are not resident anywhere on WMI's or WMI Investment Corp.'s books. Again, I would proffer the testimony of Mr. Arko to that effect.

Again, the debtors -- it's also the debtors' position that it is -- the original proof of claim does not have any evidence that these loan portfolios were acquired by WMI or WMI Investment Corp. As such, I think the burden at this point is on the Trustee of Maywood Capital to come forward with evidence that substantiates their claim, to the extent that the debtors' objection should not be granted. At this point, the debtors have no evidence, and they've been offered no evidence, that there's any liability at the -- at either WMI or WMI Investment Corp.

THE COURT: Response?

MR. FIRTH: Your Honor, I'd like to add that given the nature of the discovery in the adversary proceedings, we'd like to have some additional time in order to make the determination as to whether we have any further proof. And also given the fact that there's still a September 30th deadline for the FDIC to rule on the claim.

THE COURT: Well, I'm going to continue this because this may be moot if the FDIC determines it was a

claim against Washington Mutual Bank. When is our September omnibus hearing?

MR. CURRO: There's an August omnibus on the 24th. I'm not sure what the September date is.

(Counsel confers.)

MR. CURRO: September 25th, Your Honor.

THE COURT: All right. I'll continue this to the September 25th hearing date.

MR. FIRTH: Thank you, Your Honor.

THE COURT: But the Trustee should present evidence at that time that there is a claim against Washington Mutual, Inc. not just the bank.

MR. CURRO: Thank you, Your Honor.

The next response we received was from a claimant, John Cangiano. At the request of counsel, that matter has been adjourned to the next hearing in August.

The debtors also received a response from Vincent Roggio. Pursuant to the sixth omnibus objection, the debtors' objected to Claim 756, which was filed by Mr. Roggio. Claim 756 arises from alleged counterclaims asserted by Mr. Roggio in connection with a foreclosure proceeding instituted by WMB in the Superior Court of New Jersey, as well as the breach of a settlement agreement with WMB in respect of the same foreclosure proceeding. Claim 756 asserts a liability of $9 million in compensatory and

punitive damages.

Your Honor, Mr. Roggio did file a response. Similar to the Trustee, Mr. Roggio acknowledges that his claim is properly asserted, if at all, against the FDIC. Your Honor, for the same reasons as I mentioned, the debtors would request that Mr. Roggio's claim be disallowed and expunged. I would also note for your Court that, unlike the Maywood Capital situation where they did allege in their papers that the loan portfolios may have been acquired, no such allegations were made in the response filed by Mr. Roggio.

At this point the only claims being asserted pursuant to that claim are claims against -- counterclaims against WMB. There's been no -- no evidence submitted, no allegations made that would impose any liability on WMI. And so we would request that Your Honor grant the sixth omnibus objection with respect to Mr. Roggio's claim.

THE COURT: Is there anybody here on behalf of Mr. Roggio?

All right. I'll sustain the objection then.

MR. CURRO: Thank you, Your Honor.

And, Your Honor, for the sake of completeness, JPMorgan filed their reservation of rights also with respect to the fifth and sixth. As we indicated before we have resolved their issues and subject to final language, which

will be included in the sixth -- in the order with respect to both the fifth and the sixth omnibus objections.

THE COURT: All right. There are another a -- a number of other objections by the employees. It's my understanding that they've been continued?

MR. CURRO: And they've been continued, that's correct, Your Honor.

THE COURT: Okay.

MR. CURRO: Your Honor, moving on to the seventh omnibus objection. This was a non-substantive omnibus objection. The debtor sought to object to claims on three grounds.

The first, we sought to re-categorize one claim as filed against the wrong debtor. We sought to disallow and expunge 13 claims based on the fact that such claims were amended and superseded, and we sought to disallow five duplicative claims.

Your Honor, we did receive a response from the WMB Bondholders with respect to the seventh omnibus objection. In the response -- and this particular response dealt with Claim 3071. The debtors objected to that claim on the grounds that it was amended and superseded by Claim 3711. In their response, the Bondholders do not object to the relief sought by the debtors, but requested that the debtors waive any rights they may have to object to the

original -- I'm sorry, to the amended claim on the grounds that such claim was not timely filed.

As the debtors pointed out in our reply papers, the makeup of the bank bondholder group, on whose behalf the WMB Bank Bondholder claim was filed, changed between the originally filed claim and the amended claim. As such, the debtors wish to preserve their rights to object on timeliness grounds, solely as -- solely with respect to those amended bondholder claimants, as in those claimants that were added after the originally filed claim was filed.

The debtors -- counsel for the debtors and the WMB Bondholders have agreed on language that will be inserted in the seventh omnibus order that will give effect to that reservation.

THE COURT: Okay.

MR. CURRO: And, Your Honor, with that, I -- the -- that was the only response we received with respect to the seventh omnibus objection.

THE COURT: How about Ms. LaVine?

MR. CURRO: Oh, I'm sorry. Ms. LaVine did file a response. Again, that was an instance where we were able to work out with Ms. LaVine -- her issues, really, she just needed a point of clarification as to the relief the debtors sought and she had no further objection with respect to the relief we are seeking.

THE COURT: Okay. All right. I had no comments or questions on this omnibus objection.

MR. CURRO: Okay. Then with that, Your Honor, we would request that the Court enter that objection. Again, we will --

THE COURT: You're going to submit it under cert --

MR. CURRO: -- we will submit an order, yes.

THE COURT: Okay.

MR. ROSEN: Your Honor, we are now up to Item 12 on the agenda. And if the Court would like to move forward or otherwise take a break, we could do either one, but the Item 12 on the agenda is the motion of JPMorgan Chase for a motion -- for reconsideration of this Court's opinion with respect to the 2004 examination. I'll cede the podium to Ms. Friedman, but just to note, the matter will be handled on the debtors' side by Mr. Finestone of Quinn Emanual.

THE COURT: Okay.

MS. FRIEDMAN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. FRIEDMAN: Stacey Friedman from Sullivan & Cromwell on behalf of JPMorgan Chase.

I do think this motion for reconsideration has been substantially narrowed, so maybe what I'll do --

THE COURT: Yep, we're down to one issue?

MS. FRIEDMAN: We're down to one issue. We're three-quarters of the way there, we consider it a great victory. We hope for many more.

THE COURT: So just so it's clear, the debtor has been ceding that with respect to their counterclaims they will proceed in the adversary for discovery, not under the 2004?

MS. FRIEDMAN: That's correct, and I think fairly, although I'm sure I'll be corrected if I'm wrong. The real nub of the issue now is this business torts theory. And, you know, we have no objection, we believe the Court correctly, you know, quoted the standard and held the standard out in Your Honor's earlier opinion that the relevant inquiry is whether there's a related proceeding.

And when we looked at the business torts' theory and when we looked at the revised Rule 2004 discovery, we do believe that there is -- it is related to the pending counterclaims. And I think, the way I conceive it, is there's sort of two core issues in the business torts theory.

The first is that fundamentally there's an allegation that JPMorgan Chase didn't act in good faith. And if I look at Counterclaim 10, Paragraph 157 it is alleged that JPMorgan Chase did not acquire WMB's assets in good faith. That's going to be a crux of discovery in the

adversary proceedings and that is a crux of the business tort's theory.

And if you go to the second core, as I see it, issue in the business torts theory is that there was allegedly some prearrangement, I guess, with the FDIC that we were going to go in there and buy Washington Mutual. If you, again, look at the counterclaims -- Paragraph 68 of the counterclaims, the allegation in the counterclaims is that there was pre-discussions with the FDIC, in early September the FDIC informed JPMorgan Chase that the upcoming seizure, thus permitting JPMorgan Chase to be quote, "well prepared" for the purchase of the assets.

Those two core issues are both in the adversary proceeding and embedded in the business torts theory. And I think if you go to the Rule 2004 discovery itself and you look at the particular request, it bears out the relatedness. You know, Request Number 8 of the Rule 2004 discovery, any communication between Chase and the FDIC in the spring -- summer of 2008, that's going to go whether there was a prearrangement, that's going to go to whether there was good faith. Request Number 13, any communications with any governmental unit concerning the seizure or sale of Washington Mutual; that's going to go to good faith, that's going to go to prearrangement.

And actually, if you just take how I view this as

having two core aspects, if you're talking about the transaction itself, the Rule 2000 -- the revised Rule 2004 discovery requests that are supposed to be limited only to this business tort, the transaction broadly defined is mentioned in 1, 4, 5, 6, 7, 8, 9, 10, 11, 15 and 16. The communications with the government that are the basis of this quote, "prearrangement" are in 13, 14, 15, and 16.

The relatedness issue is whether there's the same facts. It's whether there are the same parties. And this is the holding and Bennett that Your Honor relied upon in her opinion. It's not a drafting of how you're going to come up with a particular theory. I understand that one is a fraudulent transfer theory and one is a business torts theory, but at the end of the day, if you're looking into the same facts and circumstances, if you're going to -- and I want to come back to this practical issue. If you're going to the same files and the same warehouses of documents and talking to the same people, you should cover all the related issues in one fell swoop.

So in our view, if you're going to dispose in the future some JPMorgan Chase executive about the good faith and the transaction, whether there was any prearrangement, it doesn't really matter whether you articulate that as a fraudulent transfer claim or a business tort claim or whatever claim they might come up with in the future. The

relatedness is a more, I think, discovery-oriented inquiry, which comes to the practical point. I do think that the parties are close, maybe, soon to a practical way forward or at least presenting to the Court in the future our disagreements on a discovery plan for the entire adversary proceedings.

But the point here is that we went to the debtors early this month and we said, there is going to be discovery from JPMorgan Chase. Tell us not only what you want Rule 2004 discovery, tell us what you want. Tell us what you want for your counterclaims, tell us what you want for your turnover action, because we're going to go to people's files and we're going to talk to people, we're going to collect documents and there will be production and there will be objections and we may disagree about the objections, but let's just be efficient, because to come to us now with purported Rule 2004 discovery, which we really do believe is related and come back to us in the future with adversary proceeding discovery, which we do believe is related, and make us to go back to the same sources and the same witnesses and the same documents again is unduly burdensome and simply not efficient.

So I think the sum and substance of our argument is that on the face the claims are related, on the face the discovery is related, and just practically, practically the

time is to move forward in some coordinated way, not with piecemeal discovery through Rule 2004 discovery.

THE COURT: I understand. Okay. Reply?

MR. FINESTONE: Your Honor, Benjamin Finestone on behalf of Quinn Emanual Urquhart Oliver & Hedges for the debtors-in-possession.

Your Honor, I think there are two categories that Ms. Freidman raised and I want to address them both in turn, but first one thing she didn't do was address the Court, or advise the Court -- and they didn't do this in their papers either, but they didn't set forth a standard on the motion for reconsideration. And while I'm sure that the Court is aware of the standard, I'd like to just set it forth for the record.

That standard is, as interpreted by the Third Circuit, the movant must establish one of three possible grounds. First, an intervening change in controlling law. I didn't hear any and I didn't see any in the papers.

Two, a need to correct the clear error of law or prevent manifest injustice. The only manifest injustice that I can see being prevented would be if this estate isn't allowed to conduct its investigation into what potentially is very valuable estate claims that resulted in the destruction of the going concern of -- the going concern value of these debtors-in-possession.

And three, new evidence that must -- and this is key, that must reasonably be expected to alter the conclusion reached by the Court the first time around; in this instance on May 20th before Your Honor.

Ms. Friedman then proceeded to take two topics, and first is this fraudulent transfer claim, the tenth counterclaim that the debtors felt compelled to assert. Why did they feel compelled to assert that claim? Because it comes from the same T&O, the same transaction occurrence, the P&A transaction, that JPMorgan Chase had put into play when they commenced their adversary proceeding.

The claims that were on the table at the last time were claims asserted by JPMorgan Chase as to who purchased what assets. The claims that the debtors responded with are -- is a fraudulent transfer under state law as a creditor of WMB, that the assets of WMB failed to net reasonably equivalent value.

Now both are centered around the purchase and assumption transaction. And Your Honor's opinion correctly found that the business torts, as a temporal matter, relate to conduct that allegedly took place before the closure of WMB by the OTS. Now, I think that simple temporal analysis was correct and I also think that that's dispositive of this motion for reconsideration. But if it's not, I think a review of the transcript will remove any doubt because

counsel for JPMorgan Chase on numerous occasions, at least three, basically made the same argument, except back then, since the counterclaims weren't asserted, it made the same argument in connection with claims that the debtors had asserted in the District of Columbia against the FDIC and I'd like to just put these quotes into the record.

Counsel for JPMorgan Chase argued,

"The D.C. action is about the appointment of the FDIC, the sale to JPMorgan Chase, and that the sale was not conducted in a prudent and reasonable manner."

They continued, "The issues in D.C. are the bonafides of the transaction. The issues in this business tort is the bonafides of the transaction."

Now I don't understand what they could have possibly meant, that the issues in the business tort were the bonafides of the transaction, but nonetheless, they did make that argument. This was an argument -- they were trying to basically tie challenges to the P&A transaction that the debtors asserted in the District of Columbia to the business -- to the allegedly business tort conduct.

More generally, counsel for JPMorgan Chase argued,

"If there is some claim that isn't actually a counterclaim to the JPMorgan Chase adversary

proceeding, it is still ultimately related to the sale of WMB by the FDIC to JPMorgan Chase."

So this argument is already something that they presented to the Court, and we believe -- the debtors believe that the Court properly rejected it.

Finally, if there is any doubt as to whether the tenth counterclaim were asserted back on May 20th -- and again the tenth counterclaim is this state law constructive fraudulent transfer, the opinion is -- has a Footnote 14, where if you read the Footnote 14 and you didn't know exactly what claims it was talking about, you might think that it was talking -- you might think that it could foresee the assertion of the tenth counterclaim.

The Court stated,

"JPMorgan Chase argues that the requested 2004 discovery is related to the debtors' alleged cause of action against the FDIC for dissipation of WMB's assets and the takings of debtors' property."

Now I'm going to stop quoting for a second. Those are distinct claims that the debtors have asserted in D.C., but nonetheless if I continue with the quote from the opinion my point will become clear. Continuing along.

"However, these causes of action are premised on the FDIC's failure to maximize the value of the

receivership's assets in the sale of WMB to JPMorgan Chase. Specifically, the debtors assert" -- again, this is in the District of Columbia, "the debtors assert that the FDIC would have received a higher value through the liquidation of WMB than the sale to JPMorgan Chase. The requested 2004 examination, on the other hand, does not seek to discover evidence related to the hypothetical liquidation analysis implicated in the dissipation and takings cause of action asserted in the D.C. action."

The debtors feel that Footnote 14 is directly on point and is dispositive of their motion for reconsideration, at least with respect to this tenth counterclaim, which JPMorgan Chase asserts, had it been asserted, would have been outcome determinative going the other way.

The other argument that JPMorgan Chase has presented to the Court today is this element of bad faith. And they found one sentence in our complaint that says JPMorgan Chase didn't take in good faith, and we don't deny that that allegation is there, but that does -- but I don't think anyone in this courtroom -- I don't think anyone in this courtroom is uncertain as to the reason behind the debtors' desire to take Rule 2004 discovery of JPMorgan

Chase. I think the debtors were clear on the record last time. Bad faith is not an element of any of these avoidance actions. It's not an element of the state law constructive fraudulent transfer action, it's not an element of the constructive fraudulent transfer to avoid the capital contribution, it's not an element of the constructive fraud -- of the preference -- of any of the preferential transfers that the debtors are seeking to avoid.

Given on one hand this potential significant valuable estate asset and given on the other hand this contingent -- this contingent one piece element of the claim that we -- that could potentially arise, if in fact that affirmative defense is ever raised, I don't think that under Bennett that would make those claims related, and I don't think that under any of the case law that was cited in their original opposition to our Rule 2004, that's a significant nexus to say that these claims are related and Rule 2004 should be barred.

That's the debtors' position on the technical points on the reconsideration motion, but before I conclude, Ms. Friedman also ventured into this discovery -- this overall discovery conversation. And if you note in their reply, there was the same sort of unsolicited insert as to coordination. And it's true, we have been speaking often with JPMorgan Chase and it's true that they have been using

that word coordination, coordination. It's as if they put this word on a flag and they're waving it around for everyone to see, coordination, because in most cases -- especially in most bankruptcy cases, coordination comes part and parcel with efficiency and economy.

But in this case, Your Honor, if you take a step back, what they really mean by coordination is delay. The debtors sought to do two things in this case, thus far successfully with respect to JPMorgan Chase. One, advance their Rule 2004 discovery so that they can determine whether potentially valuable and significant estate cause of action exists. If those causes of action exist and the debtors are successful in unearthing them, then they can deal with the decision of where to assert them in what court and when to assert them, but it -- on the other hand, what JPMorgan Chase would like to do under the guise of coordination is ball up the 2004, ball it up and in one ball with all the disputed asset classes that they've set forth in their JPMorgan Chase adversary proceeding so they can continue to control the pace of this dispute between them and the debtors-in-possession; drag it out long enough, hope to extract a more favorable settlement than they otherwise would be able to.

This discards the interests of the debtors-in-possession and it discards the interest of the creditors and

that's why the debtors have been fighting very hard to keep the turnover proceeding isolated and expedited because we don't believe there is a material issue of fact, and similarly keep the Rule 2004 motion going forward, because, again, that's not even a pending proceeding yet. There may or may not be causes of action there. That's already behind the pace of the other adversary proceedings.

THE COURT: Okay.

MR. FINESTONE: That's all I have. If you have any questions for the debtor?

THE COURT: I have no questions.

MR. FINESTONE: Okay. Thank you.

THE COURT: Could the party who has a BlackBerry on the table remove it? I think that's interfering with the microphones.

MR. STRATTON: Good afternoon, Your Honor, David Stratton.

Two points on this motion for reconsideration. I agree with Mr. Finestone that good faith or bad faith has nothing to do with the fraudulent conveyance claims that are part of the counterclaims asserted by the estate in the JPMorgan Chase litigation. And if you think about the business tort claim and the fraudulent conveyance claim and you realize this fact I think it becomes clear that they are not related.

If the Court were to determine that at the time the FDIC seized, I use that word colloquially, the bank and sold it to JPM, that the price they paid was adequate under the state and federal fraudulent conveyance statutes, that would not necessarily mean there was no business tort claim by this estate against Chase for its conduct from the time it first started looking at acquiring the bank through the date of acquisition.

In other words, if they did bad things that led to undermining the value, that could be a claim even if the value they ultimately paid was within the meaning of the statute fair value. So I think if you look at it that way, it's pretty clear they're not related.

Secondly, with respect to the issue of delay, I couldn't agree more. We've had motions to dismiss turnover actions, we've had motions to stay adversary proceedings that Chase filed itself, we've had motions to withdraw reference so that the district court, not this court, can consider transferring their litigation to the district court in the District of Columbia, even though Your Honor, I think, has already ruled on that and has the power to consider that issue herself. And now we're having motions to reconsider orders permitting discovery in matters, which seems to me, are fairly within the scope of 2004.

Delay, delay, delay. Expense, expense, expense

and it's all coming out of the hides of our creditors and we're very concerned about that. I offer that sort of that as the background for consideration of this motion. Thank you.

THE COURT: Thank you.

MS. FRIEDMAN: Briefly, Your Honor, two points. Delay, delay and delay and hides.

THE COURT: It's not all your fault.

MS. FRIEDMAN: That's not what my parents say.

There is one party who has tried to hand up a discovery schedule to move things forward in this adversary -- in the adversary proceedings on May 20th, that was JPMorgan Chase and we were told to wait Rule 2004 discovery. My number is 558-34 -- 3104, give me a ring, let's make it happen. We could be three months into discovery. That's point one.

Point two is, the Rule 2004 discovery cases don't ask about what theory you're going to pursue. They don't ask about the elements of your claim. They don't ask about how you are going to prove your case at trial. They ask whether the issues are the same or related. Whether the individuals and parties are related. And the reason why is quite simple, this is about the federal rules protections for discovery. And if you're going to go to the same people about the same issues, under one theory, two theories or

three theories, whether those theories have different elements or different causes of action, it doesn't matter. The question is whether that discovery is related. And that's the point that I think Your Honor got right. That is the point of Bennett, and I think that's why in the Rule 2004 discovery cases you don't see an analysis based on claims or theories, it's based on relatedness.

Any questions?

THE COURT: No.

MR. FINESTONE: Your Honor, brief reply?

THE COURT: Yes.

MR. FINESTONE: Thank you. For the record, Ben Finestone for the debtors-in-possession. I will try to keep it brief and not repeat what I said before, but Ms. Friedman came up here and touted her efforts in advancing a coordinated discovery schedule to the debtors. And I would just like to say that that's directly in theme with what I tried to, hopefully successfully, put forth to the Court the last time I spoke.

Their happy with submitting discovery schedules to us, so long as it's on their terms. And what do you think their discovery schedule did? It ignored two things that this Court has already ruled on. One, this Court's rejection of their motion to dismiss or consolidate the turnover action. And, two, the granting of the Rule 2004

order, which notwithstanding our voluntary tailoring of those document requests, that Court is still entered and effective and they haven't sought -- they haven't filed a motion to stay that order.

So I think the best evidence of the fact that when things aren't quite on JPMorgan Chase's terms, they're not quite so charitable and willing to work with us, is the fact that what was their response to our document request served pursuant to this Court's order? Nothing more -- nothing short of a blanket objection that points to what as authority? Its own motion for reconsideration and I think that just -- it puts it into context as to what level of coordination they're really looking to do on anyone else's terms other than their own.

Nothing further.

THE COURT: All right.

Well, let me do this. I'm going to deny the motion for reconsideration because I'm not convinced that the facts, let alone the legal theories, are similar to those of the constructive fraudulent conveyance and other counterclaims filed by the debtors. But I am going to suggest this, and I think that there is a strong need for coordination of discovery, and specifically I don't think that JPMC has to produce documents twice. If it produces it in the 2004 or in the adversary, the debtors can get it from

its co-counsel. And I think the parties should be very sensitive with respect to repeating deposition. I'm not going to direct anything at this point on that, but I don't think we need any repetition. I'll allow the 2004 solely with respect to the business tort claims and hope that the debtor does not try and use that to circumvent the federal rule of discovery under the adversaries.

MR. CARLINSKY: Your Honor, Mike Carlinsky. Just to be heard on one point.

With respect to those two issues Your Honor identified, one of the things we offered -- actually, the two things that we offered to Chase, one was documents would be produced one time, and in fact could be used in all of the litigations so they wouldn't have to be repeated.

THE COURT: All right.

MR. CARLINSKY: And, number two, we offered a stipulation that we would use best efforts to avoid having a deponent have to sit twice for deposition.

THE COURT: Okay.

MR. CARLINSKY: We said it may be the rare instance where it's unavoidable, but we offered both of those. And so, we take Your Honor's admonition to heart and we will follow it.

THE COURT: Okay.

I think on Item Number 13 I've already entered

the order?

MR. CURRO: You have, Your Honor. Thank you.

MR. SACKS: Your Honor, just briefly. Robert Sacks on behalf of JPMorgan Chase. I don't want there to be a half-represented record. Mr. Carlinsky has now given you his version. I don't think a he said-she said is terribly productive. There's obviously another half of the story as to what we offered and what they refused to accept, including the prospect of putting JPMorgan Chase's most senior executives to multiple depositions, which we think is really contrary to the purpose, intent and effort to utilize 2004 for the purposes of the other actions, to use that discovery in the other actions, to require us, as Mr. Friedman says, to search the files of the same people multiple times when we simply asked them to tell us what we want so we don't have to go through 50 people's files more than once because it is voluminous discovery that's being requested. And there are two sides to this.

We are really trying to make this go very efficiently and, you know, they say it's only if it's on our terms; really it's only if it's on their terms. And so I would urge that Your Honor --

THE COURT: I'm sure I'm going to get some deposition -- excuse me, some discovery disputes then.

MR. SACKS: Your Honor, if I can make a

suggestion on this? That perhaps that it would be productive if you would order us to meet and confer and submit statements on a coordinated order and come back at some point if we can agree on something to actually get this moving forward in a sensible way. So we can be assured that when they want these 2004 -- not just the documents, but the depositions, that we're going to be in a position to make those witnesses available as we said we are willing to do, but not multiple times.

When they want the CEO of JPMorgan Chase to talk about what was said and discussed and why they went forward with this transaction, they shouldn't do that, and then they shouldn't be able to drag him back again four months later on related subjects, which is what's going to happen here.

THE COURT: Well, I will direct the parties both in the adversary and the 2004 to get me some scheduling orders and coordinate them.

MR. CARLINSKY: That's fine, Your Honor. And the only thing I would say is, what we said specifically is get us the documents, the request has been outstanding on the 2004 issue, that will take some time, I suspect, for us to review. And then we would work on scheduling depositions, so as to try to avoid any duplication. And we will continue to work toward that objective, but what I am --

THE COURT: Get me -- I don't want to hear

anymore. I don't want to hear anymore.

MR. CARLINSKY: Thank you.

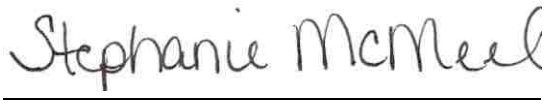
THE COURT: I've heard enough. Get me scheduling orders for the discovery.

All right. We'll stand adjourned.

(Whereupon at 3:36 p.m., the hearing was adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



August 2, 2009

Stephanie McMeel

AAERT Cert. No. 452

Certified Court Transcriptionist

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)
Debtors.	:	Jointly Administered
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	Adversary Proceeding No. 09-50934(MFW)
Plaintiffs and Counterclaim Defendants,	:	
v.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Defendant and Counterclaimant.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
Cross-Claimant,	:	
v.	:	
FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Washington Mutual Bank, Henderson, Nevada,	:	
Cross-Claim Defendant.	:	

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

ANSWER AND AMENDED COUNTERCLAIMS / CROSS-CLAIM OF JPMORGAN CHASE BANK, NATIONAL ASSOCIATION

Defendant JPMorgan Chase Bank, National Association ("JPMC"), by and through its undersigned counsel, for its Answer to the Complaint For Turnover of Estate Property of Washington Mutual, Inc. and WMI Investment Corp. (collectively, "WMI" or "Debtors") dated April 27, 2009 (the "Complaint"), hereby responds as follows:

NATURE OF ACTION

1. To the extent any response is required, denies the allegations of paragraph 1, except denies knowledge or information sufficient to form a belief as to the truth of the allegations concerning Debtors' statement of their own intentions.

2. Denies the allegations of paragraph 2, except admits that JPMC entered into a Purchase and Assumption Agreement (Whole Bank) Among Federal Deposit Insurance Corporation, Receiver of Washington Mutual Bank, Henderson, Nevada, Federal Deposit Insurance Corporation and JPMorgan Chase Bank, National Association dated as of September 25, 2008 (the "P&A Agreement") pursuant to which JPMC acquired certain assets and liabilities of Washington Mutual Bank, Henderson Nevada ("WMB"), and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

3. Denies the allegations of paragraph 3, except admits that Debtors have quoted a portion of the second recital contained in the P&A Agreement, and refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

4. Denies the allegations of paragraph 4, except denies knowledge or information sufficient to form a belief as to the truth of Debtors' allegations concerning what Debtors contemplated.

5. Denies the allegations of paragraph 5.

6. Denies the allegations of paragraph 6.

7. Denies the allegations of paragraph 7, except admits that JPMC has asserted that it has valid rights of setoff and a valid security interest against funds claimed by Debtors to be deposit liabilities owed by JPMC.

8. Paragraph 8 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 8, except (i) admits that JPMC has asserted that it has valid rights of setoff and a valid security interest against funds claimed by Debtors to be deposit liabilities owed by JPMC and (ii) denies knowledge or information sufficient to form a belief as to the truth of debtors' allegations concerning their solvency.

9. Denies the allegations of paragraph 9, except admits that the Complaint purports to seek turnover and restitution.

JURISDICTION AND VENUE

10. Paragraph 10 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 10, except admits that Debtors purport to bring this action under Federal Rule of Bankruptcy Procedure 7001 and II U.S.C. §§ 541 and 542.

11. Paragraph 11 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 11, except

admits that Debtors purport to allege that this Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b).

12. Paragraph 12 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 12, except admits that Debtors purport to allege that venue is proper under 28 U.S.C. § 1409(b).

13. Paragraph 13 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 13, except admits that Debtors purport to allege that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

THE PARTIES

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 and respectfully refers the Court to Debtors' filings in this action for a complete and accurate statement of their content.

17. Admits the allegations of paragraph 17.

FACTUAL BACKGROUND

18. Denies the allegations of paragraph 18.

19. Denies the allegations of paragraph 19 and respectfully refers the Court to the referenced Exhibit for a complete and accurate statement of its content.

20. Denies the allegations of paragraph 20.

21. Denies the allegations of paragraph 21, except admits that Debtors purported to list certain accounts on their Schedules of Assets and Liabilities filed with the Bankruptcy Court.

22. Denies the allegations of paragraph 22, and respectfully refers the Court to the GL Administration Policy for a complete and accurate statement of the terms of that policy.

23. Denies the allegations of paragraph 23, except admits that the referenced Exhibit are copies of documents sent by JPMC but avers that such documents were sent (i) subject to a full reservation of rights, (ii) pending judicial resolution, without prejudice to JPMC's position that the accounts referenced did not reflect deposit accounts and/or did not contain, in whole or in part, funds belonging to Debtors, and (iii) subject to Debtors' acknowledgment of JPMC's rights of setoff, recoupment and offset.

24. Denies the allegations of the first sentence of paragraph 24. The second sentence of paragraph 24 contains legal assertions as to which no response is required. To the extent a response is required, denies the allegations of the second sentence of paragraph 24 to the extent applicable to the accounts that form the basis of Debtors' Complaint.

25. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25.

26. Denies the allegations of paragraph 26, except denies knowledge or information sufficient to form a belief as to the truth of Debtors' allegations concerning what WMI "determined."

27. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27, except admits that WMI engaged in improper

conduct and did not properly create a deposit account at Washington Mutual Bank fsb ("WMB fsb").

28. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28, except admits that WMI improperly directed backdated entries on the books and records of WMB and avers that the misconduct of WMI caused the system to generate account statements that did not accurately reflect either the character of the accounts at issue, the existence of valid and collectible account balances, or the proper ownership as between WMI, WMB and WMB fsb of any actual funds.

29. Denies the allegations of paragraph 29, except denies knowledge or information sufficient to form a belief as to what was intended by Debtors.

30. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30, except (i) respectfully refers the Court to the GL Administration Policy for a complete and accurate statement of its contents, (ii) respectfully refers the Court to the referenced Exhibit for a complete and accurate statement of its contents, and (iii) avers that the efforts of WMI to create a deposit account liability at WMB fsb in the days prior to WMB's seizure by the regulators did not comply with internal policies or applicable law.

31. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31.

32. Denies the allegations of the third sentence of paragraph 32 and denies knowledge or information sufficient to form a belief as to the truth of the first and second sentences of paragraph 32.

33. Denies the allegations of paragraph 33, except (i) admits that JPMC acquired certain assets and assumed certain liabilities of WMB pursuant to the P&A Agreement and respectfully refers the Court to that Agreement for a complete and accurate statement of its terms, (ii) admits that the assets acquired by JPMC pursuant to the P&A Agreement included all of the stock of WMB fsb, and (iii) admits that Debtors purport to reference a press release issued by the FDIC and respectfully refer the Court to that release for a complete and accurate statement of its contents.

34. Denies the allegations of paragraph 34, except admits that Debtors purport to quote from the P&A Agreement and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

35. Denies the allegations of paragraph 35, except admits that Debtors purport to quote from the P&A Agreement and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

36. Paragraph 36 contains legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 36 and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

37. Denies the allegations of paragraph 37, except admits that WMB fsb became a wholly-owned subsidiary of JPMC and was subsequently merged into JPMC.

38. Denies the allegations of paragraph 38, except respectfully refers the Court to the referenced public statements for a complete and accurate statement of their contents.

39. Denies the allegations of paragraph 39, except denies knowledge or information sufficient to form a belief as to Debtors' contemplation and respectfully refers the Court to the Account Stipulation for a complete and accurate statement of its terms.

40. Denies the allegations of paragraph 40, except respectfully refers the Court to the Account Stipulation for a complete and accurate statement of its terms.

41. Denies the allegations of paragraph 41, except respectfully refers the Court to the referenced public statement for a complete and accurate statement of its contents.

42. Denies the allegations of paragraph 42.

43. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 43, except admits that JPMC has declined to confirm that some or all of the accounts that Debtors claim to be demand deposit accounts are demand deposit accounts or the property of Debtors.

44. Denies the allegations of paragraph 44, except admits that JPMC has refused to turn over certain accounts which Debtors claim belong to it and which claim JPMC disputes, in whole or in part, and avers that JPMC has commenced an interpleader to determine the character of such accounts and to resolve disputed claims with respect to ownership of any funds actually in such accounts.

45. Denies the allegations of paragraph 45, except admits that JPMC reached an agreement with Debtors to accrue interest to the extent the accounts are determined to be deposit accounts and contain funds that belong to Debtors.

46. Denies the allegations of paragraph 46, except admits that JPMC issues Account Statements to Debtors but only (i) subject to a full reservation of rights, (ii) pending judicial resolution of disputes relating to Debtors' claims of ownership and without prejudice to JPMC's position that the accounts referenced are not deposit accounts and/or do not contain, in whole or in part, funds belonging to Debtors, and (iii) subject to JPMC's rights of setoff, recoupment and offset.

47. Denies the allegations of paragraph 47, except admits that Debtors purport to quote from a proof of claim filed by JPMC and respectfully refers the Court to the proof of claim identified in the paragraph for a complete and accurate statement of the terms of its contents.

48. Paragraph 48 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 48.

49. Paragraph 49 contains legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 49 and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

50. Paragraph 50 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 50.

51. Paragraph 51 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 51.

52. Paragraph 52 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 52, except denies knowledge or information sufficient to form a belief as to the truth of Debtors' allegations concerning their solvency.

53. Paragraph 53 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 53.

54. Paragraph 54 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 54.

55. Paragraph 55 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 55.

FIRST CLAIM FOR RELIEF
Turnover Pursuant to 11 U.S.C. § 542

56. JPMC incorporates its responses to paragraphs 1 through 55 as if fully set forth herein.

57. Paragraph 57 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 57.

58. Denies the allegations of paragraph 58, but admits that Debtors do not presently have use of what they claim to be "the Deposits."

59. Paragraph 59 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 59.

60. Paragraph 60 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 60.

61. Paragraph 61 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 61 except or denies knowledge sufficient to form a belief as to the truth of Debtors' allegations concerning their solvency.

62. Paragraph 62 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 62.

63. Paragraph 63 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 63.

64. Paragraph 64 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 64.

65. Denies the allegations of paragraph 65, except admits that to the extent the accounts referenced in Debtors' complaint are in fact deposit accounts and in fact contain actual funds, JPMC has possession and custody of them.

66. Denies or denies knowledge sufficient to form a belief as to the allegations of paragraph 66.

67. Paragraph 67 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 67.

SECOND CLAIM FOR RELIEF
Unjust Enrichment

68. JPMC incorporates its responses to paragraphs 1 through 67 as if fully set forth herein.

69. Paragraph 69 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 69.

70. Paragraph 70 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 70.

71. Paragraph 71 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 71.

72. Denies the allegations of paragraph 72 except admits that Debtors purport to seek an order as alleged in the paragraph.

73. Denies all of the allegations of the Complaint not specifically admitted above, including those set forth in the Reservation of Rights and Prayer for Relief.

AFFIRMATIVE DEFENSES

In further response to the Complaint, upon information and belief and subject to further investigation and discovery, JPMC alleges the following affirmative defenses without assuming any burden of proof that JPMC does not otherwise bear:

First Affirmative Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

The Court lacks subject matter jurisdiction over Debtors' claims in this action.

Third Affirmative Defense

Debtors lack standing to maintain some or all of the claims alleged in the Complaint.

Fourth Affirmative Defense

Debtors' claims are barred, in whole or in part, by principles of *res judicata* and/or collateral estoppel.

Fifth Affirmative Defense

To the extent subject matter jurisdiction over Debtors' claims in this action is not limited to the United States District Court for the District of Columbia, Debtors' claims are compulsory counterclaims that they were required to bring in the Adversary Proceeding entitled *JPMorgan Chase Bank, National Association* v. *Washington Mutual, Inc., et al*.

Sixth Affirmative Defense

Debtors are barred from seeking or obtaining some or all of the relief sought in the Complaint by the doctrines of waiver and/or estoppel.

Seventh Affirmative Defense

Debtors are barred from seeking or obtaining some or all of the relief sought in the Complaint as a result of their unclean hands.

Eighth Affirmative Defense

Debtors are barred from seeking or obtaining some or all of the relief sought in the Complaint by the doctrine of *in pari delicto.*

Ninth Affirmative Defense

Debtors' claims are barred, in whole or in part, for failure to join one or more indispensable parties.

Tenth Affirmative Defense

Debtors' claims are barred, in whole or in part, by applicable banking rules, regulations and statutes.

Eleventh Affirmative Defense

JPMC is entitled to a setoff, recoupment and/or offset from any recovery to which Debtors may be found to be entitled.

Twelfth Affirmative Defense

Debtors are barred from some or all of the recovery they seek due to a failure of consideration.

Thirteenth Affirmative Defense

Debtors' claims are barred, in whole or in part, due to their fraud.

Fourteenth Affirmative Defense

Debtors' claims are barred, in whole or in part, because their conduct and/or the matters upon which their claims are based was or are illegal.

Fifteenth Affirmative Defense

Debtors' claims are barred, in whole or in part, because the transactions on which their claims are based were the product of duress.

Sixteenth Affirmative Defense

Debtors failed to exhaust their administrative remedies.

Seventeenth Affirmative Defense

Debtors' claims are barred, in whole or in part, by the statute of frauds.

JPMORGAN CHASE'S AMENDED COUNTERCLAIMS / CROSS-CLAIM

JPMC, for its counterclaims against Debtors, and its cross-claim against the FDIC, alleges upon knowledge as to itself and upon information and belief as to all other matters as follows:

NATURE OF ACTION

1. JPMC brings these counterclaims and cross-claims to protect itself from the ongoing efforts of WMI to claim as its own assets that do not belong to WMI and from WMI's transparent attempt to profit from its own misconduct in causing WMB's failure by trying to shift the cost of that failure to the federal government and JPMC as the purchaser of

assets in good faith from the FDIC as Receiver for WMB under Title 12 of the United States Code. Certain of these counterclaims and cross-claims are among the claims that have already been asserted in an adversary proceeding entitled *JPMorgan Chase National Association* v. *Washington Mutual, Inc., et al.* (the "JPMC Adversary Proceeding").

2. JPMC is also asserting a claim for fraud relating to WMI's purported transfer of $3.67 billion from WMB to WMB fsb in the days leading up to WMB's seizure by government regulators. This most extraordinary purported transfer was attempted by WMI with full knowledge that WMB was about to fail and would shortly be seized by regulators, and while WMB was experiencing massive outflows of deposits from unaffiliated depositors. The purported transaction was engineered by senior management at WMI (identified below) who directed clerical and other lower level employees to make accounting entries that misrepresented the true nature of the transaction and concealed relevant facts. This caused the resulting transaction without the informed and voluntary participation of WMB fsb, without the actual movement of any funds from WMB to WMB fsb, and for the purpose of putting WMI in a position to try to lay claim to $3.67 billion that it would not otherwise have had a clear right to upon WMB's failure. Indeed, the purported transfer of $3.67 billion by WMI from WMB to WMB fsb was supposedly accompanied by the simultaneous, round trip, loan back from WMB fsb to WMB of precisely the same $3.67 billion WMI purportedly transferred in the other direction. In other words, without any disclosure to WMB fsb, and without any movement of funds to WMB fsb, WMI purported to (i) impose upon WMB fsb an unconditional $3.67 billion obligation to WMI, (ii) require WMB fsb to loan $3.67 billion to WMB when WMI knew WMB was not safe and sound and that no rational bank would ever make such an unsecured loan and that WMB was about to be placed in a receivership and would therefore unlike ever pay the loan

back, and (iii) thereby effectively steal $3.67 billion from WMB fsb. JPMC, as the successor to WMB fsb, is entitled to recover from WMB for this blatant fraud.

3. JPMC believes that disputes involving the matters that are the subject of Debtors' claims and these counterclaims and cross-claims must be resolved in the action commenced by Debtors in the United States District Court for the District of Columbia entitled *Washington Mutual, Inc., et al.* v. *Federal Deposit Insurance Corporation*, Case No.1:09-cv-00533 (the "D.C. Action"). In addition, JPMC has requested withdrawal of the reference to the bankruptcy court for this action. And JPMC believes that this turnover proceeding must be dismissed because, among other things, there is a dispute about the alleged assets that are the subject of Debtors' complaint, which makes turnover improper. However, without prejudice to those positions, JPMC seeks a resolution through these counterclaims and cross-claims to the extent the disputes that are the subject of this action are not resolved in the D.C. Action, as JPMC believes they should be, and to the extent this action is not dismissed, as JPMC also believes it should be.

4. Under the P&A Agreement, JPMC acquired the business and related assets of WMB, including ownership of all of WMB's direct and indirect subsidiaries, and all right, title and interest of the Receiver in those assets. As provided for in the P&A Agreement, JPMC purchased "all of the Receiver's right, title and interest" to these assets, pursuant to and in accordance with the Federal Deposit Insurance Act, as amended (the "FDI Act"). Among the assets acquired by JPMC under the P&A Agreement were certain assets that have been claimed by Debtors in this action and elsewhere. JPMC's right in the assets that the Debtors seek to recover from JPMC in this action were transferred to JPMC by the FDIC pursuant to the P&A Agreement.

5. On December 30, 2008, the Debtors submitted claims in the Receivership for, among other things, ownership of the assets that they seek to require JPMC to turn over to them in this action. On January 23, 2009, the FDIC, as Receiver, disallowed the Debtors' claims to those assets. The Debtors elected not to appeal the disallowance of their claims to ownership of these assets. Rather, on March 20, 2009, the Debtors filed the D.C. Action against the FDIC in the United States District Court for the District of Columbia, challenging the disallowance of their claims and also claiming ownership of, among other things, those assets. The Debtors have exercised their purported right to demand a trial by jury in the District Court Action.

6. The Court in the D.C. Action has not overturned the FDIC's disallowance of the Debtors' claims to the assets that the Debtors seek to recover from JPMC in this action. Debtors' claims to the assets have already been disallowed pursuant to the resolution procedures under Title 12. Consequently, unless and until the D.C. Court overturns that disallowance, the Debtors have no rights in the assets they seek to recover from JPMC in this action, and both the Debtors and this Court are bound to honor and respect the determination under Title 12.

7. The assets that are the subject of the Debtors' disallowed claims are also among the assets set forth in the Debtors' Schedules and Statements of Financial Affairs filed with this Court on December 19, 2008, January 27, 2009 and February 24, 2009 (collectively, the "Schedules"). Notwithstanding the assertions in the Schedules and the D.C. Action, there are substantial questions as to ownership of the assets that are the subject of the Debtors' claims in this action. They are, in whole or in part, not property of the Debtors' estates under 11 U.S.C. §541, and they are, in whole or in part, property of JPMC, which acquired them in good faith and for value from the FDIC pursuant to the FDI Act.

8. In response to the Debtors' actions and in order to protect its economic interests in the assets the Debtors chose to put at issue in the District Court Action, on March 24, 2009, JPMC filed the JPMC Adversary Proceeding. In that action, JPMC seeks declaratory relief requesting adjudication in the D.C. Action of the ownership of assets put at issue by Debtors in that action or, in the alternative, requesting that the Bankruptcy Court grant relief as to JPMC's interests therein. On May 29, 2009, Debtors answered JPMC's Complaint in the JPMC Adversary Proceeding and asserted eighteen counterclaims, none of which included the claims Debtors assert in this Complaint even though these omitted claims are compulsory counterclaims.

9. In this action, JPMC seeks (a) a determination that title to the disputed accounts and any funds in those accounts be determined in the D.C. Action, and (b) to the extent that does not happen, pursuant to Title 12 and the P&A Agreement, (i) a declaration that, as the successor of the Receiver, it has or is entitled to full legal title to and the beneficial interest in some or all of the "disputed accounts" and any funds in them, and (ii) adjudication of any and all conflicting claims to the so-called "disputed accounts" and any funds in them.

PARTIES

10. Counterclaimant JPMC is a national banking association organized under the laws of the United States of America with its principal place of business in Columbus, Ohio. JPMC is a wholly-owned subsidiary of JPMorgan Chase & Co., a corporation organized under the laws of the State of Delaware. JPMC is the "Assuming Bank" as that term is defined in the P&A Agreement and is the successor to and good faith purchaser for value from the Receiver under the P&A Agreement and under Title 12 of the United States Code.

11. Counterclaim Defendant WMI is a holding company incorporated in Washington with its principal place of business in Seattle, Washington and is one of the debtors and debtors-in-possession in these cases, having filed its voluntary petition for reorganization under chapter 11 of Title 11 of the United States Code on September 26, 2008 (the "Petition Date") before the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

12. Counterclaim Defendant WMI Investment Corp. is a Delaware corporation with its principal place of business in Seattle, Washington and is the other debtor and debtor-in-possession in these cases. WMI and WMI Investment Corp. are referred to collectively as "WMI" or "Debtors".

13. Cross-Claim Defendant FDIC is a federal corporation with its principal place of business in the District of Columbia. The FDIC is named as a defendant solely in connection with the interpleader claim in its capacity as Receiver of WMB.

JURISDICTION

14. This Court has jurisdiction over these counterclaims and cross-claims pursuant to 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. §§ 1334 and 1335, 28 U.S.C. § 157, and Bankruptcy Rules 7013, 7019 and 7020.

STATEMENT OF FACTS

A. The Bank Failure and Acquisition.

15. On September 18, 2008, the Office of Thrift Supervision ("OTS") designated WMB as a "problem institution," thus subjecting it to closer control and scrutiny by the federal regulatory authorities and on September 25, 2008, the OTS placed WMB in receivership because of significant concerns over the safety and soundness of the institution. To

ensure continuity of operations, maximize public confidence and minimize cost to the public treasury, the FDIC ran an accelerated bidding process in accordance with statutorily mandated procedures under Title 12 that, subject to certain limited exceptions, resulted in the sale of all of the Receiver's right, title and interest to or in WMB's assets whether or not reflected on the books and records of WMB, to JPMC pursuant to the terms of the P&A Agreement.

16. At the time of the Receivership, WMB was the sixth-largest bank in the United States, with 2207 branches, more than 43,000 employees, and more than 13 million depositors with more than $140 billion of deposit liabilities insured by the FDIC.

17. WMB also owned 100% of WMB fsb. WMB fsb or "the little bank" (as it has sometimes been called) had 26 offices to WMB's 2,207 and less than $5 billion in customer deposits insured by the FDIC to WMB's more than $140 billion.

18. The FDIC's ability to promptly find a suitable acquirer of WMB's banking operations had significant economic and policy ramifications. This was a bank failure of unprecedented magnitude that occurred in the midst of the most severe financial crisis in decades. Had the FDIC been unable to sell the assets of WMB, 13 million depositors would have lost their bank and the confidence of consumers in the banking system generally would likely have been further undermined. The protection of the title conveyed by the FDIC to institutions like JPMC, who are encouraged to step into the breach and provide the stability and continuity necessary to avert a run on a failing bank and disruption of its services to the public, is critical to the ability of the regulators to manage bank failures under Title 12 and the government to administer an insurance fund that can maintain public confidence in the banking system.

19. That WMB stands as the largest bank failure in United States history stems in large part from the financial crisis and crisis of confidence that still grips the nation. In

the ten days immediately prior to the Receivership, WMB experienced deposit outflows of more than $16.7 billion, amounting to more than $2 billion per banking business day, as its customers were apparently moving their assets so as to avoid the effects of what was increasingly perceived to be an inevitable bank failure. Incredibly, while that was occurring, WMI engaged in a series of inappropriate and ineffective book entries described below, in order to try to seize for itself assets that belonged to WMB.

20. JPMC had only two days after being briefed by the FDIC to submit a bid and then only twenty-four hours from the time that its bid was accepted by the FDIC until the time the acquisition closed to complete the single-largest acquisition of a failed institution in United States history. The circumstances which led to execution of the P&A Agreement meant that JPMC had limited opportunity to prepare for this unprecedented transaction.

21. The acquisition included, among other things, a nationwide credit card lending business, a multi-family and commercial real estate lending business, and nationwide mortgage banking activities. JPMC's acquisition avoided an interruption in WMB's banking services. It assured that the 2,207 branches operated by WMB, as well as the 26 additional branches operated by WMB fsb, opened for business on September 26, 2008, protecting the interests of employees, customers, vendors, and communities who were dependent on WMB's banking operations. JPMC paid $1.88 billion dollars to the FDIC for these and other assets, and assumed all deposits. This transaction involved no financial assistance from, or cost to, the FDIC's Deposit Insurance Fund. This stands in contrast to other recent bank failures such as the FDIC's sale of IndyMac Federal Bank FSB, which cost the FDIC approximately $10.7 billion, despite IndyMac being a much smaller bank than WMB.

22. There is substantial evidence that, contrary to Debtors' unsupported assertions, at the time of the receivership and at all relevant times before the receivership, WMI, WMB, and WMBfsb were solvent. Indeed, the OTS found that "WMB met the well-capitalized standards *through the receivership date*." (OTS Fact Sheet 9/25/2008 (emphasis added).)

23. The task of stabilizing, integrating and creating as smooth a transition as possible has been time-consuming and arduous. But its success has been vital to the banking system, the communities served by WMB and the general public interest.

B. Combined Operations of Washington Mutual

24. As a federal savings association committed to serving consumers and small businesses, WMB accepted deposits from the general public, originated, purchased, serviced and sold home loans, made credit card, home equity, multi-family and other commercial real estate loans, and to a lesser degree, engaged in certain commercial banking activities. WMB's substantial mortgage business was hit especially hard by increasing home and commercial mortgage delinquencies in late 2007 and 2008.

25. As the financial crisis took root toward the end of 2007, WMI focused its efforts on raising capital for WMB. In late 2007, WMI raised approximately $3 billion in new capital through the issuance of a series of debt securities. In early 2008, WMI sought out merger partners and equity investors. A number of companies participated in the process (including JPMC, which submitted a bid to acquire WMI, but whose bid was rejected by WMI). In April 2008, in lieu of an acquisition or a merger, WMI negotiated a capital infusion of approximately $7.2 billion from a group of investment funds led by Texas Pacific Group, a private equity firm, through an issuance of preferred stock, which included anti-dilution provisions that severely constricted the ability of WMI to raise additional capital.

26. All of the money raised by WMI provided additional capital to WMB. WMI formally contributed to WMB at least $6.5 billion of the approximately $10.2 billion in capital it had raised. As discussed below, certain book entries made between September 19 and September 24, 2008 reflect that an additional $3.7 billion was apparently contributed as capital to WMB fsb, accounting for much of the remaining debt and equity capital raised by WMI during 2007 and 2008. While book entries were made, neither WMI nor WMB transferred cash or other good funds to WMB fsb corresponding to the book entries, whether as a contribution or otherwise.

27. Prior to the Receivership, WMI and WMB had identical and overlapping directors and held joint meetings of the Boards of Directors of both entities on a combined basis, resulting, in effect, in a single Board of Directors with identical directors that met on the same topics at the same time and collectively made decisions for both entities. WMI's officers and employees were also officers and directors of WMB and WMI and WMB shared a joint general ledger and other books and records, and centralized their decision making, treasury, cash management, finance, governance, regulatory and executive functions in the same individuals. The overlap was so extensive that, as of the time of the Receivership and subsequent Petition Date, WMI claimed it had only a handful of employees remaining as the result of the Receivership.

28. Likewise, the assets and liabilities of the Debtors and their direct and indirect subsidiaries, including the Affiliated Banks, were connected and in many cases, commingled and intertwined. Prior to the Receivership, the Debtors and their direct and indirect subsidiaries operated a centralized and consolidated cash management system pursuant to which external receipts and payments were accounted for on a consolidated basis and internal receipts

or payments were done in whole or in part by book or journal entry as "due to/from" accounts on the general ledger or other books of account.

29. At various times prior to the Receivership, WMI entered into agreements with third parties that titled assets or contractual rights in WMI's name although WMB or a subsidiary of WMB paid for the asset or contractual right or was the entity liable on the payment or liability therefore. At various times prior to the Receivership, WMI also entered into intercompany arrangements with the Affiliated Banks with documentation different than the documentation that the Affiliated Banks would have obtained in an arm's-length transaction with an unaffiliated party.

30. In 2007 and 2008, WMI undertook a series of projects and other acts, at least some of which appear to have moved assets away from WMB or its subsidiaries to WMI or another of WMI's subsidiaries. This included transfers undertaken during August and September 2008 as part of WMI's self-titled "WMI Cash Optimization Program", for the apparent benefit of WMI.

31. To the extent that that any person has or may assert claims against JPMC that resulted from these transactions, JPMC is entitled to be indemnified and held harmless by WMI since all pre-petition transactions were consummated at the behest and direction of WMI and for its benefit.

C. The Intercompany Amounts and Accounts

(i) The "On-Us" Accounting Entries

32. On the Petition Date, WMI claimed that JPMC was liable to pay a total purported deposit liability to WMI and its non-WMB subsidiaries, originally claimed in the amount of $5 billion. In their complaint in this action, Debtors assert claims in six accounts (the

"Disputed Accounts") in the total amount of $4,038,509,283 (the "Intercompany Amounts"). According to WMI, the Intercompany Amounts represent deposits maintained by WMI at the Affiliated Banks.

33. JPMC disputes Debtors' characterization of the Disputed Accounts and its claimed entitlement to the Intercompany Amounts. With respect to the Disputed Account alleged to have been created by WMI at WMB fsb on the eve of WMB's receivership, JPMC further specifically disputes that such an account was properly created or that good funds – alleged by Debtors to be approximately $3.67 billion – were ever delivered to WMB fsb.

34. As set forth in the P&A Agreement, JPMC purchased "all of the Receiver's right, title and interest," in the Intercompany Amounts, pursuant to and in accordance with the FDI Act. On December 30, 2008, the Debtors nonetheless submitted a claim to the Receiver asserting, among other things, ownership of the Intercompany Amounts. On January 23, 2009, the Debtors' claims were disallowed by the Receiver. On March 20, 2009, the Debtors commenced the D.C. Action with respect to the disallowance of their claims, assert that the Intercompany Amounts are deposit accounts at JPMC, and claim damages relating to the Intercompany Amounts.

35. The Receiver's disallowance of the Debtors' claims to the Intercompany Amounts has not been vacated or overturned by the Court in the D.C. Action.

36. With the exception of signature cards for several of the smaller Accounts, JPMC has not located and believes there do not exist pre-petition any deposit account agreements, signature cards or any other documentation for the Accounts as deposit accounts. Notwithstanding that fact and while it continued to investigate whether such documents existed somewhere, JPMC was prepared to treat the Accounts as if they were deposit accounts so long as

all rights of all parties, including JPMC's rights, were acknowledged and approved by order of this Court. Toward that end, on or about October 15, 2008, JPMC and the Debtors entered into a proposed stipulation (the "Account Stipulation") with respect to the Accounts that was filed with the Court for approval. The Account Stipulation was ultimately withdrawn following objections filed by certain creditors of the Receivership and the FDIC and was never entered by the Court.

37. Pursuant to the Account Stipulation, and before it was withdrawn, JPMC and the Debtors executed customary deposit account agreements regarding the Accounts on or about October 21, 2008 that provided, among other things, customary rights of setoff, recoupment and banker's liens to secure JPMC's rights to recover claims JPMC may have against the Debtors or their subsidiaries and affiliates from the funds on deposit in the Accounts.

38. After the execution of those documents but prior to December 19, 2008, JPMC acceded to a request of the Debtors and the Official Committee of Unsecured Creditors (the "Committee") to agree to the accrual of interest on the Intercompany Amounts as a sign of good faith in the event that it were ultimately determined that any of the Intercompany Amounts were in fact deposit accounts, without prejudice to its rights. Similarly, JPMC agreed to the Debtors' further request that as a sign of "goodwill" it agree to release $292 million of the Intercompany Amounts attributable to the Accounts of the non-debtor subsidiaries of WMI, without prejudice to its rights.

39. JPMC agreed to those requests from the Debtors in good faith, without prejudice to its rights, and on the understanding that the parties were working diligently to resolve open questions and issues with respect to the Intercompany Amounts. It did so in reliance on the Debtors' execution of account documentation for the Accounts that protected the interests of JPMC, and on the understanding that the Debtors would respect those rights.

However, on or about December 19, 2008, after obtaining from JPMC the benefit of these concessions, the Debtors advised JPMC that the execution of those deposit account agreements on October 21, 2008, was only in anticipation of the proposed Account Stipulation and, since that stipulation had never been approved, the execution and delivery of the agreements was in error, unauthorized and considered by the Debtors to be null, void and without legal effect.

40. The execution and effectiveness of the account documentation executed by the Debtors on October 21, 2008 was a key factor in JPMC's decision to agree to the request that it accrue interest on the Intercompany Amounts and to the release of $292 million to the Debtors and their non-debtor affiliates. While JPMC does not dispute that the Account Stipulation was never so ordered, to the extent that such documentation is ineffective, it should be ineffective for all parties and for all purposes, including the effectiveness of any post-petition book entries reflecting any portion of the Intercompany Amounts or Accounts as deposit liabilities and the release of any funds to the Debtors or their non-Debtor affiliates.

41. Although JPMC still has not discovered any pre-petition deposit account agreements, signature cards or other documentation for the Accounts that would have been required of depositors that were not affiliates in order to treat the Accounts as deposit accounts (except for the signature cards on a few accounts as described above), it is nonetheless clear that if these are deposit accounts—not capital contributions—they were and are subject to the standard terms and conditions specified in the Master Business Account Disclosures and Regulations (the "MBA Policy") of the Affiliated Banks.

42. The Disputed Accounts were associated with the DDA numbers provided by WMI. Most were so-called "On–Us Accounts", the internal nomenclature for intercompany receivables that were understood to represent deposit accounts at the Affiliated Banks. Thus, the

balances in these Accounts as of any point in time, unlike third party deposit accounts, were maintained both at the depository institution and as intercompany book entries on the general ledger of WMI and the Affiliated Banks that were its subsidiaries.

43. The decision on how to characterize an intercompany transaction was made by a single centralized Treasury group for WMI and all of its affiliates. That Treasury group was under the direct supervision of Robert Williams, currently the Chief Executive Officer of WMI.

44. To the extent the Intercompany Amounts and the Disputed Accounts reflect capital contributions, they are the property of JPMC under the terms of the P&A Agreement. To the extent they are deposit liabilities, they must be governed by standard terms and conditions governing unaffiliated deposit accounts, as a result of which they become subject to any liens, claims and interests that JPMC may have, and are also subject to setoff, recoupment or other offset.

(ii) Deposit Liabilities

45. Putting aside whether any account (much less an account belonging to WMI and containing $3.67 billion) was ever created at WMB fsb, to the extent the Intercompany Amounts in the Disputed Accounts are not capital contributions and are in fact deposit liabilities of WMB or WMB fsb assumed by JPMC under the P&A Agreement, WMI and its subsidiaries, like every other Affiliated Bank depositor (expressly or otherwise), are bound by the standard terms and conditions for deposits at the Affiliated Banks.

46. The Accounts were utilized to settle intercompany obligations, including obligations arising from the payment and allocation of expenses among WMI and all of its subsidiaries, with intercompany allocations, payments and settlements on a periodic, usually

monthly, basis. The balances on the Accounts were reflected on "On-Us Elevation Reports" generated on a monthly basis and on paper "Washington Mutual Internal Checking Detail" statements mailed to an employee of WMB on a monthly basis.

47. These Accounts were established by WMI or one of its non-bank subsidiaries at the Affiliated Banks pursuant to WMI's Internal Corporate Demand Deposit Account Establishment and Usage Policy (the "On-Us Policy"). According to that policy, WMB had the right to use the Intercompany Amounts for, among other things, processing and clearing transactions between WMB and WMI or their respective subsidiaries, customers, vendors, or investors, again raising the question of whether the Intercompany Amounts represented a continuing deposit liability or should be characterized as a general reserve, a capital contribution or a form of intercompany advance to the Affiliated Banks. The On-Us Policy was silent regarding the rules and terms governing the acceptance by the Affiliated Banks of amounts under the On-Us Policy as deposit accounts and services related to such accounts maintained at the Affiliated Banks.

48. WMI and the Affiliated Banks maintained a detailed, forty-page policy, the MBA Policy, that operated as a contract setting forth the terms and conditions governing all deposit accounts established at the Affiliated Banks and reflected the processes used to comply with applicable banking rules and regulations. The MBA Policy contained, among other things, a self-executing clause that made the terms of the policy binding upon all depositors, even those who did not expressly give permission, through consent implied by the opening and continued use of the deposit account.

49. The MBA Policy and its terms and conditions apply to and govern any accounts that are in fact deposit accounts at the Affiliated Banks, including the Accounts to the

extent any are deposit accounts. WMI, as the sole shareholder and parent of the Affiliated Banks, is charged with knowledge and acceptance of the MBA Policy for any deposit account it maintained at the Affiliated Banks.

50. Any claim that WMI is entitled to terms more favorable to it than the terms imposed on third-party depositors under the MBA Policy would violate applicable federal law and regulations and be untenable. The provision of services, including deposit services, to WMI by its Affiliated Banks, under relevant banking laws and regulations, were required to have been conducted on terms and conditions no less favorable to the bank than would have been undertaken in a comparable transaction with an unaffiliated third party. Thus, these accounts, to the extent they reflect deposits, were required by law to be maintained on terms no less favorable to the Affiliated Banks than those clearly set forth in the MBA Policy.

51. The MBA Policy expressly grants the Affiliated Banks a right to offset any and all claims against all deposit account liabilities and reflects WMI's legal obligations to its banking affiliates. Specifically, the MBA Policy provides, "you agree we have the right to offset any account or asset of yours then held by us, by our sister bank, or any subsidiary of ours or our sister bank." Said differently, to the extent the Accounts and the Intercompany Amounts contained therein are deposit liabilities of the Affiliated Banks, the MBA Policy created a broad contractual right of setoff against the Accounts and the Intercompany Amounts for the benefit of the Affiliated Banks and their subsidiaries and reflected WMI's legal obligations.

52. Accordingly, to the extent that any of the Accounts or Intercompany Amounts are found by the Court to constitute deposit liabilities of JPMC as assignee of the Receiver, they are deposit liabilities subject to and created under the MBA Policy, and JPMC has a security interest in, lien rights against and rights of set-off and recoupment against the

Intercompany Amounts as deposit liabilities under the MBA Policy and standard deposit account agreement terms and conditions applicable to all third-party depositors and as in effect at the time that the Affiliated Banks and their parent entered into the transactions creating and maintaining the Accounts.

(iii) JPMC Also Has an Express Security Interest in at Least One Account

53. In addition, WMI entered into at least one specific security agreement with WMB (the "Security Agreement") whereby WMB received a security interest in and lien upon at least one of the Accounts in return for providing value to WMI. According to its terms, the Security Agreement "shall be binding upon [WMI] and its successors and assigns, and shall inure to the benefit of, and may be enforced by [WMB] and its successors, transferees, and assigns." This express security interest creates a lien to secure any and all intercompany obligations. JPMC is the successor, transferee or assignee of the Security Agreement and entitled to enforce its terms against WMI at least as to Intercompany Amounts associated with Account No. 177-8911206.

(iv) The September $3.67 Billion Book Entry Transfer

54. Between September 19, 2008 and September 24, 2008, in the days immediately preceding the impending takeover of WMB by its regulators, WMI directed book entries purporting to transfer approximately $3.67 billion (the "$3.67 Billion Book Entry Transfer") from WMB to WMB fsb. The entries direct the purported transfer from the triple 070-10450-009909 "On-Us" Account No. 17900001650667, which is reflected in the internal On-Us Elevation Report and the Internal Checking Detail as an account at WMB, to what WMI

now claims was a deposit account at WMB fsb identified as triple 070-10441-0009909 "On-Us" Account No. 44100000064234.

55. The general ledger entries for this transaction indicate that the entries were posted on September 24, 2008 with a "retro" date to September 19, 2008 and describe the $3.67 Billion Book Entry Transfer as "WMI contributes to FSB." WMI has asserted that the transaction was intended to be a transfer of funds from a WMI deposit account at WMB to a WMI deposit account at WMB fsb. JPMC disputes this characterization.

56. What is clear is at least the following: (i) no cash or other funds were actually moved to or received by WMB fsb in connection with the purported $3.67 billion transfer; (ii) simultaneously with the purported transfer, the same supposed $3.67 billion was simultaneously loaned back to WMB; (iii) no account was properly established at WMB fsb; and (iv) it appears that no officer of WMB fsb authorized this highly suspect transaction.

57. JPMC also disputes the assertion that the purported funds in the Accounts belonged to WMI. As described herein, the funds have been identified as capital belonging to WMB, as well as tax amounts owned by WMB and now JPMC. In addition, in the weeks leading up to the receivership nearly a billion dollars in purported funds were transformed from an unsecured general ledger debt that was not supported by good funds or collateral—and had accumulated over several years until WMI began to deliberately and improperly siphon off cash from its subsidiaries—into purported deposit funds. This transformation was undertaken at the command of WMI, and is a substantial portion of the $3.67 Billion Book Entry Transfer.

58. The Debtor's agreement to the terms of the Account Stipulation and the deposit agreements that provide JPMC on behalf of itself and its affiliates and subsidiaries with broad post-petition lien rights and rights of setoff and recoupment resulted in the entry, without

prejudice, of the $3.67 Billion Book Entry Transfer as a deposit liability on the books and records of JPMC. Having executed the standard deposit agreements with JPMC necessary to have this account reflected as a deposit at JPMC, and having understood that this was without prejudice to JPMC's rights, WMI should be estopped from taking the position that these account agreements were a mistake and not binding on it or from enjoying the benefit of having the Disputed Accounts reflected as deposit liabilities free of the lien and setoff rights created by those very same agreements. To the extent that any post-petition book entry is considered as relevant to the status of the purported deposit, any such resulting deposit should similarly be considered subject to the depository institution's rights, including post-petition contractual and statutory rights of setoff, that accompany the post-petition deposit.

59. WMB fsb would never have accepted a deposit liability from an unaffiliated third party without first receiving good funds, or at least not a deposit liability of the magnitude its parent now asserts was created on or about September 19, 2008 at a time when WMI alleges WMB was insolvent. The $3.67 Billion Book Entry Transfer represented approximately 44% of the total deposits at WMB fsb, an increase of nearly 80% in total deposit liabilities. And, simultaneously with the purported transfer, the same "funds" were immediately loaned back to WMB. In no way was this an ordinary course transaction. And in no way was this transaction properly authorized, at least by WMB fsb.

60. Likewise, to the extent that the purported deposit funds were created by the manipulation of intercompany general ledger entries, master notes, and other intercompany book entries, the rights, interests and obligations of parties in and to the purported funds can only be determined in accordance with a full accounting for the related intercompany transactions. Accordingly, to the extent that the $3.67 Billion Book Entry was originally created through

intercompany transfers that were unauthorized, from sources not owned by WMI, or unaccompanied by the actual movement of funds, there could not have been a deposit liability at WMB.

61. Regardless of the fact that WMI and its affiliates may have operated a centralized cash management system for efficiency as members of the same corporate family, intercompany transfers, unaccompanied by actual movement of funds, cannot create obligations and liabilities as third parties when the corporate ownership link is broken. Because no cash or other funds were actually transferred by WMI to WMB fsb, the $3.67 Billion Book Entry Transfer could not have created a deposit liability of WMB fsb to WMI without receipt of good funds. To the extent the $3.7 Billion Book Entry Transfer is nonetheless deemed to create such a liability, JPMC is entitled to a complete offset for WMI's failure to deliver good funds representing that $3.67 billion deposit.

62. The $3.7 Billion Book Entry Transfer was not a deposit account and WMI should be estopped from making any claims to the contrary.

63. Alternatively, to the extent any third party has or may have a claim against WMB fsb and/or JPMC with respect to or as a result of the $3.7 Billion Book Entry Transfer, JPMC is entitled to be indemnified by WMI for any liability it may incur and is entitled to recover the amount by which it is or may be liable to any such third party from the Intercompany Amounts.

(v) The Tax Refunds and other Funds in the Accounts

64. A substantial portion of the Intercompany Amounts were, at the time of the Receivership and the Petition Date, in fact the property of the Affiliated Banks, representing tax payments made by the Affiliated Banks either as (i) accelerated payments of amounts

previously claimed by WMI against the Affiliated Banks purportedly for taxes paid in prior years by WMI on behalf of the Affiliated Banks; or (ii) amounts transferred to WMI in payment of estimated or actual 2008 taxes.

65. In addition, after the Petition Date, at least approximately $234 million of tax refunds due to WMB — the rights to which were purchased by JPMC as assets of WMB (the "Tax Refunds Received") — were paid to WMI. An amount equal to at least this $234 million of the Tax Refunds Received are included in the balance of the Intercompany Amounts and the Accounts and should be paid over to JPMC as the lawful owner of those funds.

66. The Tax Refunds Received should not have been, and at various times were not in fact, recorded in any way as a deposit liability. The Tax Refunds Received were and are property of JPMC purchased under the P&A Agreement.

(vi) Section 9.5 of the P&A Agreement

67. To the extent any of the Accounts are deposit liabilities assumed by JPMC, pursuant to Section 9.5 of the P&A Agreement, "[a]t any time, the [FDIC] may, in its discretion, determine that all or any portion of any deposit balance assumed by [JPMC] pursuant to this Agreement does not constitute a "Deposit" . . . and may direct [JPMC] to withhold payment of all or any portion of any such deposit. Upon such direction, [JPMC] agrees to hold such deposit and not make payment of such deposit balance to or on behalf of the depositor, or to itself, whether by way of transfer, set-off, or otherwise. [JPMC] shall be obligated to reimburse the [FDIC], . . . for the amount of any deposit balance or portion thereof paid by [JPMC] in contravention of any previous direction to withhold payment of such deposit balance or return such deposit balance, the payment of which was withheld pursuant to this Section."

68. The FDIC has not, to date, notified JPMC that all or any portion of the Intercompany Amounts or Disputed Accounts are or are not Deposit Liabilities within the meaning of the P&A Agreement. Nor has the FDIC directed JPMC to withhold payment on all or any portion of the Disputed Accounts. JPMC requests that, to the extent this Court orders JPMC to pay any portion of the Intercompany Amounts or Accounts to the Debtors or into the registry of this Court, that the Court do so by way of interpleader under Rule 7022, releasing JPMC from any liability for such amounts to any person and preserving the rights of all parties and all possible claimants with respect to those funds (including JPMC). Specifically, JPMC requests a finding that it only has to pay or credit the Accounts or the Intercompany Amounts once and that this Court's determination regarding ownership, character and rights in or to the Intercompany Amounts or the Accounts is final so that JPMC has no further liability in any capacity for the Intercompany Amounts or Accounts except as may be determined by this Court in this proceeding.

RELIEF REQUESTED BY JPMC

Count One
(Against WMI only)
(Declaratory Judgment: Intercompany Amounts in Disputed Accounts)

69. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

70. In this action and in connection with these Chapter 11 cases, WMI has asserted that the Intercompany Amounts in the Disputed Accounts are its property.

71. WMI previously asserted a claim to such Intercompany Amounts in the Receivership and its claims were disallowed by the Receiver. WMI is currently challenging the disallowance of its claims in the D.C. Action.

72. Absent a determination by the Court in the D.C. Action that the disallowance of WMI's claims to the Intercompany Amounts was improper, WMI is bound by the disallowance of its claims in the Receivership and has no right to continue to claim the Disputed Amounts as its property as against JPMC or anyone else.

73. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

74. JPMC requests a declaratory judgment finding that (i) Debtors are bound by the disallowance of their claim to the Intercompany Amounts and have no right to assert such a claim against JPMC to the same assets, and (ii) any challenge by Debtors to the disallowance of their claim to the Intercompany Amounts must proceed in the D.C. Action.

Count Two
(Against WMI only)
(Declaratory Judgment: $3.7 Billion Book Entry Transfer)

75. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

76. WMI has asserted that the $3.7 Billion Book Entry Transfer creates a deposit liability owed to it by WMB fsb, now JPMC. JPMC disputes that there is a valid deposit liability due to Debtors as the result of the $3.7 Billion Book Entry Transfer or otherwise.

77. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

78. JPMC requests a declaratory judgment finding that Debtors must proceed with any claim to assert ownership of or interest in the $3.7 Billion Book Entry Transfer through the D.C. Action they elected to commence. In the alternative, JPMC requests a declaratory

judgment determining that there is no valid deposit liability due to Debtors as a result of the $3.7 Billion Book Entry Transfer.

Count Three
(Against WMI only)
(Declaratory Judgment: Setoff, Recoupment, and Other Equitable Limitations)

79. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

80. To the extent that JPMC has any liabilities to Debtors, including deposit account liabilities, it is entitled to: (i) recoup and/or setoff all such amounts under the MBA Policy and/or any other applicable terms and conditions governing those liabilities or deposit accounts; (ii) imposition of a constructive trust for the amount of all such liabilities over any funds of Debtors it possesses; and (iii) enforce any security interest determined to apply to the funds of the Debtors. Debtors dispute that JPMC has these rights.

81. The amounts owed to JPMC include, but are not limited to, approximately $234 million in tax refunds deposited in the Accounts and due to WMB, which the Debtors have claimed as their own, the intercompany receivables of $275 million due from WMI to WMB, and any amounts awarded by the Court under this Complaint.

82. There is substantial evidence that, contrary to the Debtors' unsupported assertions, at the time of the receivership and at all relevant times before the receivership, WMI, WMB, and WMBfsb were solvent. Indeed, the OTS found that "WMB met the well-capitalized standards *through the receivership date*." (OTS Fact Sheet 9/25/2008 (emphasis added).)

83. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

84. JPMC requests a declaratory judgment determining its right to setoff, recoupment, imposition of a constructive trust, and/or enforcement of its security interests.

Count Four
(Against WMI only)
(Fraud)

85. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

86. JPMC asserts this counterclaim solely in the event it is determined that the $3.67 Billion Book Entry Transfer created a deposit liability at WMB fsb.

87. On or about September 19, 2008, acting with knowledge that WMB was not a safe and sound institution and would be shortly seized by the regulators, senior management at WMI, including but not limited to Robert Williams, the current President and former Treasurer of WMI, and Thomas Casey, the Chief Financial Officer of WMI, orally directed that a deposit liability of $3.67 billion recorded in the 0667 Account in the name of WMI be transferred to WMB fsb, without the transfer of good funds. The instructions were relayed to administrative personnel, including Yolonda Noblezada, a Senior Analyst at WMB, and Doreen Logan, a Controller and Assistant Treasurer at WMB, who prepared records purporting to reflect the transfer. WMI, senior management at WMI, Mr. Williams and Mr. Casey directed this transfer for the benefit of WMI. WMI, senior management at WMI, Mr. Williams and Mr. Casey took these actions with knowledge that the transfer was to the detriment of WMB fsb and other banking subsidiaries, in disregard for the safety and soundness of these institutions and with the intent to defraud these institutions.

88. In the ten or so days leading up to the $3.67 Book Entry Transfer, WMB was experiencing rapid deposit outflows, estimated to be more than $16.7 billion, or more than

$2 billion per banking business day, from unaffiliated depositors. Government regulators had recently informed senior management at WMI, including Mr. Williams and Mr. Casey that WMI needed to raise additional capital for WMB in order to avoid Receivership. On or about September 18, 2008, the senior management, including Mr. Williams and Mr. Casey, and the Board of Directors of WMI were informed by regulators of affirmative steps that needed to be taken because of concerns for the safety and soundness of WMB. After learning of these regulatory concerns, senior management of WMI, including Mr. Casey and Mr. Williams, directed the $3.67 Billion Book Entry Transfer. Doreen Logan, WMI's Controller, has already submitted a declaration on WMI's behalf stating that WMI's undisclosed purpose for the $3.67 Billion Book Entry Transfer was to try to move funds from WMB to a more well-capitalized institution.

89. To the extent any portion of the $3.67 billion reflected a deposit liability to WMI at WMB prior to the purported transfer, upon WMB's failure that liability would have been subject, among other things, to reduction or elimination based upon government insurance levels and/or because it was an obligation of a failed institution to a parent, to claims of setoff and recoupment and offset, to potential claims of WMB's creditors, and to various avoidance powers of the FDIC as Receiver. Thus, the purpose on WMI's part for engaging in this fraudulent transaction was to attempt to maximize WMI's ability to keep for itself any deposit balance free and clear of these avenues of offset, reduction and conflicting claims. However, in doing so, WMI sought to shift the burden of WMB's inevitable failure onto WMB fsb without disclosing to WMB fsb that it was doing so or giving WMB fsb any say or choice in the matter.

90. The $3.67 Billion Book Entry Transfer did not involve any actual movement of funds to WMB fsb. WMI did not deposit any actual funds with WMB fsb in

connection with the purported transfer of this $3.67 billion, and no funds to support such a deposit balance were deposited at WMB fsb from any other source.

91. Rather, in conjunction with the purported $3.67 Billion Book Entry Transfer to WMB fsb, Mr. Casey and Mr. Williams, and potentially other senior officers of WMI, directed that other entries be booked to effect the immediate loan back of the same $3.67 billion from WMB fsb to WMB via a credit revolver, dated March 7, 2007, (the "Master Note"). On September 19, 2008, Mr. Williams and Mr. Casey were specifically asked to "approve an increase in the size of the Master Note between Washington Mutual Bank (as Borrower) and Washington Mutual Bank fsb (as lender) from $15 billion to $20 billion," to facilitate the loan back. On September 19, 2008, Mr. Casey approved the increase by e-mail stating "[p]lease review with Robert [Williams]. I am ok if he gives the okay." And on September 21, 2008, Mr. Williams also approved by e-mail stating, "[y]es, should increase size of master note program." The master note increase was done to accommodate the loan to WMB without additional collateral being posted to protect WMB fsb and to support this extraordinary increase. In other words, without any movement of funds whatsoever, WMI purported to transform a purported $3.67 billion liability owed to it by WMB – an allegedly insolvent institution – into a $3.67 billion liability of WMB fsb to it, without ever transferring a single penny to WMB fsb. At the same time, WMI purported to leave WMB fsb holding the bag for WMB's pending failure as a bank with a "loan" to WMB of the same $3.67 billion that WMI knew WMB would never be in a position to repay in the ordinary course, but rather would be subject to a receivership process.

92. This round-trip set of book entries was a complete fraud. Nothing about the $3.67 Billion Book Entry Transfer was done in the ordinary course or for business purposes aligned with the safety and soundness of the banking institutions. At the time of the purported

transfer, no WMI account existed at WMB fsb into which WMI was able to direct such a transfer. In its rush to make this fictitious transfer, WMI first purported to make a transfer to another account at WMB, which did not accomplish the purpose of the transaction. Then, when this impediment was discovered, clerical personnel at WMI, acting under Mr. Williams' and Mr. Casey's direction, purported to direct the opening of a new account at WMB fsb.

93. No account documentation was created at WMB fsb for this supposed new account containing an unprecedented $3.67 billion. And, since no funds actually moved to WMB fsb, WMI, acting at the direction of Mr. Casey and Mr. Williams, and potentially other WMI senior officers, also had to cause the $3.67 billion to be recorded as a credit to a WMB fsb account under circumstances where no bank would ever make such a credit to an unaffiliated depositor. Then, since no funds were being moved (indeed, it may be that no such funds even existed), WMI had to arrange for the loan of the purportedly transferred funds back to WMB, the place from which the funds were supposedly coming in the first place. But WMI's and WMB's and WMB fsb's internal documentation would not permit this, which again required WMI to purportedly raise the loan limit for intercompany loans to enable this fabricated transaction to appear to occur. The transaction violated numerous banking laws, rules and regulations, as well as fundamental principles of safety and soundness. Mr. Casey and Mr. Williams, acting on behalf of WMI, authorized and approved the form of the transaction, the substance of the transaction, and the acts of concealing material facts from WMB fsb, including WMB's true financial condition, recent direction from regulators as to WMB's status and need for additional capital, that no good funds were or could be transferred to WMB fsb to support the book entry, that no additional collateral was being posted to support the round-trip loan, that the purpose for the transaction was to benefit WMI at the expense of WMB fsb in the event of any receivership of

WMB, and the transaction was one that potentially left WMB fsb exposed for lending $3.67 billion to an institution that had no reasonable chance of repaying it outside a receivership.

94. The $3.67 billion includes funds that do not belong to WMI. The $3.67 billion also purportedly includes approximately $922 million that WMI directed WMB to transfer into the Disputed Accounts. On or about August 19, 2008, Mr. Williams and Mr. Casey approved these transfers, which were effected on or about August 19 and September 19, 2008. The $922 million was purportedly transferred for the purpose of repaying WMI for state taxes WMI paid on WMB's behalf—that is paying off a general ledger (unsecured) debt that had accrued, unpaid for several years, until the weeks leading up to the Receivership. Mr. Williams and Mr. Casey directed that these WMB funds be transferred into WMI's name and then later used those same amounts to fund a $500 million capital contribution from WMI to WMB that was finalized on or about September 10, 2008. Said differently, WMI and its senior management, including Mr. Williams and Mr. Casey, authorized the transfer of $922 million from WMB to, among other things, effectively fund a capital contribution from WMI to WMB with funds from WMB. WMI's senior management, including Mr. Williams and Mr. Casey, then purported to include these amounts in the $3.67 billion book entry transfer to WMB fsb, without disclosing to WMB fsb that it had done so.

95. WMI is liable for the fraud and intentional misrepresentations of its senior management, including Mr. Williams and Mr. Casey, because it made false representations about the nature of the $3.67 Billion Book Entry Transfer, including, but not limited to: (a) directing a representation be made on the general ledger that a purported deposit liability was created at WMB fsb on September 24, 2008, with an effective date of September 19, 2008, when no actual funds were actually wired to WMB fsb to fund this supposed new deposit liability; (b) directing

that the Master Note between WMB and WMB fsb be increased by approximately $5 billion on or about September 19, 2008, without increasing collateral as required by the Asset Pledge Agreement to the Master Note; and (c) representing that WMI was the owner of funds purportedly credited to the Disputed Accounts in connection with the $3.67 Billion Book Entry Transfer when (i) good funds were not transferred and may not have been available for transfer from WMB; (ii) at least a portion of those funds purportedly credited to the account were actually owned by other entities, including but not limited to WMB; and (iii) $922 million in purported funds associated with the $3.67 Billion Book Entry Transfer were manufactured by converting an unsecured general ledger debt allegedly due to WMI from WMB into a purported deposit liability due to WMI.

96. WMB fsb had no knowledge that the representations were false, did rely upon the false representations, and had a right to rely on the false representations. But for the conduct of WMI, Mr. Casey and Mr. Williams, WMB fsb (a) would not have accepted a $3.7 billion deposit in WMI's name without the receipt of good funds, (b) would not have made a $3.7 billion loan to WMB at the direction of WMI, (c) would not be alleged to have acquired assets that are susceptible to fraudulent transfer, preference and other claims, and (d) would not have taken actions that are now alleged to frustrate setoff, recoupment or other equitable claims against WMI, which could give rise to separate damages claims. In this way, WMB fsb relied to its detriment on false statements by WMI, Mr. Casey and Mr. Williams. WMB fsb has suffered substantial damages in an amount to be proven at trial as a result of WMI's false and intentional misrepresentations.

97. WMI is also liable for the material omissions of its senior management at WMI, including Mr. Williams and Mr. Casey, because they failed to disclose to WMB fsb

material facts relating the $3.67 Billion Book Entry Transfer. WMI, Mr. Williams and Mr. Casey: (a) failed to seek appropriate consent from WMB fsb for the $3.67 Billion Book Entry Transfer or any aspect of it; (b) failed to seek appropriate consent from WMB fsb to reflect on its books a $3.67 billion deposit prior to the receipt of good funds; (c) failed to seek appropriate consent from WMB fsb for an uncollateralized (or undercollateralized) "loan" $3.7 billion to WMB; (d) failed to disclose to WMB fsb that funds purportedly associated with the transfer did not belong to WMI and/or may be subject to a preference, fraudulent transfer or other claims by third parties; (e) failed to disclose to WMB fsb that WMB may not have been financially able to repay the money that was supposedly being loaned back to it by the series of book entries because of the impending Receivership; (f) failed to disclose to WMB fsb that federal banking regulators were about to seize WMB or their knowledge that WMI was unable to raise sufficient capital in order to keep WMB operating outside a receivership; and (g) failed to disclose to WMB fsb that it was engaging in the $3.67 Billion Book Entry Transfer in order to maximize what WMI would be able to keep when WMB failed, and that the consequence of that goal would be to cause WMB fsb to incur a corresponding loss.

98. WMI and its senior management, including Mr. Williams and Mr. Casey, owed fiduciary duties to WMB fsb. Mr. Williams was an officer of WMB fsb and Mr. Casey was a director of WMB fsb. To comply with their fiduciary duties, WMI, Mr. Williams, and Mr. Casey were required to comply with the federal laws and regulations governing WMB fsb and their obligation to ensure that WMB fsb was operated in a safe and sound manner. WMI, Mr. Williams, and Mr. Casey breached their duties by failing to disclose and willfully concealing these material facts from WMB fsb. WMB fsb — indeed no financial institution — would have accepted a $3.67 billion deposit and credited it as a deposit liability prior to the receipt of good

funds or loaned $3.67 billion to WMB without sufficient collateral or security or reasonable likelihood of normal repayment under the circumstances given the pending receivership.

99. WMB fsb has suffered substantial damages in an amount to be proven at trial as a result of WMI's intentional misrepresentations and omissions, including damages arising from (a) any deposit liability of WMI that it is required to repay without funds or collateral from WMI that fully offsets that liability; (b) any funds it is required to repay as the recipient of funds credited to the Disputed Accounts that can be recovered by a third party, including funds recovered by a third party as fraudulently transferred; and (c) defrauding WMB and its successors of the valuable right of setoff.

100. JPMC is the successor to WMB fsb is entitled to recover any damages caused by WMI's fraud, including, but not limited, (a) the amount of any setoff, recoupment or offset JPMC would have been entitled to against WMI had the $3.67 Billion Book Entry Transfer never occurred, (b) the amount of any loss or liability JPMC may incur as the result of being required to satisfy a deposit liability due to WMI without having received funds or collateral from WMI that fully offsets that liability and (c) the amount of any loss or liability JPMC may incur as the result of being found to be a fraudulent transferee or recipient of funds credited to the $3.67 Billion Book Entry Transfer.

101. JPMC has been damaged in an amount to be proven at trial.

102. WMI acted with fraud, malice and/or oppression and, as a result, JPMC is entitled to an award of punitive damages.

Count Five
(Against All Defendants)
(Interpleader Pursuant to Bankruptcy Rule 7022)

103. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

104. Pursuant to the terms of the P&A Agreement, JPMC, WMI, and the FDIC have asserted, and may assert, competing claims to any funds that constitute deposit liabilities and JPMC may be exposed to double liability if it were to pay these claims to the wrong party.

105. JPMC seeks to interplead any remaining funds that constitute deposit liabilities pursuant to Bankruptcy Rule 7022, less any attorneys' fees and costs, so that all claims to the amounts can be adjudged and the funds can be properly disbursed.

Count Six
(Against WMI only)
(Declaratory Judgment as to Other Assets)

106. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

107. In addition to the Intercompany Amounts in the Disputed Accounts, Debtors have improperly asserted claims to certain assets that belong to JPMC and not to Debtors. These assets (the "Other Assets"), and the basis for JPMC's ownership of these assets, are described more fully in the complaint filed by JPMC in the JPMC Adversary Proceeding, *JPMorgan Chase Bank, N.A. v. Washington Mutual, Inc.*, Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del.), which is incorporated herein fully by reference.

108. These Other Assets include the following: (i) intercompany amounts in certain additional accounts that are not included in Debtors' complaint in this action; (ii) certain trust securities in an aggregate face amount of approximately $4 billion (the "Trust Securities")

(described in JPMC Adversary Complaint ¶¶ 41-56); (iii) tax refunds that WMB is or was entitled to receive, including tax refunds that are owned by and attributable to the tax attributes of WMB but that may be nominally payable to WMI as agent for WMB because of the form in which tax returns were filed by the WaMu Group (described in JPMC Adversary Complaint ¶¶ 57-92); (iv) the proceeds of goodwill litigation (described in JPMC Adversary Complaint ¶¶ 125-129); (v) ownership of certain Rabbi trusts and benefit plans (described in JPMC Adversary Complaint ¶¶ 130-148); (vi) ownership of certain life insurance policies (described in JPMC Adversary Complaint ¶¶ 149-157); (vii) ownership of certain class B shares of common stock in Visa, U.S.A., Inc. (described in JPMC Adversary Complaint ¶¶ 158-171); and (viii) ownership or rights to certain intellectual property, contracts and intangible assets (described in JPMC Adversary Complaint ¶¶ 172-179).

109. In counterclaims filed in the JPMC Adversary Proceeding, in its complaint in the D.C. Action, and in connection with these Chapter 11 cases, WMI has asserted that the Other Assets are its property.

110. WMI previously asserted a claim to some or all such Other Assets in the Receivership and its claims were disallowed by the Receiver. WMI is currently challenging the disallowance of its claims in the D.C. Action.

111. Absent a determination by the Court in the D.C. Action that the disallowance of WMI's claims to the Other Assets was improper, WMI is bound by the disallowance of its claims in the Receivership and has no right to continue to claim such Other Assets as its property as against JPMC or anyone else.

112. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

113. JPMC requests a declaratory judgment finding that: (i) Debtors are bound by the disallowance of their claim to the Other Assets and have no right to assert such a claim against JPMC to the same assets; and (ii) any challenge by Debtors to the disallowance of their claim to the Other Assets must proceed in the D.C. Action.

Count Seven
(Against WMI and the FDIC)
(Declaratory Judgment as to Ownership of Other Assets)

114. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

115. As set forth above, JPMC contends that, pursuant to the P&A, it purchased the Other Assets. The Debtors have disputed JPMC's ownership of these Other Assets in this bankruptcy case, in their Schedules, in their answer and counterclaims in the JPMC Adversary Proceeding, and in the D.C. Action. Resolution of these disputes is a necessary predicate to any determination of solvency or setoff.

116. The FDIC is a party to the P&A Agreement, has certain indemnification obligations to JPMC under that Agreement, is the Receiver of WMB, and has an interest in the determination of what assets were owned by WMB, seized in the receivership, and transferred to JPMC pursuant to the P&A Agreement.

117. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

118. To the extent it is found that Debtors are not bound by the disallowance of their claim to the Other Assets in the Receivership or obligated to proceed with any claim to the

Other Assets through the D.C. Action, JPMC requests a declaratory judgment determining that the Other Assets were purchased by JPMC from the FDIC as Receiver under the P&A Agreement and belong to JPMC.

Count Eight
(Against WMI only)
(Unjust Enrichment)

119. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

120. The Debtors would be unjustly enriched if they retained the Other Assets.

121. Thus, to the extent the Court does not enter a declaratory judgment determining that the Other Assets are assets purchased by and belonging to JPMC, JPMC requests that the Court establish a constructive trust for the benefit of JPMC consisting of: (i) the value recognized by Debtors as a result of the treatment of the Trust Securities as core capital; (ii) the tax refunds received by and/or deductions recognized by WMI to which WMB is entitled; (iii) the value of the assets of the Rabbi trusts and the life insurance policies; (iv) amounts necessary to reimburse JPMC for amounts it contributed to any benefit plans; (v) to the extent JPMC is not fully protected against liabilities associated with the reorganization of Visa, the Visa shares; and (vi) the value of the intellectual property, contracts and intangible assets.

Count Nine
(Against WMI only)
(Breach of Contract re: Trust Securities)

122. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

123. WMI assumed a direct obligation to WMB upon entering into the Contribution Agreement (as defined in the JPMC Adversary Proceeding Complaint) to immediately contribute and transfer the Trust Securities to WMB following the conditional exchange. In the alternative, WMB was the third party beneficiary of WMI's commitment to the OTS and the FDIC under the Contribution Agreement. WMI also assumed a direct obligation to WMB pursuant to the Assignment Agreement (as defined in the JPMC Adversary Proceeding Complaint).

124. To the extent the Assignment Agreement is interpreted as leaving WMI with anything other than bare legal title, WMI breached the Contribution Agreement. WMI further breached the Contribution Agreement and the Assignment Agreement by refusing to assist JPMC in obtaining registered ownership of the Trust Securities.

125. JPMC (as successor in interest to WMB), has suffered, and will suffer, substantial monetary damages as a proximate result of WMI's breach of the Contribution Agreement and the Assignment Agreement.

Count Ten
(Against WMI only)
(Administrative Expenses)

126. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

127. To the extent the Court accepts WMI's claims of ownership of any of the Pension and 401(k) Plans or other assets and JPMC has made payments and incurred expenses in

connection with these assets, JPMC is entitled to reimbursement from Debtors of all post-petition expenses it has incurred and payments it has made on account of those assets.

128. To the extent JPMC incurs any liability or suffers any loss as the result of conduct by Debtors after the Petition Date, including conduct by the Debtors as the sponsor of any of the Pension and 401(k) Plans, JPMC is entitled to post-petition administrative claim for those amounts.

Count Eleven
(Against WMI only)
(Indemnification)

129. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

130. Claims have been threatened against JPMC arising out of or relating to the acts, omissions or conduct of Debtors prior to the Petition Date. To the extent that any claim is asserted against JPMC as a result of such matters, JPMC is entitled to be indemnified and held harmless by the Debtors for any loss, damage or liability JPMC might incur.

PRAYER FOR RELIEF

WHEREFORE, JPMC respectfully requests that this Court grant judgment:

(i) determining that Debtors are bound by the disallowance of their claims to the Intercompany Amounts by the Receiver and must proceed, if at all, on claims of ownership of such amounts in the D.C. Action in accordance with Title 12;

(ii) declaring that the legal title and all beneficial interest in each of the assets described in the Debtors' complaint in this action belong to JPMC;

(iii) awarding JPMC damages as a result of WMI's fraud;

(iv) awarding JPMC prejudgment interest and punitive damages to the extent permitted by law;

(v) determining that JPMC is entitled to setoff, recoup, or impose a lien against any liabilities that JPMC may owe to Debtors, for all amounts JPMC may be entitled to under this Complaint;

(vi) determining that any and all interested persons, entities or agencies are restrained from instituting any actions against JPMC for recovery of any amounts being interplead with the Court;

(vii) determining that JPMC be discharged from any and all liability with regard to claims to the interpleaded funds;

(viii) declaring that the legal title and all beneficial interest in each of the assets described in these Counterclaims belong to JPMC;

(ix) ordering Debtors to deliver the assets described in these Counterclaims to JPMC;

(x) ordering Debtors to take steps to allow, and where appropriate, direct third parties to act in accordance with JPMC's ownership of its assets;

(xi) awarding JPMC damages as a result of Debtors' failure to transfer, or facilitate the transfer of, assets JPMC acquired under the P&A Agreement;

(xii) ordering Debtors to indemnify JPMC for all losses JPMC incurs as a result of Debtors' pre-petition actions;

(xiii) requiring Debtors to reimburse JPMC for all amounts by which Debtors have been unjustly enriched;

(xiv) awarding JPMC damages for losses resulting from Debtors' post-petition actions;

(xv) granting JPMC an administrative claim for amounts paid into or on account of the Pension and 401(k) Plans and other assets;

(xvi) awarding JPMC its attorneys' fees and costs; and

(xvii) awarding JPMC such other and further relief as this Court deems just and proper.

Dated: August 10, 2009
Wilmington, Delaware

Respectfully submitted,

/s/ Matthew B. McGuire

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	)	Case No. 08-12229(MFW)
	)	(Jointly Administered)
	)	Chapter 11
WASHINGTON MUTUAL, INC.,	)	
et al.,	)	Courtroom 4
	)	824 Market Street
Debtors.	)	Wilmington, Delaware 19801
	)	
	)	August 24, 2009
	)	11:38 A.M.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

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THE COURT: Good morning.

MR. ROSEN: Good morning, Your Honor. Brian Rosen, Weil Gotshal & Manges, on behalf of the debtors.

We have a pretty full calendar this morning, Your Honor.

THE COURT: And would the parties on the phone please mute their phones? Thank you.

MR. ROSEN: Your Honor, I think we can skip to Item Number 4 since the first three were all adjournments. And Item Number 4 was the debtors' motion for an extension of exclusivity. And it is my understanding that based upon the certificate of no objection that had been filed, the Court entered the order extending exclusivity, I think either today or on Friday afternoon.

THE COURT: I did.

MR. ROSEN: Which would take us to Matter Number 5, which is the first contested matter going forward. And that is a motion by some -- several movants for relief from the automatic stay to continue certain prepetition litigation. And I will turn over the podium to them.

THE COURT: Thank you.

MR. LONG: Good morning, Your Honor. May it please the Court. Brian Long from Rigrodsky & Long in Wilmington.

I rise this morning to introduce to the Court, my co-counsel, Joe Tusa, who's been previously admitted pro hac.

Thank you.

THE COURT: All right.

MR. TUSA: Good morning, Your Honor.

THE COURT: Good morning.

MR. TUSA: Thank you for entertaining our motion this morning.

As Your Honor is, no doubt, aware, we represent the plaintiffs in a class action pending in the Eastern District of New York before the Honorable Arthur Spatt. The case was filed approximately four years ago in June of ‘06. So, I mention that just to point out that it wasn’t filed any time near the commencement of this proceeding.

The case has progressed substantially far, although -- and, of course, once this matter was filed last year, Judge Spatt has honored the bankruptcy automatic stay.

THE COURT: Um-hum.

MR. TUSA: And we come here before you this morning on behalf of the named certified plaintiffs in that case who are the movants in this particular motion to ask Your Honor to modify the stay to allow us to proceed to liquidate only our claims in our original court, the Eastern District of New York.

We’re not seeking to collect the damages at this time, merely just to liquidate the matter in that court. We’re moving pursuant to 11 U.S.C. 362(d)(1) and we believe, Your Honor, there is cause under the standards in this District to

allow the stay.

Just to briefly summarize for Your Honor the substantial amount of knowledge and the breadth of work that's already gone on in the Eastern District of New York, Judge Spatt has now resolved two motions to dismiss, a motion to strike a motion to contested for personal jurisdiction of that court, he's presided over a motion to reconsider those opinions, we have done no less than 10 discovery motions, no less than four scheduling and settlement conferences, we've taken a substantial amount of discovery, probably most of the discovery that's going to happen. We've done at least eight depositions, exchanges thousands of pages in document discovery, we have exchanged interrogatories, request to admit, so forth and so on.

We have exchanged Local Rule 56.1 statements in preparation to file summary judgment motions. Judge Spatt has entertained a pre-motion summary judgment conference. He has presided over a motion to join new parties to amend the pleadings a number of times. He has also recently decided a motion for class certification. And that motion for class certification was as to all of the defendants which were previous subsidiaries to the debtor in this particular bankruptcy, safe for the debtor in this bankruptcy in deference to the automatic stay. And he has -- in his opinion certifying the class, at least the way we read it. I realize the debtor

may read it slightly differently. We realize he is prepared to rule on that fully briefed motion as to the debtor if and when the automatic stay would ever expire.

We are prepared to go back and resume litigating that case this September. Your Honor may have seen this motion was originally filed, I believe, in April. I believe we were on the June docket. And then shortly thereafter, Judge Spatt honored a request by the FDIC to stay the matter until September. He did so, and we're about to resume in that decision staying the matter. He expressed his opinion that we not litigate piecemeal, that he would like to see all parties resume at the same time. And that was, of course, our primary argument, Your Honor.

We're happy to go through the elements of cause. But I guess generally our proposition is it's the least amount of prejudice and the least amount of hardship to all of the parties and this Court to allow the Court in the Eastern District of New York to at least liquidate any claim that may or may not exist against Washington Mutual, Inc.

Looking at the decisions that arise in this District as to what constitutes cause, we see, Your Honor, that there are probably two different tests. In an instance where you have prepetition litigation, some courts speak about a one factor test running from the statements by the houses of Congress that your cause could be, and often is, substantiated

when you have prepetition litigation. And you see courts like the Racine opinion talking about a one factor test and granting motions to modify the stay to allow the case to at least reach the liquidation amount of the claim back in the original forum.

And then, of course, you have probably your more usual tests when all types of motions for stay are filed, whether it be prepetition litigation or not. You have the three factor test that speaks of prejudice, hardship, and success on the merits.

And this is, again, where I would point Your Honor to the prior decisions in this District, the Racine opinion, the SCO opinion, Continental Airlines where they recognize that in one manner or another, the movant's claims is going to have to be liquidated somewhere. And in a case such as an SCO, which is very similar to this one, where the case is four years old, and the District Judge has gained substantial knowledge in the parties' claims, defenses, and the parties' various disputes, that makes a lot more sense to allow that judge to get to the claim resolution part of the case rather than making this Court having to basically replicate and duplicate all of those proceedings.

We realize the debtors speaks of certain prejudices that it may incur if it's continue -- forced to continue that litigation. It talks about the time and cost. And I guess we would just point out the same defenses were made in the Racine

litigation, SCO, and they were rejected.

This, of course, is a much bigger company with many more lawyers. I think by our reading of the agenda before Your Honor today, we counted 11 different law firms representing the debtor, all seeking to be paid out of the bankruptcy estate. It seems somewhat self-serving that they draw the line at continuing our case in a court where it's been litigated for four years. But nevertheless, that's seemingly the prejudice they claim.

They do claim a hardship that -- you know, if Your Honor were to grant this motion to stay, there may be as many as 180 other cases lying in the weeds that haven't filed the motion for the 11 months this bankruptcy has been going on, but they're apparently waiting for Your Honor to rule on our motion, and then they, of course, will all seek to have their own cases sent back.

We would just mention to Your Honor that there's not a single motion that we're aware of pending from any of the so-called 180 other cases. And if -- of course, if those motions were ever to be filed, we're confident this Court would deal with them in an appropriate manner.

Even though I think the cases balancing the hardships, they often times speak of prejudice and a hardship together. I think we just wanted to point out a few additional things about hardship. I've already said that most of the

discovery that's going to be done in the underlying case has probably been done.

The other thing to point out is that to the extent there is additional discovery to be done, and there is some additional discovery to be done, I don't mean to say there isn't, it's not likely to come from the debtor. As debtor points out, the first line of contact with the movants and the certified class was probably done by a subsidiary of Washington Mutual Bank. And that subsidiary, as we understand it, was, of course, seized and sold to JPMorgan Chase. They are in possession of the records.

In recognition of that fact, Judge Spatt in April, when he was extending the FDIC's request for a stay until this past September, asked the FDIC to tell JPMorgan Chase please preserve the records, realizing that they're the ones that have the discovery. It's quite unlikely there's going to be much discovery that's going to come from the debtor in this particular case.

We would also point out as far as hardships go, Your Honor, the debtor has pointed out that, of course, the policies underlying the automatic stay say, of course, this Court should be mindful of alleviating them of the burdens that drove them into bankruptcy. It's clear that our case did not drive them into bankruptcy.

They speak of the fact that you know, it would put us

in an unfair position vis-a-vis some of the other creditors. That's, we believe, not true for at least two reasons:

Number one, again, we're seeking only to liquidate the claims, not to collect on any of them.

And if you look at the cases like SCO and Racine, they were entirely comfortable with the fact that so long as you are only trying to liquidate the amount of the claims in the original forum of filing, there will be no prejudice to any of the other creditors.

I would also point out to Your Honor that none of the Creditors' Committees in this case have objected to our motion. They are certainly represented by able counsel and if they thought we were gaining an unfair advantage, I expect they would have spoken up about that.

Your Honor, the last element in the balancing test is usually spoken to about success on the merits. Most of the cases in this District talk about that burden being extraordinarily slight, that we only must possess some possibility.

There is no doubt, Your Honor, that we differ greatly from the debtor and its -- and the other defendants in our prepetition case in our view of what our success on the merits are.

I don't expect to resolve that matter today. And, indeed, it's taken four years, and we're still fighting about

it in front of Judge Spatt.

However, I would mention that we have been through a dispositive motions, motions to dismiss, motions to strike.

The motion to strike the allegations of the pleading were entirely denied. At this point in time, at least five of our nine original claims survived the motion to dismiss, and we have at least two additional of those claims left against the debtor, who is not a movant in a motion to dismiss.

So, the way we read it, we have thus far successfully prosecuted at least seven of our original nine claims against the debtor here.

There is a motion for class certification which, as I mentioned before, has been granted as to at least some of the defendants. It is fully briefed. And we believe that if Your Honor were to modify the stay to allow Judge Spatt to extend his ruling, either granting or denying class certification over the debtor, we will, of course, get a much better handle on where movants' and plaintiffs' case will be going in that proceeding.

Again, we believe it's fully briefed. As soon as that motion is decided, the parties are probably headed towards summary judgment motions. And then trial after a little bit of discovery.

So, we've made a lot of progress there. And those are all matters which would have to be replicated here. There

was some talk in defendants' objection about, well, we can do it in a claims estimation process, or maybe a adversarial proceeding. They suggest that in their objection. But all they would be doing is creating two different trial courts, and then two different appellate courts, all resolving the same matter.

If you read the cases, working out the balancing test, what you'd see, that they speak of not only prejudice and hardship to the parties, but prejudice and hardship to the courts and the judicial efficiency.

What they are asking for is at least a two-track litigation. I say at least because there was some argument, both in our motion and in the objection about whether or not our underlying claims are core or noncore. And it's not something I think we need to dwell on because regardless of whether it's core or noncore, Your Honor still has to either reach a final decision or propose findings of fact.

But assuming it's noncore, then we would just be interposing yet another court, the District Court here in Delaware that has to render its opinion on it. And it would not only throw the matter into a bit of a -- a bit of a mess, but it would also create substantial judicial efficiency.

At the moment, we have five defendants, all in front of one court. The case is partially certified. It is withholding certification due to the automatic stay of this

case.

And with that, Your Honor, I will reserve any questions you have, either now or following the position of the debtor.

THE COURT: No, thank you.

MR. TUSA: Thank you.

MR. ROSEN: Again, good morning, Your Honor. Brian Rosen on behalf of the debtors.

Your Honor, I'm not going to belabor the Court with a recitation of what the case law is because I know the Court is very well aware of what it is in the Third Circuit.

I would say that we disagree with some of the representations made by counsel as to what it is, however. But, again, we'll rely upon what's in our papers and what the Court is already very well aware of.

I would like to spend a moment, though, Your Honor, because there was a reply filed in connection with our objection. And if I could just address some of those points that were raised in that reply. So, something the Court has not heard already.

THE COURT: Okay.

MR. ROSEN: Specifically, Your Honor, the movants take the position that we have already granted relief from the automatic stay two times in this case and, therefore, the Court should not be concerned about granting relief from the

automatic stay again.

I would just point out that the two times that we have stipulated from relief from the automatic stay:

One was so that we would permit the insurance companies to advance proceeds for officers and directors to cover defense costs in connection with certain Department of Labor subpoenas and other WMI defense costs.

The other was with respect to, I believe, the -- so as to permit a party to destroy certain documents that we believe were not property of the estate.

The debtor also -- excuse me. The movant also makes the argument about the commencement of the D.C. action outside the Bankruptcy Court and, therefore, we are certainly willing to engage in litigation.

As the Court knows, the crux of this case is what brought everybody to this courtroom today. It is for the litigation that is pending in the District of Columbia, as well as the litigation that is pending in this Court.

And obviously, Your Honor, without that litigation, the recoveries to creditors in this case would be extremely limited. I tried to do a back of the envelope type of analysis because I think it really brings home the issue. Right now, Your Honor, there are approximately $800 million worth of cash in the estate. And -- excuse me -- and, of course, there are, I think, $35 billion worth of claims. And where will that

shake out, Your Honor? There's $7 billion of funded debt, and there's perhaps another billion dollars of additional debt that might be allowed in this case.

So, assume that for the moment, you obviously see that we have approximately a 10 percent recovery in that analysis, absent a recovery in the JPMorgan litigation or the litigation with respect to the FDIC.

The claim that's being asserted here in this class action is a $5 million class action. So, 5 million out of potentially $8 billion worth of claims, that would probably yield, Your Honor, about a $500,000 recovery in the event that there were no additional recoveries for the benefit of the estate.

And what's being asked here, Your Honor, is that the estate engage in litigation which is going to cost hundreds of thousands of dollars to defend itself. And I might point out, Your Honor, that while counsel -- the movants' counsel has said that there are 11 counsel lined up to receive distributions today for payment of their fees, we do not have counsel engaged in that litigation. That counsel has been on hold. They have not been retained as an ordinary course professional, they have not been retained pursuant to a separate application in the court. The debtors have no counsel involved in this litigation at this time.

Could they be engaged? Yes, Your Honor. Would they

have to be brought out to speed? Yes, Your Honor. Would they incur significant costs and expenses in doing so? Yes, Your Honor.

While counsel has said that there would not be any discovery that would be needed from WMI, we all know, however, Your Honor, that we would have to participate in that discovery. We would have to look at all the documents being produced. We would have to take part in depositions.

Counsel at one moment said there was -- substantially all of the discovery had been done. And yet counsel then subsequently mentioned that there would have to be additional discovery. And, indeed, the District Court in the Eastern District said that in responding to the FDIC's motion to stay the proceeding, "In this Court's view, it would be inappropriate to issue a stay on the one hand and order discovery on the other. Accordingly, the plaintiff's request is denied without prejudice."

Leaving for another day, Your Honor, the ongoing discovery that would be required in that litigation.

The movants also -- excuse me. The movants did raise the issue a second time with respect to those two motions for relief from stay. Again, Your Honor, one was with respect to relies on, not involving prepetition litigation but rather business forms. And the other one also dealt with, Your Honor, the termination of a Madison Square Garden naming rights

agreement. It had nothing to do with litigation.

Counsel goes on to point out that there is a desire to permit prepetition litigation to proceed in another forum, and that constitutes cause for relief from the automatic stay.

Your Honor, we, in our papers, did not say that this might be the ultimate forum to litigate this. What we said, Your Honor, was now is not the time to litigate this matter. Perhaps somewhere down the road.

What we've made a point in saying throughout this proceed, Your Honor, is we've cited to the Court to the recent decisions -- or actually the decisions in this Circuit and beyond, that said that that alone is not the reason for relief from the automatic stay. And we contend, Your Honor, that this court should, at this point in time, allow that -- allow the automatic stay to remain in effect so that we are not engaged in multiple litigations. We want to focus this Court's attention, and all parties' attention on the two litigations that matter, which is the one here and the one in the District of Columbia.

There -- as counsel pointed out, Your Honor, there is a very large disagreement as to what Judge Spatt has already ruled. We believe that class certification was already denied. And, in fact, counsel in their papers said that they would necessarily have to relitigate the issue of class certification against WMI. To us, Your Honor, that means that they are going

to have to step up and deal with that on appeal.

But at the same time, counsel stands up here and says that he's ready to go forward with that class certification before Judge Spatt.

Our point, Your Honor, is simple. There are many things that have to go on in that litigation. Our point is it's not timely. We believe that the automatic stay should remain in effect. We should get a better handle as to whether or not there's even going to be a recovery in this case for creditors that would warrant going forward with that litigation at this point in time.

Obviously if there is a significant recovery for the estate, which we believe that there will be, our position with respect to this litigation will be -- could be substantially different than it is today. But at this point in time, Your Honor, our view is dollars don't make sense to move forward with that litigation. But dollars incurred in defending that litigation would far outweigh any potential recovery that we currently see. So, based upon that, Your Honor, we would say that the hardships to the estate are significant and far outweigh anything in connection with that litigation.

If, in fact, plaintiff desires to go forward and proceed with that litigation against the other defendants, let them do so, Your Honor. We're happy to have that subsequent litigation.

So, Your Honor, our point, again, is very simple. Now is not the time, the automatic stay is here for a reason. We believe cause does not -- excuse me -- weigh in favor of continuing with that litigation. On the contrary, we say that when you apply all the factors that the Court well knows, we believe that, in fact, the automatic stay should remain in effect.

Your Honor, we have in the courtroom Mr. Charles Smith, who is general counsel to WMI. And I know that counsel did not want to -- opposing counsel did not want to get into whether or not success on the merits matters. And if the Court wants to consider that, we have Mr. Smith in the courtroom who would talk about how WMI had no involvement at all in that.

THE COURT: Well, it's just whether it's a colorable claim, correct?

MR. ROSEN: Correct.

THE COURT: They've survived a motion to dismiss.

MR. ROSEN: That's what they say, Your Honor. Again, we would say that there's an interpretation of Judge Spatt's decisions which are different on many of the matters that have already been resolved. We contend that improper defendants, as we define them in our pleading, Your Honor, many of these things have already been thrown out against WMI. We contend on the class certification issue that the Court already determined that it's not for WMI.

I know counsel has a different interpretation. That's for a different day, Your Honor. And we footnoted that, and I think counsel alluded to it.

THE COURT: Well, they only have to show a colorable claim, they don't have to prove success on the merits at this stage.

MR. ROSEN: We believe it's merely a factor, Your Honor. And as I said, we have Mr. Smith here, if the Court would like to hear from him.

THE COURT: I don't.

MR. ROSEN: But, again, Your Honor, our point is very, very simple. Now is not the time. We're happy, Your Honor, if the Court would take this up at a different point in time down the road when we have a better understanding of where we are in connection with the litigation so that the estate's assets are not burned on a litigation that would essentially be a negative yield because we would be incurring costs that would far exceed the distribution to the creditor.

Thank you, Your Honor.

MR. TUSA: May I be heard briefly on that point?

THE COURT: Let me hear from others first.

MR. GURFEIN: Your Honor, Peter Gurfein for the Creditors' Committee.

Movant commented that the Creditors' Committee has not objected to their motion. We've worked with the debtor and

kept in touch, read the papers, and agreed with what the debtors' position has been, there was no reason for us to clutter the docket with more papers.

The Creditors' Committee opposes the motion and -- for all the reasons Mr. Rosen just noted.

THE COURT: Thank you. Anybody else?

(No audible response heard)

THE COURT: All right. I'll hear a reply.

MR. TUSA: Your Honor, I know you have a busy docket so I won't take up much of your time. I just want to address just a few points made by debtors' counsel.

They state repeatedly that this is just not the right time to take it up. Their plan is more delay.

And I think if Your Honor reads the case law, SCO, Racine, the tenor is clear, more delay equals more prejudice. More time goes by, witnesses lose memories. Parties have to sit on the sidelines.

By also saying now is not the right time, they implicitly concede that there is -- this is a claim that has to get resolved somewhere at some time. There is a Court in the Eastern District ready to do it right now.

He also said, Your Honor, our claim is for $5 million only. That's not precisely right. What we pled in our complaint was that the claim was worth in excess of $5 million, and that we didn't claim $5 million only. It has something to

do with the Class Action Fairness Act jurisdictional limits.

THE COURT: Okay.

MR. TUSA: And I just want to just briefly raise the fact that discovery -- I think I said it before, but I want to be clear. We never said that there's not going to be anymore discovery in the case. I think what we said is that substantial discovery has already been completed. There might be some additional discovery. It's likely that the lion share of it will not have to be from debtor. However, that's not a death knell to the motion, as Your Honor will see in cases like the SCO case. The fact that some discovery has to be done, including perhaps a couple more depositions. And even in that case, SCO, the debtors, claiming that discovery has hardly even begun, the court, never or less, allowed the case to go back to the original forum.

Thank you, Your Honor.

THE COURT: Well, let me say this. This is a close case. As stated of the three factors, success on the merits. I think they only have to show a colorable claim, I don't have to decide the merits of the action obviously in deciding whether to grant relief from the stay to send it to somewhere else to decide the merits. I think they've shown at least a colorable claim by surviving a motion to -- motions to strike and motions to dismiss in the District Court. So, I don't think that that is a factor militating against denying relief

from the stay.

But in considering it, I do have to weigh the prejudice to the debtors and the estates versus any prejudice to the movants.

With respect to the floodgates argument, I don't think that's a sufficient basis to deny a motion for relief from the stay. I have to consider each of them on the merits. There's no evidence that this claim is similar to thousands of other claims. It may give me reason to consider an alternative to granting relief from the stay, such as a mediation or alternative dispute resolution proceeding, whether in an plan or separately. So, I just don't think that that's a basis to deny relief from the stay.

The prejudice to the movant obviously is that there will be piecemeal litigation. The prejudice to the debtor is that at this stage in the proceeding, the debtor asserts that it's just not appropriate to liquidate this claim. There may be no reason to liquidate it at all at some point.

But I think in weighing the proceedings, I'm going to grant the motion for relief from the stay. I think that any counsel that is dealing with this case will not be debtors' bankruptcy or main counsel involved in the DC litigation, or the litigation here over the property of the estate issues.

The records, witnesses, et cetera, I presume are largely in control of the bank, not the debtor. So, that while

the debtor may have to participate in discovery, the debtor won't be called upon to produce a lot of discovery itself.

I just think the main reason I'll grant relief from the stay is judicial economy.

The other court has lots of knowledge. Has dealt with this case for years. A lot has progressed in the case. And quite simply, either reeducating another judge or requiring that judge to proceed piecemeal with respect to all of the other defendants first, and then considering the action against the defendant, I think, just doesn't serve the purposes of justice.

So, for that reason, I will grant the motion for relief from stay and let it proceed to liquidate anyway.

I'll look for a form of order then from counsel.

MR. ROSEN: Your Honor, in that regard, I would say that we will have to engage counsel, probably the counsel who was handling it before. We will have to do it probably, Your Honor, so that when the application is filed, it's going to refer back to the period when we get it nunc pro tunc.

THE COURT: Okay. I assume it will be under the ordinary course professionals or separately, I don't know.

MR. ROSEN: Your Honor, I'm not sure based upon the thresholds that are in the case whether we could get it in under the ordinary course because counsel has projected a significant amount of dollars to be expended in defending the

litigation. So, we may have to file a separate application.

But just to let the Court know that it would be nunc pro tunc --

THE COURT: It will.

MR. ROSEN: -- to that point.

THE COURT: Understood.

MR. ROSEN: Thank you.

THE COURT: All right.

MR. ROSEN: Your Honor, if you'd just allow us one minute as we get all the claims materials.

THE COURT: Okay.

(Pause)

MR. ROSEN: Your Honor, I think Items 6 through -- 6 through 11 are all claims related matters. And I will try and run through them as expeditiously as possible. And to the extent that we have a proffer that we will do, Your Honor, I would ask that it be applicable to more than one of those claims objections so we don't do it more than once.

THE COURT: That's fine.

(Pause)

MR. ROSEN: Your Honor, as I indicated, we have several claims objections that are on the calendar. The first is the first omnibus objection. And there were two items that had been left there. And, Your Honor, by agreement, those have agreed to be adjourned further to September 25. Those were --

I'll refer to them as the Schindler claim and L.A. County Treasurer claim.

THE COURT: Where's the first omnibus objection listed on the agenda? I think you're going out of order, am I --

MR. ROSEN: Oh, it might have already been taken off, Your Honor. I apologize.

THE COURT: All right.

MR. ROSEN: Because we knew that it was already adjourned.

THE COURT: Okay.

MR. ROSEN: Sorry about that. So, when we get to Number 6 on the agenda, it's the third omnibus.

THE COURT: Yes.

MR. ROSEN: And they are the third and the fourth omnibus, I sort of put together, Your Honor. And the outstanding dispute that was there was with respect to language associated with the bondholder claims. Those have essentially been mooted, Your Honor, and we will be withdrawing, based upon the ninth omnibus objection, and we will be withdrawing the balance of the third and fourth omnibus objection. So, there's nothing further to do there.

THE COURT: Okay.

MR. ROSEN: Which takes us to the fifth omnibus objection, Your Honor. There were several claims there, Your

Honor:

There were two claims: Claim Numbers 2306 and 1026 filed by Asbury Park Press and Cape Publications, Inc. respectively. Those were adjourned from July 27th hearing to today based upon the counsel -- claimant's counsel. And no response has been filed to date with respect to these claims, Your Honor.

So, we just ask the Court to approve the objection as we will be going forward at this time based upon the objection that we originally filed.

THE COURT: Which ones are you talking about?

MR. ROSEN: They were the claims, Your Honor, of Asbury Park Press and Cape Publications, Inc. They had been adjourned from July 27th to today at counsel's request.

THE COURT: All right. Where are they listed on the agenda?

MR. ROSEN: Your Honor, my understanding is they were not technically listed because we never got an additional response by the -- by claimant's counsel. I apologize for not having those listed there.

THE COURT: So, what do you want me to do with them?

MR. ROSEN: Well, Your Honor, they were carried today. But I understand that if -- since they were not technically listed on that agenda, we'll move them to September.

THE COURT: Okay.

MR. ROSEN: There were some additional items that had been pushed to September also, Your Honor, just to let the Court know. They were Compliance Coach, Courier Solutions, Andrew Eschenbach and Kenneth Coch. So, with respect to the fifth omnibus, the only claims that are going forward, Your Honor, are with respect to certain employee claims that have been kicked over from the prior hearing.

THE COURT: And I'm going to suggest we continue those also because your further declaration I only got on Friday. And are you relying on that?

MR. ROSEN: Well, we have Mr. Spatelle (phonetic) here in the courtroom. We can certainly put him on the witness stand also, Your Honor.

But if the Court would like additional time to consider it, we can do that.

THE COURT: Well, I think it's necessary. I think that -- I'm not sure it addressed all the issues I raised. But --

MR. ROSEN: Okay. With --

THE COURT: And does it not deal with some of the others -- other omnibus --

MR. ROSEN: Well, it dealt with all of the matters on the fifth that were going to go forward on the employees' side, Your Honor. And they -- with all the employee issues regarding

the retention agreements, change in control --

THE COURT: Let's continue it to September since we have --

MR. ROSEN: That's fine, Your Honor.

THE COURT: -- a full day today.

MR. ROSEN: Okay. Then with respect to the sixth, Your Honor, I would say that the majority of that would also be continued to September. There are, however, several that we could handle right now.

One of the claims was filed by John Cangiano, Your Honor. It was Claim Number 2145, Your Honor. And it related to a litigation called Cangiano versus Washington Mutual Bank.

THE COURT: Okay.

MR. ROSEN: That was pending in the Superior Court of the State of Connecticut, and that had been filed in December of 2007.

The allegations in the litigation pertain to a wire transfer made at a Washington Mutual Bank branch bank. And the claimant alleges that a bank employee confirmed for him certain funds had been deposited in his account, and that based on those representations, claimant wired $100,000 to Hong Kong.

Claimant later discovered that those funds had not been deposited in his account. As a result, his home line of credit was severely overdrawn after he wired the $100,000.

In his response to the objection, Your Honor,

claimant simply states that the debtors, quote, “may bear liability to the claimant.”

However, no allegations are contained in the underlying litigation related to WMI, nor has the claimant asserted any other theory under which WMI could be liable.

So, it was our position, Your Honor, that as, in fact, we were not truly a party to that, they failed to meet their burden with respect to Claim 2145. And that the claim should be disallowed and expunged.

THE COURT: All right. Is there anybody here on behalf of Mr. Cangiano?

(No audible response heard)

THE COURT: All right. I will sustain the objection.

MR. ROSEN: Thank you, Your Honor.

THE COURT: Despite his response.

MR. ROSEN: There is one other claim that we could handle then, Your Honor, on the sixth omnibus, and that is the claim of MSG, Madison Square Garden. And I -- counsel is here, Your Honor.

Your Honor, I guess -- why don’t we let them state their position, and then we can respond to it?

THE COURT: Okay.

MR. KORNFELD: Good afternoon, Your Honor. Alan Kornfeld and Michael Seidl, Pachulski Stang Ziehl & Jones, for MSG.

Your Honor, before I begin, we have clean copies of the agreement and amendment. May Mr. Seidl approach the Court and provide the Court with copies of those documents?

THE COURT: Yes.

(Pause)

THE COURT: Thank you.

MR. KORNFELD: Your Honor, this is a rather simple contractual interpretation matter that has given rise to two highly divergent interpretations of the contract. In particular, who is a party to the contract.

As the Court is aware, the contract arises out of naming rights and sponsorship agreement for a theater at Madison Square Garden. That naming rights and sponsorship agreement is the document that is in front of the Court.

MSG thought, and has contended in its claim, that this is a rather simple case. It has two parties on either side, one is Washington Mutual Bank, and the other is the debtor Washington Mutual, Inc. The debtor says no, despite what the contract says. There is only one counterparty to the contract, and that is Washington Mutual Bank.

The debtor makes two primary arguments about why that is the case:

One is that the contract is signed by Steve Rotella, who happens to be the President and COO of Washington Mutual Bank, although he’s also the President and COO of Washington

Mutual, Inc.

And the second argument is that the contractual language is clear to the debtor in terms of who the parties are.

And there's a third sort of ancillary argument, which is there's an amendment to this document. And that amendment, which is also before the Court, is simply an amendment that involves Washington Mutual Bank and MSG and, therefore, the claim fails because Washington Mutual, Inc. is not a party to the contract.

Your Honor, we respectfully submit that the debtors simply ignores the contractual language. And let me summarize the language that shows that Washington Mutual, Inc. is a party to the contract, and that certainly our client thought was simple and clear language.

In the first paragraph of the naming rights and sponsorship agreement, the contract says it's by and among Washington Mutual Bank, a federal savings association, having a principal office address of 1301 2nd Avenue, Seattle Avenue for itself, and on behalf of its parent company, Washington Mutual, Inc.

So, by that first clause, Your Honor, the two counterparties to the contract are Washington Mutual Bank and Washington Mutual, Inc. Those two counterparties become a defined term collectively. And collectively they're defined as

WaMu, a term that is used throughout the contract. The counterparty, of course, is MSG.

The last sentence of the first paragraph of the contract defines who the parties are to the contract. And that last sentence reads, “Each of WaMu and MSG may be individually referred to as a party and collectively are referred to as the parties.”

Well, by that last sentence, WaMu’s a defined term. And the defined term WaMu, as we’ve just discussed, means Washington Mutual, Inc. and Washington Mutual Bank.

Your Honor, the contract throughout the contract uses the defined term “WaMu.” Basic rules of contractual interpretation say to lawyers and courts, did you look at the contract, you read the contract, you provide a reasonable interpretation based on what the contract says objectively, and that reasonable interpretation is that when the contract says WaMu, it is referring to the defined term WaMu, which means Washington Mutual, Inc. and Washington Mutual Bank.

Your Honor, there is no question about anybody’s authority to enter into the document. There’s a rep and warranty regarding authority in Paragraph 15 of the contract.

So, it’s clear, based on that rep and warranty, that both MSG and WaMu represented and warranted that they each had all the rights granted to the other pursuant to this agreement. They were each authorized to grant all those rights. And,

again, WaMu is a defined term that includes two entities: Washington Mutual Bank and Washington Mutual, Inc.

I think the fundamental error of the debtor in its contractual interpretation, Your Honor, is that they simply ignore what that defined term WaMu means. They pay attention to the language that says Washington Mutual Bank is contracting --

(Interruption by telephonic participants)

THE COURT: Could the parties on the phone please mute their phones? Thank you.

I'm sorry for that interruption.

MR. KORNFELD: No problem, Your Honor. They pay attention to the language that says Washington Mutual --

THE COURT: Is the operator on the phone?

OPERATOR: Yes, Your Honor.

THE COURT: Would you please mute whoever is making that noise?

OPERATOR: Yes.

THE COURT: Mute their line. Thank you.

Go ahead.

MR. KORNFELD: The debtors acknowledge that this contract was made by Washington Mutual Bank for itself and on behalf of the debtor, Washington Mutual, Inc. They forget about the defined term that defines that WaMu means Washington Mutual, Inc. and Washington Mutual Bank.

This agreement, Your Honor, has a merger clause. It has an integration clause that's in Paragraph 25. And it says that any amendment must be in writing. And that all prior understandings of the parties, whether oral or in writing, are merged into the document.

The signature is, in fact, a signature by Mr. Rotella. There is only a signature block for Washington Mutual Bank, which frankly isn't a surprise given that Washington Mutual Bank is contracting for itself and for Washington Mutual, Inc.

THE COURT: Well, why do you say that it is contracting for Inc.?

MR. KORNFELD: Because in the first sentence, Your Honor, it says naming rights and sponsorship agreement, it's made and entered into by and among Washington Mutual Bank for itself and on behalf of its parent company, Washington Mutual, Inc.

And then I also say that, Your Honor, because the defined term WaMu, which appears throughout the document --

THE COURT: Right.

MR. KORNFELD: -- includes both entities.

THE COURT: Okay.

MR. KORNFELD: So --

THE COURT: What was the theater named?

MR. KORNFELD: The theater was named, Your Honor,

WaMu Theater at Madison Square Garden, and that's in 1.5 of the contract.

THE COURT: Thank you.

MR. KORNFELD: So, that defined term even made it into the theater's marquee.

So, Your Honor, again, in response to the debtors' argument that the signature block is Washington Mutual Bank, that's no surprise given the way this contract is drafted. And despite the debtors' argument, just because the signature block is Washington Mutual Bank, that doesn't drop Washington Mutual, Inc. from this contract.

Nor, Your Honor, does the amendment drop Washington Mutual, Inc. from the contract. Let's talk about how the amendment was arrived at. Your Honor, on Page 22 of the contract, the first document in front of the Court, there's a box that says ATM. And the first bullet point in that box says, "Subject to MSG and WaMu entering into a separate agreement with respect to all operational elements thereof, WaMu shall take over operation of all the existing ATMs in the Madison Square Garden Sports and Entertainment Complex, and all such ATMs shall be rebranded as WaMu ATMs at WaMu's sole cost," et cetera.

Basically this bullet point, which is part of the original contract, says that we need to enter into a ATM contract and we will enter into an ATM contract, which would be

separate from the first contract. And that ATM contract is a four-page document that is in front of the Court entitled first amendment to naming rights and sponsorship agreement.

That ATM contract -- that first amendment references the naming rights and sponsorship agreement. It says in background Paragraph B that the agreement provides that the parties would enter into a separate agreement regarding the placement and maintenance of ATMs, et cetera. And then it says in background Paragraph C, that this amendment is that separate agreement. And the rest of the contracts deals with the technical issues necessary to complete the placement of the ATMs at Madison Square Garden.

There is one significant provision, that’s Paragraph 2. That says in its second sentence, that’s on Page 3 of the first amendment, “Except as expressly set forth above, all terms of the agreement,” that’s the original contract in front of the Court, “remain unmodified and in full force and effect.”

So, this contract doesn’t say that suddenly WMI is no longer a party to the original contract.

It simply says that the original contract contemplated a technical contract regarding ATMs and here it is.

THE COURT: Okay.

MR. KORNFELD: Your Honor, Madison Square Garden entered into this contract with two entities for a reason.

Among other things, it wanted to make sure that it had two entities that would be responsible for payment. And we know that, Your Honor, not because of extrinsic evidence, but because in looking at the contract and the obligations to make payment under the naming rights and sponsorship agreement, that's an obligation in Paragraph 5 that's a WaMu obligation. That's an obligation by two entities.

And, in fact, Your Honor, the word "WaMu" goes to all of the obligations for MSG's counterparty, again, a defined term meaning all of those obligations are obligations by Inc. and by Bank.

Your Honor, contracts are interpreted by a court. They're interpreted objectively. They're interpreted based on the clear and unambiguous language of the documents. And we would respectfully submit, Your Honor, that the clear and unambiguous language of these documents show that both Washington Mutual, Inc. and Washington Mutual Bank were parties to the contract.

And, therefore, Your Honor, we would request that the objection be overruled.

THE COURT: All right. Thank you. Your response?

MR. ROSEN: Your Honor, always somebody when they stand up here they say it's a clear and unambiguous. First of all, I would like the Court to know that despite granting MSG relief from the automatic stay to terminate the naming rights

agreement a while back, this morning, when leaving Penn Station to come down here, the name WaMu is still on the side of the building.

And why is it WaMu? Because WaMu is how the bank was referred to, Your Honor. It's what's out there. It's the trademarks, it's how the bank was known.

But let's just talk about the agreement itself. Counsel very adeptly stood up here and pointed to what he said was the be all and end all, which was Paragraph 2 of the amendment where he said "except as expressly set forth, everything is the same."

But then he didn't go to the next sentence. "In the event of a conflict between the terms and conditions of the agreement in this first amendment, the terms and conditions of this first amendment shall govern."

Okay. So, now let's go backwards in time. Let's go to Page 1 of this document, Your Honor. Counsel has made a very, very large point of saying WaMu means the universe. It's not just Washington Mutual Bank, it includes its parent, it includes every affiliate that could possibly be out there.

But let's go to the first amendment, and it says, "This first amendment to the naming rights and sponsorship agreement is entered into by and between Washington Mutual Bank, a Federal Savings Association, defined as WaMu. Each of WaMu and MSG may be individually referred to as a party and

collectively are referred to as the parties."

So, to our point, Your Honor, it's pretty clear we're talking about the bank. We're not talking about a family of banks, a family of corporations and affiliates. We're always talking about the bank.

Counsel also wants to stand up here and talk about contractual interpretation. Well, let's talk about that, Your Honor.

Under the document, the governing law provision says it's governed by New York law. And under New York law, Your Honor, a party cannot be bound by the terms of a contract unless there is some objective manifestation of an intent to be bound by such a contract. For an example, a signature. Here, there is no signature on behalf of WMI in connection with the original agreement. And certainly when we get to the second, the amendment, that agreement, it's clear WaMu is WaMu. WaMu is the bank, and it was signed by Washington Mutual Bank. It is not signed by anyone else on behalf of Washington Mutual, Inc.

Yes, Mr. Rotella was an officer of Washington Mutual, Inc. But he signed the document in his capacity as a Washington Mutual Bank representative.

Counsel stands up and says that the agreement is enough to create a three-party agreement -- excuse me. The language is sufficient. Your Honor, we disagree with that. We

believe that the language is insufficient. If anything, Your Honor, one could argue that Washington Mutual, Inc. might have been a third party beneficiary of this document. But, again, Your Honor, it is not bound by the terms of it.

Again, Section 25 of the agreement required the written consent of, quote, "both parties hereto" before the agreement could be modified. This is significant because, one, it was a two-party agreement. And then when we get to that amendment, Your Honor, Washington Mutual, Inc. was not a party to that understanding.

MSG's motion for relief from the stay that it filed way back when, Your Honor, the one I referred to about the termination of the naming rights agreement stated that it sought to -- it sought relief from the automatic stay, quote, "to the extent such relief is necessary to terminate the MSG agreement," quote, "in an abundance of caution because WMI is both the direct parent of WMB and a debtor in these cases."

Madison Square Garden did not allege in that stay relief motion, as they do now, that Washington Mutual, Inc. was a party to the MSG agreement.

Your Honor, we submit that the inclusion of the words "on behalf of" -- "for itself and on behalf of its parent" is not enough to bind WMI to the agreement.

If that were, in fact, the case, under New York law, it would have been required to be an express signatory to the

agreement.

So, Your Honor, we believe that, if anything, there are third party beneficiary rights, but, again, that is not enough to create a claim against the estate. Madison Square Garden is left to pursue the claim in the receivership against the FDIC. And we believe, Your Honor, that based upon that, that the claim should be denied and expunged in its entirety.

Thank you.

THE COURT: Any reply?

MR. KORNFELD: Yes, Your Honor.

Your Honor, I think the debtor asked the wrong question. The debtor asked who is the signature to the contract. The question here is who is the party to the contract.

And, frankly, this contract could have been signed by Mr. Rotella in his capacity as the President and COO of WMI, or it could be signed in his capacity as the President and COO of WMB, or it could be signed in both capacities.

That doesn’t answer the question in looking at what capacity he signed the contract about who is the party. And the New York cases don’t, and the debtor doesn’t say that the New York cases do, require a party to sign a contract in order to be a party to the contract.

Your Honor, the parties entered into this contract. Who the parties are are carefully defined in the first

paragraph of the contract.

The debtor has not responded to the position that we have based on the definition of who the parties are that defines WaMu as being WMI and WMB. The debtor has no response to that because the debtor really can't respond to that point.

And that is collectively who MSG was contracting with. And MSG entered into this contract, and put the name on the theater, and accepted payment under the contract and performed under the contract based on the objective manifestation of intent here.

So, everybody performed under this contract. It was very clear there was a contract. And the contract, by its terms, again, with all due respect to counsel's argument, we think clearly defines who the parties are.

Thank you, Your Honor.

MR. ROSEN: Your Honor, if I could just add one thing?

THE COURT: Sure.

MR. ROSEN: Your Honor, we don't argue that there wasn't performance under the contract. We just argue that the case law doesn't weigh in their favor on this.

The case law is pretty clear that to be a party to a contract, you actually have to sign a contract. In fact, I believe there was a case here in Delaware Chancery Court this year, Your Honor, and we cited it in our response. And what we

noted in the quote was “the ordinary rule is that only the formal parties to a contract are bound by its terms.”

The merger agreement was only signed by three parties. Accordingly, only those three parties had obligations under that agreement.

We don’t disagree that Washington Mutual Bank received significant benefits from that agreement. We also don’t disagree that Madison Square Garden got paid significant dollars under that contract.

Our only point of disagreement, Your Honor, is that Washington Mutual, Inc. is not a party to it. And a claim against its estate should be expunged.

THE COURT: Well, I’m going to take this matter under advisement. I want the parties, if they want to provide any additional briefing on that specific issue as to whether you have to sign the contract to be a party to the contract, I don’t know if you’ll find any cases directly on point where the contract states you’re a party, but you don’t sign it.

MR. ROSEN: Okay, Your Honor. Is there a time frame that you would like that?

THE COURT: 10 days.

MR. ROSEN: That’s fine, Your Honor.

THE COURT: All right. You can both do it simultaneously.

MR. ROSEN: Thank you.

(Pause)

MR. ROSEN: Your Honor, that then takes us up to the eighth and ninth omnibus objections.

Your Honor, that was filed on July 24th. We objected to 11 claims on substantive grounds, that fell into two general categories:

There were tax claims for claims that we're asserting a tax liability on account of property that is not owned or operated by the debtors.

And contract claims asserting contractual liability on account of contracts either entered into with WMB or pursuant to which services were provided to WMB, and not to the debtors.

Claim Number 2105 that was filed by Green & Hall was withdrawn prior to the hearing. And so that has been removed from the exhibit to the final form of order.

We did receive responses from the County of Santa Clara and the Tennessee Department of Revenue. And both of those had been resolved. Santa Clara objected -- excuse me. We objected on the grounds that WMI did not own the property. Santa Clara has reserved their right to file additional claims if they discover new evidence, and the debtors reserve their rights to object to such claims on any grounds whatsoever, including timeliness, Your Honor.

So, that claim will be withdrawn, I believe or --

expunged. Excuse me, expunged.

With respect to Tennessee, we objected to the claim on the grounds that it related to a tax obligation that was not WMI's. Counsel for the debtors and the Tennessee Department of Revenue have discussed this issue, and the Department of Revenue has no further objection to the relief sought, and will allow the claim to be expunged.

We also received a response from the L.A. County Treasurer and Tax Collector, and that objection to that claim, Your Honor, has been adjourned until September 25.

So, with that, Your Honor, all of the other claims under the eighth omnibus are unopposed.

THE COURT: All right. I'll grant that objection then.

MR. ROSEN: Thank you, Your Honor.

THE COURT: That omnibus objection.

MR. ROSEN: With respect to the ninth omnibus objection, we objected to claims on nonsubstantive grounds, amended and superseded claims, late filed claims, and unsupported claims.

We did receive several responses. One was from the WMB bank bondholders. And we have agreed to certain language, specifically we've agreed to the language that would resolve it on many levels. And this goes back, Your Honor, to that third and fourth omnibus that I referred to earlier. It is language

that was similar to the language that we included in the seventh omnibus order.

The debtors agreed to waive the right to object to the amending and superseding claim on timeliness grounds. And the bank bondholders agreed not to oppose our objection to Claim 3114.

However, we did reserve our right to object on the timeliness ground solely with respect to new bondholder claimants who are now integrated into their consortium.

Previously, Your Honor, there was a smaller group, they've added some. So, we reserved our right with respect to that.

With respect to the late filed claims, Your Honor, we received nine responses merely stating that "the claims were not timely filed, and we're sorry." And as the Court is very well aware, in order to get over the "we're sorry" or "we didn't mean to get it in late," that is not enough to get it by the excusable neglect requirements under the Pioneer decision.

No one has stepped forward to establish any excusable neglect, Your Honor. Rather it was a one-page "please allow my claim notwithstanding the fact that it was untimely."

THE COURT: Well, they say they filed it as soon as they got the notice.

MR. ROSEN: In some instances. But, Your Honor, as you know, we certainly published notice, we did everything that

was conceivably possible, and as certainly is required under the bar date order. We mailed notices to parties. We published notices in many newspapers around the country.

THE COURT: Well, but these are known claimants who presumably got written notices, am I correct?

MR. ROSEN: Your Honor, some of them are equity holders. And as you know, we did not have an equity bar date, but they are now claiming proofs of claim, not equity interest claims.

And the others are individual bondholders who would have been served through the trustees themselves rather than directly. That is pursuant to the order that was entered.

THE COURT: And how many days was given?

MR. ROSEN: Your Honor, I think it was in excess of 60 days for the bar date.

THE COURT: Well, do we know when the trustee --

MR. ROSEN: I do not know when the indenture trustee sent out the notices.

If you'd like, Your Honor, we can adjourn that and find out that information for you.

THE COURT: Let's do that.

MR. ROSEN: That's fine, Your Honor.

THE COURT: I'm not sure what prejudice the debtor is suffering by some late claims here.

MR. ROSEN: That's fine, Your Honor. But that, of

course, opens the door to subsequently late filed claims, if that's the position we take. But I understand that. We'll get the information for the Court.

With that, Your Honor, I believe that takes care of --

MR. GURFEIN: I'm sorry, Your Honor. Peter Gurfein for the Creditors' Committee.

Just to clarify the language on the bondholder's claim objection. We understand that the agreed language would be for all parties in interest to reserve their rights as stated by debtors.

THE COURT: Yes.

MR. ROSEN: Yes, Your Honor. We don't mean to conclude the Committee or any other party.

THE COURT: Okay. All right. Then with respect to the others --

MR. ROSEN: We'll modify the orders, Your Honor, to be consistent with what we've done today, and appropriately adjourn those that we are now going to adjourn.

THE COURT: Okay.

MR. ROSEN: Your Honor, I think that takes us up now to the 12th item on the agenda, which is the motion of JPMorgan to compel disclosure pursuant to Bankruptcy Rule 2019.

THE COURT: All right. Thank you.

MR. SACHS: Good afternoon, Your Honor. Robert Sachs

from Sullivan and Cromwell on behalf of JPMorgan Chase.

We are here on a 2019 motion which applies to every entity or Committee representing more than one creditor or equity security holder. The rule is mandatory, it's written in the terms "shall disclose," and it requires disclosure of certain enumerated information.

The original SEC proposal that became this rule ultimately required disclosure of this type when you had 12 or more people being represented. The rule as adopted is more than one.

The rule is part and parcel of the Bankruptcy Court's principle of full disclosure and transparency. And it is so all interested parties in the estate, parties include the other parties to the proceeding, the Court, other creditors, know with whom they're dealing, know the interest, know the nature of the interest, know the extent of that interest, know the bias of the parties who have elected to make their interest known in proceedings before the Court.

And I think it's worth pausing, and I'm going to go through it a little more in a minute, but pausing to note that these are people who have voluntarily elected to inject themselves into this proceeding and to assert on a consolidated basis to have their views known and made known to the Court, and to advocate their position, and to act on a coordinated, consolidated basis with respect to the other parties, both in

negotiation and advocating their positions.

They don't have to do that. And if they don't want to make the disclosures the rules requires, they shouldn't do that. It has nothing to do with the fact that they have interest, but they've injected themselves into the proceeding.

It's for the interest of all constituencies. As I said, the parties who have to negotiate and litigate with this Committee. For the Court in assessing the arguments that this Committee is advancing, to know what they own, how much they own, and I'll go into it in a minute. But we don't even know for this group of noteholders what notes they own. They say they're noteholders, we don't know whether they're -- which tranche of notes they own, what level of notes they own, whether they own multiple notes, whether they bought them, whether they've sold them.

And a lot of that has a lot to do with assessing the credibility and motive behind arguments that they are advancing in this case. And it's also relevant to other creditors who, while they may not technically be representing them as fiduciaries, look to the parties who are actively participating in the process here to determine whether they're advocating similar interest or divergent interest, and whether they're protecting their interest.

The rule applies here by its express terms. The Northwest decision, Your Honor, which was recently followed in

the Chrysler case, is on point. It couldn't be clearer. The Court, again, on a practical basis in that case in Northwest said I'm not saying these individual funds can't take action in their own interest. I'm just saying that Rule 2019 says that. If they're a group, and they want to affect this case, and they certainly do, that they've got to file certain basic information that I didn't make up, I didn't create that requirement, it's on the books, it should be filed. It's basically a rule that is clear on its face, and I know there's substantial objection to it. And, indeed, you've got in the papers before you the noteholders have put before you some information put in by various industry associations who are seeking the repeal of the rule which in itself is an indication that the rule does apply, they just don't like it.

Here, this is a group of 20 plus people who are asking the Court to consider the accumulated comp heft of their supposed positions and asking the Court to accept that as the basis on which you should give credibility to the positions that they advocate.

As in Northwest, they agreed to appear here, and they -- voluntarily, and they've decided to appear as a Committee in an aggregated form.

If you look, Your Honor, at -- if there were ever a case that disclosure of this type were essential, this is it. And look at what this Committee has done, and I'm going to get

to their arguments in a minute as to why they say the rule shouldn't apply to them. But just at the outset, look at what they've done before the Court.

If Your Honor -- it's Exhibit --

THE COURT: You don't have to go through that. I'm aware of what they've done.

MR. SACHS: Oh.

THE COURT: And I think your papers and your reply list some of the various actions they've taken.

MR. SACHS: Okay. I didn't mean to go through all the things they've done. I just wanted to focus on one appearance, Your Honor, where they set forth before the Court and they said they "represent the holder of $3.3 billion."

THE COURT: Um-hum.

MR. SACHS: They "represent the principal stakeholder in this dispute." And they purported to be advocating positions that were for the benefit of the creditors.

The information that Rule 2019 requires be disclosed goes to all of those issues, and goes to an assessment of whether any of that is or is not true.

Their arguments: First, that they're not a Committee, that they're a loose affiliation. They don't represent anyone other than each other. Or they don't represent each other. And everybody makes their own investment decisions.

And second, even if they are a Committee, that there's a variety of arguments that go to what they claim to be the discretion of the Court to not require compliance with Rule 2019, that it would be burdensome to produce this information, that it's sensitive information, that it would disadvantage them in their trading activities, that the price they paid for their securities has nothing to do with their ultimate right to collect as a creditor in this estate if there's ultimately a distribution which, of course, misses the issue because part of the question is whether they are, indeed, acting as a creditor in that capacity or whether they are short-term people who are utilizing the Court for purposes of buying and selling securities rather than acting in the interest of the long-term creditors who are looking for a distribution of the estate at the end of the day, one of the issues. And they impute bad motives to JPM Chase in seeking to have this information disclosed.

And unless the Court has questions about that, I don't propose to address that last point.

The evidence that they are a Committee in this particular case is similar to the evidence that was relied upon in the Northwest case. They advocate in this case a single position. They appear in a unified form in negotiations in this case, they've indicated that.

In their own submission, they've indicated that

decisions are not made individually by people, but the decisions are made by the Committee -- members of the Committee discussing the issues, and then coming to a consensus view that they advocate in a single way through a single set of counsel. Indeed, they can only advocate a single unified position through one lawyer because otherwise the lawyer couldn't represent divergent interest.

So, by definition, they are asking the Court to take account of supposedly $3.3 billion of undefined creditor interest in deciding whether those are interests that should be worthy of consideration and their views.

And the fact that they are making their own investment decision -- well, they also indicate that they're looking at it for the interest of all creditors. They don't say it's in our interest to do this. They say it's in the creditors' interest. That's -- their arguments have been so far to the Court.

And the fact that they have the ability to make their own investment decisions, that has nothing to do with 2019. It has nothing to do with the positions they're articulating before the Court. Of course they can make their own investment decisions regarding their single investments. But in coming to the Court and asserting a position, it is in that form that they are asserting joint and uniform positions.

I've indicated why this information is relevant.

It's relevant to litigation, it's relevant to negotiation. As I said, they don't even indicate what class of debt they own. It's possible they have conflicts, certain of these people because they own senior debt, and more junior debt, unsecured debt. We don't know, and it's not transparent in this particular case.

Acting as a unified force that's relevant to the parties here who are acting and trying to deal with the substantial issues in this case in good faith to know who they're negotiating with, who are these people, what do they or don't they own?

And I would point out, Your Honor, that the interests of this group have changed. Originally it was supposedly in excess of 1.1 billion. Then it went up to in excess of 3.3 billion. And in the limited disclosures that were filed and presented to the Court, it's back down to 3.26 billion in some notes of some sort.

So, the fact that the interests are shifting is an indication in the record that there's a need for this type of disclosure, to know whether these people are, in fact, buying and selling, whether they're looking for their short-term trading interest in this case rather than advocating the interest of creditors. And it's important for us as parties to know that, and I respectfully suggest it's of interest to the Court in assessing the credibility of the positions that they

ask Your Honor to accept.

Their claim of harm from disclosure is not supported anywhere in the record that's been presented to Your Honor. They don't -- first of all, you should never get to that issue because it's not for the Court to secondguess the rule that Congress decided to pass. But I recognize that some courts have looked at it as a matter of discretion, and I'm going to get to that in a minute.

But even if you were to do that, there's no evidence in this case of the parade of horribles that they suggest. They say this is burdensome. Your Honor, if they don't know what they bought and sold, and have that information, I don't know how they could file their taxes, much less anything else. These are sophisticated institutions that clearly know what securities they bought, when they bought them, and how much they bought them for. That's not burdensome.

They suggest that this is proprietary and sensitive. Well, Your Honor, we're not asking for anyone's trading strategies. The rule doesn't require disclosure of trading strategies or the subjective factors that people take into account.

This is -- asks for disclosure of historical purchase and sale information. It's much of the type the SEC would require a five percent shareholder to disclose under Rule 13(d). There's nothing unique or proprietary or particularly

troubling about it.

And there's no evidence, although they assert it to be the case, this would have some affect on the secondary market for trading in distressed debt. There's no evidence in the record to that, other than pure speculation on their part that maybe it could affect -- if other people knew what they had purchased or sold for, they -- that it could affect the negotiation as to what they would trade the debt at. But that it wouldn't have -- there's no suggestion in this record that it would have an affect on the secondary market.

And, indeed, they talk about competitors. There are no competitors that we're talking about here, competitively sensitive information. We're talking about simply disclosure of historical information based upon positions that they have told the Court in a very general sense, or represented to the Court that they possess and that they're asking the Court to assess as the basis for giving their positions significant weight.

Finally, Your Honor, on the issue of discretion, they referred to 2019(b), and they also refer to the Scotia case from Texas on that point where the point said it wasn't a Committee, I think's just dead wrong on that issue. There's no analysis of the issue in that particular case, unlike the Northwest Airlines case which goes through the language and relies upon it, but also suggests that, indeed, if there was,

they could exercise discretion not to require compliance with the rule. And in this court, the Sea Container case where the Court found the rule applicable, rejecting the argument it is not applicable, but said I can exercise discretion as to how much compliance with the rule is required.

But, Your Honor, 2019 does not say any such thing. The rule, as indicated as in 2019(a), and that's mandatory. 2019(b) is simply a provision that grants authority to the court as to what type of relief it can order for a failure to comply with 2019(a).

So, it affirmatively authorizes the court may, not shall, but the court may offer -- order relief that is -- as draconian as saying "you guys may not participate in this case."

But in no way, shape, or form does 2019(b) say notwithstanding that this is a mandatory rule, the court can choose to ignore it if the court wants to ignore it, and it's really not a mandatory rule. When Congress says shall, it means shall. Congress means something different, it means something different.

But to seize upon something as to the discretionary relief that the Court can grant in order to say that, therefore, the affirmative obligation no longer exists is, I suggest, unwarranted and improper a statutory interpretation.

So, for all those reasons, Your Honor, we

respectfully request that you order this noteholders' committee to make the disclosures that 2019 requires in a reasonable period of time.

Thank you.

THE COURT: Thank you. Does the debtor or Committee take any position on this motion?

MR. ROSEN: Your Honor, the debtor takes no position.

THE COURT: How about the U.S. Trustee? I'm sorry, the Committee?

MR. STRATTON: Your Honor, the Committee has no position on the motion, Your Honor.

THE COURT: U.S. Trustee?

MR. McMAHON: Your Honor, Joseph McMahon for the Acting United States Trustee.

We did not file papers indicating a formal position. Although, as the Court might surmise the Program's position is more consistent with the Northwest case, as opposed to Scotia.

THE COURT: Thank you. Mr. Lauria?

MR. LAURIA: Good afternoon, Your Honor. Tom Lauria for the noteholders.

JPM premises its motion on four points when it gets all boiled down:

Chapter 11 is a transparent process and the disclosure of my client's trading position is consistent with that.

Number two, the plain language of Bankruptcy Rule 2019 requires disclosure.

Number three, requiring disclosure is consistent with existing case law.

And number four, disclosure is not prejudicial to my clients.

Careful review of the record in this case reveals that the contrary is true with respect to each point. In fact, no one else in this case, or in any case that we're aware of, has actually disclosed the information sought here.

2019 is not applicable to my clients. Case law does not support disclosure. And disclosure would be highly prejudicial to my clients in violation of their rights under 11 U.S.C. 107.

Perhaps more importantly, Your Honor, the Bankruptcy Code and rules are generally construed to promote practical, efficient administration, not the opposite as urged by JPM.

Let's go through this now point-by-point, starting with the transparency argument. JPM would have the Court believe that the cost of participating in a bankruptcy case is that you have to disclose everything about what might be motivating your interests. JPM says, in effect, that bankruptcy is the nude beach of litigation. If you want in, you can have no secrets.

Cursory review of what happens in bankruptcy cases

generally, and what has happened in this case in particular, reveals that that is not true.

Let's start with the proposition that's not in dispute. Certainly individual creditors have no such duty to disclose their trading information. They can own multiple claims at different classes. They can own CDS, they can own derivatives that may put their economics at odds with the interest of the estate. And they have no duty whatsoever to make any disclosure, no matter how large their holdings are. The same is true, interestingly, of bank agents.

THE COURT: Well, isn't it true that they have to disclose that if they seek a distribution, i.e., they have to file a proof of claim and disclose what their positions are?

MR. LAURIA: They certainly -- well, Your Honor, actually generally, the indenture trustee files the proof of claim for debt that's traded in a case, or the bank agent, which I was just going to get to, files the proof of claim. And the individual holders are under no obligation to file a proof of claim. Their distributions are received either through their bank agent, if we're talking about bank debt, or through their indenture trustee if we're talking about bonds.

THE COURT: Okay.

MR. LAURIA: As I was saying, Your Honor, though, the same is true of bank agents who generally do appear in court, and generally as a matter of their contractual obligation speak

for all of the obligations owed under the credit agreement, even though, as we all know, that debt may be held by dozens, if not hundreds, of individual investors. I think for obvious reasons, however, you don't hear JPM arguing that bank agents need to file 2019 statements.

More importantly, Your Honor, to the extent actions speak louder than words, we've gone back and we've looked at a number of cases where JPM has appeared as the agent for the banks and guess what? We find that JPM doesn't find that it has any duty to make a 2019 disclosure despite the fact that it actually has contractual obligations to speak for all of the debt, and all of the holders of the debt.

Even members of official committees who clearly are acting in a bankruptcy case as fiduciaries aren't required to publicly disclose the type of information that JPM seeks to compel my clients to disclose here the details of every trade they have made in the securities of this debtor.

The fact is that contrary to JPM's argument about the importance of transparency, absent a dispute that makes relevant the details surrounding each purchase and sale of claims against the debtor, such information is generally not disclosed by parties in bankruptcy cases.

Parties are presumed --

THE COURT: Excuse me. Could the operator please mute all of the lines?

OPERATOR: Yes, I'll mute them, Your Honor.

THE COURT: Thank you. I'm sorry. Go ahead.

MR. LAURIA: Parties are presumed to be acting in what they perceive to be their best interests. And absent extraordinary circumstances, neither the Court nor the other parties need to look behind the appearance to determine if that party really is acting in its best interest, or is acting to pursue some other agenda.

So, why pick on a group of creditors who got together for the sole purpose of sharing fees? This leads to --

THE COURT: I think you have to ask the Judicial Conference that, not Congress, but --

MR. LAURIA: Well, Your Honor, we would submit that the answer is that the rule doesn't apply to that situation. That the sine qua non of the rule -- and I want to get to this in due course. But the sine qua non of the rule is the ability to bind somebody. And here, there is no --

THE COURT: That's not what it says, though.

MR. LAURIA: Here -- well, what it says is a committee who represents. Okay?

THE COURT: Entity.

MR. LAURIA: An entity

THE COURT: It says an entity.

MR. LAURIA: Well, let's talk about -- let's attach -- attack each of those points. Let's ask if this group is an

entity.

THE COURT: Well, are you an entity? You purport to represent them.

MR. LAURIA: Well, I think JPM has conceded that the obligation is not one that falls to counsel. It's one that's directed at the party in interesting.

THE COURT: Okay.

MR. LAURIA: But, Your Honor, the term entity is defined in the Bankruptcy Code. And the term -- the words that are used there clearly would not apply to our group, with the possible exception of the word "person." And yet when you look at the word "person," what you see is corporation or partnership, in effect, that might be applicable here. And I can assure you that the noteholder group here is neither a corporation nor a partnership.

There is no shared interest by the members of this group. They are each making their own decisions on their own behalf.

And, in fact, the membership of the group has changed over time. People have come in and people have dropped out. Some cases because, in fact, a particular person didn't agree with the views that others were expressing and said, okay, I'm going to discontinue my participation.

So, there is no -- there is no understanding or agreement between and among the members to bind themselves to

anything. The only thing that's being accomplished here is an efficient mechanism to obtain advice. That is sharing the cost.

Now, Bankruptcy Rule 2019, it should be noted, is a rule, not a statute. It is not, in fact, an adopted act of Congress.

And so as a starting point, I'd like to suggest that the repeated argument of JPM that we should adopt the case law in Ron Pair, Lamey (phonetic), and other cases that when the language of the statute is clear, it should be given its plain meaning and the Court has no choice but to apply it as a matter of rote doesn't apply to Bankruptcy Rule 2019.

THE COURT: Well, what is the standard for application of rules then?

MR. LAURIA: Your Honor, a rule --

THE COURT: Not the plain language?

MR. LAURIA: A rule is -- has been promulgated -- the rules have been promulgated to facilitate the application of a code. They are not a congressional act entitled to the benefit of any interpretative rule cited by JPM. And in that regard, 2019 should not be interpreted in a fashion that is at odds with the Code, as would be the case if applied as requested.

Clearly 107, which is a statutory provision, protects proprietary information from disclosure. And 2019, as a rule, should not be construed to defeat that statutory provision.

Now, let's look at the actual language for a moment, and see what it says. As the Court has noted, an -- any entity or committee representing more than one creditor. That's the operative language to get us into Bankruptcy Rule 2019.

Your Honor, I think I've already addressed the issue of entity. But let's talk about whether or not our noteholder group is a committee representing more than one creditor.

In our initial filing of record in the case, we expressly disclaimed the representation of any creditor outside the group.

More importantly, Your Honor, the group doesn't represent, and there is no evidence to the contrary, but I can represent having sat in on meetings with the members of the group, that the group doesn't represent any individual member of the group. Each member acts individually and makes its own decision, and to the extent that we find a common denominator, sometimes it's a very painfully low common denominator. But to the extent that we find a low -- a common denominator, that is the position that's put forth by the members of the group.

To the extent individual members have different views, they have freely communicated them throughout this case to the official committee and to the debtor, and to JPM on repeat occasions.

There is simply no basis --

THE COURT: I don't know that any of them have come

into court and articulated a position.

MR. LAURIA: Well, Your Honor, I guess when they determine that they need to, if they need to, they will do that.

The fact of the matter is, let's talk about the issuance of appearances in court for a moment. Over 1,500 pleadings have been filed in this case to date, four of them have been filed by the noteholder committee, not counting the response to the present motion.

JPM cites to four appearances in the case. The fact of the matter is the business of the noteholder group is predominantly obtaining private advice regarding legal theories and positions of parties, and potential outcomes, most of which is provided in the conference room, not in the courtroom.

And certainly the level of appearance is not enough in this case to cause or to support a conclusion that this group of noteholders has bound themselves together such that they somehow can only act together, or are only -- or have somehow authorized a group to act for and bind any particular member.

In fact, there is no reason for these noteholders to be together, and to be acting through the noteholder group other than they want to share the cost. They're looking for an efficient way to represent themselves in this case, and to get legal and financial advice. They have retained a financial

advisor. The financial advisor has run models for them, has performed sensitivities and financial diligence. That's -- it's a stretch to say that because a group of noteholders are trying to get legal analysis and financial analysis, that they should now be required to disclose information in this case that no other party is disclosing.

THE COURT: Well --

MR. LAURIA: Simply --

THE COURT: They've done more than that. They've filed pleadings in court purporting to act as a group. And isn't that what 2019 -- I mean if they had simply consulted you, gotten legal advice, and represented -- acted on their own, that would be one thing. But they filed pleadings purporting to represent all of them.

MR. LAURIA: Your Honor, those pleadings took positions that all of the members agreed with. And there were people who dropped in and out of this committee because of that from time-to-time. Okay? It is not -- the sine qua non, as was made clear in the history to 2019's predecessor, Rule 10-211, is the ability to bind someone. This group has no ability to bind anyone.

THE COURT: But isn't that the problem? There have bee people in and out of the group, and that's not been disclosed as far as who was in the group. You're purporting to represent a group.

If, for example, you filed an objection to a motion that said I represent, you know, XYZ, and here is our position. And then the next motion or pleading you filed I represent ABCXYZ, it would be clear who you were representing.

MR. LAURIA: Well, Your Honor, arguably, if our papers didn't say we were representing the WMI noteholder group, but instead said we were representing at any point in time somebody between 20 and 30 individual noteholders, I suppose that would eliminate this ambiguity.

But I would hate to think that having shorthanded it, and just said we're representing the noteholder group, who we did disclose the membership of at the beginning of the case, and we have recently updated that disclosure to disclose who is currently in the group, and what the aggregate holdings are, it would -- it stretches the bounds of reasonableness to say that that mere fact subjects these noteholders to this type of disclosure, which they believe -- which they believe is harmful to them.

And quite frankly, I think the reality is -- and I'm skipping ahead here a little bit in my argument. But, Your Honor, if the Court were to rule that this type of participation in a Chapter 11 case mandates the disclosures contemplated in Bankruptcy Rule 2019, including, in particular, (a)(4) which I think is the -- where the rubber hits the road here -- that, in fact, it's likely that many of these creditors

would simply drop out. They'd say, I'm going to -- if I'm going to act in this case at all, I'll act individually. And many of them who hold small positions may conclude that they don't have the wherewithal to be represented.

And so what you'll -- the result -- the best case result of an interpretation of the rule as posed by JPM is that you would have a string of not one lawyer, but 30 lawyers filing papers when matters come up in the case. And 30 lawyers making arguments. And 30 lawyers conducting discovery. And 30 lawyers conducting legal diligence. And 30 financial advisors conducting financial diligence. Which, Your Honor, can't be the kind of inefficient result that the Bankruptcy Code seeks.

Now, I say that's the best case because the worst case is more likely that you'll have a small number of these creditors who will determine that their position is large enough, standalone, to incur the cost of separate counsel and separate financial advisors. And the vast majority will determine that they can't carry the freight. That the cost is too high.

And so the real question is is there any offsetting benefit to the estate of requiring this disclosure. And what's interesting to me about that is that the cases are unanimous. Not 95 percent in my favor, but unanimous that absent extraordinary circumstances not alleged to be present here, the price a creditor pays for its claim is irrelevant to the rights

associated with that claim in a bankruptcy case.

In fact, I would cite the Court to Chief Judge Carey's musings in the Sea Container case where Judge Carey declined to apply (a)(4) in that case. And Judge Carey said, I'm not going to give the movant their ah-ha moment to say in court these creditors got these claims for a song. Why? Because it's irrelevant. Whether the claim was bought for 99 cents, a penny, or a dollar twenty-five, the claim is 100 cent claim. And it's entitled to that treatment in the case --

THE COURT: Where --

MR. LAURIA: -- and to require --

THE COURT: Where --

MR. LAURIA: -- disclosure otherwise is nothing but a sideshow and a distraction, Your Honor.

THE COURT: But I didn't write the rule.

MR. LAURIA: Well --

THE COURT: And aren't the cases pretty straightforward that disclosure is mandatory?

MR. LAURIA: Well, the only case that so holds are the two Northwest decisions.

THE COURT: Um-hum.

MR. LAURIA: And, Your Honor, it --

THE COURT: It's the only one who has written on it. Do you have cases contra?

MR. LAURIA: Well, I believe Sea Container, which

we've cited to this Court is contra.

THE COURT: Was that a written opinion?

MR. LAURIA: No, Your Honor.

THE COURT: Okay.

MR. LAURIA: No, Your Honor. And, Your Honor, contrary to the statement of JPM on the records, in fact, in Scotia, the Bankruptcy Court specifically found that the group before him was not a committee within the auspices of Bankruptcy Rule 2019, and we have attached the lengthy transcripts conducted before Judge Schmidt where the Court can clearly see that all of the issues presently before this Court were before Judge Schmidt. And on the basis of those arguments, he concluded that disclosure was inappropriate. So, there really is only the Northwest case out there.

And let's just talk about Northwest for a moment. Because putting aside for the moment that I think Northwest was wrongly decided, there are significant factual and record distinctions between Northwest and this case that make it clear that Northwest should not be applied.

First, unlike the group in Northwest, the WMI noteholder group has never sought official status. As such, given their explicit disclaimer in our first appearance in the case, there's no basis for finding that they act in a representative capacity, which was, again, the sine qua non of Judge Gropper's decision in Northwest.

Second, unlike --

THE COURT: I'm not sure that was the basis on which he made his decision.

MR. LAURIA: Well, he -- Judge Gropper actually stretched to find an implied fiduciary duty. He said that because there's nobody else representing these stakeholders in the case, because these particular stakeholders tried to get official status, he found that, in fact, they had obtain or acquired an implicit fiduciary duty to all similarly situated stakeholders. And, therefore, their disclosures were appropriate under the principles of former Rule 10-211.

Now, that's where I part with Judge Gropper because I don't think there is such a thing as an implied fiduciary duty. I think the law is pretty clear on that.

But putting that argument aside, the facts that Judge Gropper relied on in that case aren't present here. As I said initially, number one, our folks have never sought official status. They've never asked to have the ability to represent other parties, and they've explicitly disclaimed any duty or obligation to do so. And they made that clear from the beginning.

Number two, unlike Northwest, the creditors in the group are represented by an official committee. The Official Committee of Unsecured Creditors, in fact, represents the same classes of claims that the noteholders hold.

So, there is an official Committee representing those interests. In Northwest, there was not.

Third, unlike Northwest, here there other holders of the same types of claims who have appeared and are active in this case. The Fried Frank group. Fried Frank has appeared and is representing holders of the same classes of bonds that are within the WMI noteholder group. And it has made clear that they're not being represented by us. They've got their own views. They've appeared in court. And they've appeared in meetings and conferences and the like, and they do not view themselves in any way as relying on positions we take or bound by anything that we say individually or as a group.

Fourth, unlike the group in Northwest, we take instruction from the members, not the group.

Your Honor, as I've already explained when an issue is before the group, there's discussion back and forth. And we find the lowest common denominator that everybody supports. And if we can't find a position, you don't see us here.

Fifth, our appearance on the record in these cases is sporadic, at best. As I've always -- already mentioned, Your Honor, out of the 1,500 pleadings filed in the case, we filed four, not counting the response to this motion. And we've appeared on the record four times in over a year.

I would note as an aside here, JPM argued that we made statements that the position we were asserting was in the

best interest of creditors. That we were somehow speaking -- purporting to speak for creditors.

Your Honor, I've represented individual creditors in cases, and we frequently stand up and say that what we believe is our position is in the best interest of creditors at large, or the estate, or is not in the best interest of creditors, or not in the best interest of the estate. So, the fact that a party comes to court and says I think this is in the best interest of the estate or not doesn't mean that you are now speaking for the broader group. It happens to go usually to issues that are before the Court to determine whether or not a particular course is, in fact, in the best interest of the estate or creditors, not just in the best interest of one particular stakeholder.

Sixth, and finally, Your Honor, the movant here, JPM, is not even arguably within the scope of the interest protected by Bankruptcy Rule 2019. Former Rule 10-211 made it absolutely clear that the interest protected were the people who were supposedly being represented by the committee, who the protective committee had the power to bind in the bankruptcy case.

Let's remember that JPM is the principal opponent to the estate. And by analogy or by alignment, to the noteholders. Every dollar that ends up going to JPM as a consequence of the Court's determination of the issues that are

before it is a dollar that is not available to the estate, and ultimately not available for distribution to the noteholders.

So, JPM is not a party protected by the rule when you look at its history. JPM is our opponent, which does raise the question as to why JPM is the movant here.

As the Court will note, in Northwest, the movant was the debtor. The debtor is a fiduciary for the estate, and all stakeholders. And does have standing as the debtor to assert and protect those fiduciary interests. JPM has no duty. JPM is our opponent.

We think these distinctions are sufficient and material to support the Court's determining that Northwest is really inapplicable to the circumstances before the Court here.

JPM also ignores Judge Carey's ruling in the Sea Container case, as I've referred to. And I think there's one other point that is probably worth mentioning on the issue of authority on this issue. It's instructive that there is a dearth of opinions or decisions on the issue. Certainly this Court can take notice of the fact that informal committees or groups of creditors appear regularly in bankruptcy cases. And yet, for some reason, there's no a whole body of case law describing what the bounds of their obligations are under 2019. In fact, no published decision out of the District of Delaware.

Now, the practice is to do what we've done. We disclosed the list of clients and what their aggregate holdings

are. In the absence of more, conventional wisdom says that's enough. In the absence of more, in the absence of some allegation or argument that these creditors have engaged in bad conduct.

Now, there is some insinuation, by the way, in the JPM reply that maybe these creditors continued trading in the debt when they had inside information and were subject to a confidentiality obligation.

Unless and until somebody wants to come forward and seek recompense, or assert a claim based on that and is prepared to make an affirmative allegation to that effect, that's part of the sideshow. And this information isn't made relevant until somebody does. And as of today, no one has.

Now, I want to talk for a moment about the issue of harm. JPM and this Court are both too experienced and too sophisticated for it to be necessary to go to the expense of an evidentiary hearing regarding the proprietary nature of a trader's positions and the harm that would follow from disclosure.

This Court has heard plenty on the bench about how each trader views these issues as highly proprietary, and how if it were forced to disclose the data points of its positions, that it would give its competitors -- and let's talk about JPM says there are no competitors. It's the counterparties. It's the people who are also trading in the

debt. The ability to know -- the ability to know what's driving a particular creditor's trading strategy. And if you know that strategy, you can counter it, and you can capitalize on it. You can short it. You can do other things that will cause harm, that will create an unfair detriment to the party who's forced to disclose while the other party doesn't have to disclose. Now --

THE COURT: Well, what is being disclosed is historical information, not what you think is going to be a good buy today or tomorrow.

MR. LAURIA: Well, the past is always a reflection of the future.

THE COURT: Is it?

MR. LAURIA: And when -- if you --

THE COURT: If you are correct, I'd have a lot more money in my retirement fund.

(Laughter)

MR. LAURIA: I'm not saying that they're always making money. They're not always making the right decision, Your Honor. I'm saying that if you look at their past behavior, you can understand when you line up transactions with events, you can start to extrapolate and determine exactly what is driving the transactions.

And the fact of the matter is if the Court needs evidence on that, we will come back and we will put that

evidence in the record. We will put the traders on the stand and subject them to examination as to their proprietary trading strategies and how disclosure of their past trades will create harm for them in the market. We assume that we didn't need to burden this record with that. We've got a long day already, and we could make it a long three days if the Court wants to get into that.

But, Your Honor, if you determine that it's relevant and important, we'll do so.

THE COURT: All right. I think the threshold issue, as you've articulated it, is whether Rule 2019 applies.

MR. LAURIA: Well, Your Honor, as we've said, we don't think you can get there with Northwest because of the material differences between this case and Northwest. And we think the history of the rule, going back to former Rule 10-211, which was directed at protective committees, regardless of whether they included insiders, and they often did, but regardless of whether they included insiders, they had the ability to bind people. People who were part of the group, and people who were outside the group. And the concern was that if someone can bind another party, then the party who could be bound has the right to know what's motivating the party with that power. That is a committee who represents. That's a direct translation from the former rule to the present rule. And to hold otherwise creates an impractical inefficient

result, as I've already described.

THE COURT: All right.

MR. LAURIA: These noteholders are here to share costs. If the Court rules they can't do that without having to disclose their trading positions, what we're going to get is an unfortunate and inefficient result that I don't think advances any ball, as far as the case is concerned and, probably at the end of the day, makes resolution more difficult, not easier.

THE COURT: Okay.

MR. LAURIA: So, for the foregoing reasons, Your Honor, we'd ask that the motion be denied.

THE COURT: All right. Thank you. Any reply?

MR. SACHS: Very briefly, Your Honor. I will be very brief, Your Honor.

Let me start at the end and work my way backwards towards the beginning. First, you heard Mr. Lauria talk about his -- about the members of the Committee as being traders. But they're appearing before this Court as creditors, and they're advancing the interest of creditors. I think inherently that shows exactly part of the reason why disclosure in a case like this is appropriate, and they're advocating not just their individual interest but, indeed, three plus billion dollars, and claim to be the principal stakeholder in this case. Yet they are talking about confidentiality and concern as trading, not having anything to do with their concern as

creditors.

But I don't think Your Honor has to get to any of that because that all gets to issues about whether it should or shouldn't apply. The rule on its face does apply.

Mr. Lauria made two statements that I believe just need correction about some of the cases. First, in Northwest a principal distinction was that there were -- the court found there that they were -- the committee was a fiduciary. In fact, the court found no such thing. And I'm reading now from Exhibit F to our reply. "I think that -- but it's -- I did not get to that point, and I don't think I need to get to that point as to whether or not this committee is a fiduciary. I'm not finding that, and my opinion held to the contrary."

That was not the basis of the Northwest holding. The basis of the Northwest holding is that the rule is clear, and that the rule should be enforced as it is written -- applied as it is written.

Similarly, in Sea Container, again, as well, the court there, as well, and I'm, again, looking -- there's not a written ruling in that case. But, again, the court in the hearing on that said "But I will tell you that this is probably, in my view, a committee within the meaning of the rule."

And so the application of the rule in those particular cases is clear, and those statements as to those

cases, I think, were in error.

Just -- again, getting to the point of this as being a committee, this group has to act in a unified manner. And if you look at their own submission, it may be that people have the ability to do things differently. But if they are going to participate and be members of this committee, the positions that they are putting before the Court are their unified positions, and that's -- they're trying to take advantage of that fact. And if you look at Paragraph 20, it talks about the committee coming to a judgment to present a unified position to the Court. It's precisely because of that that they ought to be here.

Ultimately what this comes down to, Your Honor, is that Mr. Lauria and his clients don't like this rule. They want to rewrite this rule. They don't want to apply this rule. But the rule is here. It exists for the benefit of everyone. It's not like JPM is some evil monster out here. You've heard from everybody talk about how we're the key to this entire case. We have -- you listened to our positions, Your Honor, you know where we're coming from. There's no mystery every time I get up here, or Ms. Friedman gets up here as to what our position is and where we're coming from. And I presume you consider that in assessing the credibility of what we're advocating before you.

Similarly, we know where the debtor comes from. We

know where the Official Committee of Unsecured Creditors come from. But we don't know where these people come from. And that's part of the reason why this rule is there. We know what Mr. Lauria says. But the rule requires for unofficial committees like this who want to come before the Court, don't want to appear as individuals but want to come and give the added heft to their positions, that they need to make disclosures, put them in an even footing if they're going to participate in a unified manner in this process, both in front of the Court, and in negotiations, and otherwise in this process. And it benefits all constituencies in this proceeding, not just the debtor, not just an individual creditor, and not just the evil doers, as JPMC has alleged to be, Your Honor. And I think you -- we respectfully request you enforce the rule as written and require these disclosures.

If the Committee doesn't want to make them, then they'll elect to participate in a different manner, or not to participate at all. You've heard there are numerous committees, official committees in place here. But they've somehow determined that they have an interest that they want to set forth before the Court in a combined fashion. And if they want to do that, if they want to participate, they should play by the rules.

Thank you very much.

THE COURT: Thank you. Well, I'm going to do this,

I'm going to take this under advisement and issue a written ruling on this. I think it's sufficiently important to have that.

Let's take a five-minute breaker before we finish.

UNIDENTIFIED ATTORNEY: Your Honor, do you need any creditor submissions with respect to the issue?

THE COURT: I don't. Thank you.

MR. ROSEN: Your Honor, one more request before you break because counsel, I think, might leave from Madison Square Garden.

The 10 days that we talked about for the submission of that other authority with respect to the party to an agreement, that falls out right around Labor Day. If we could have the Wednesday after Labor Day, Your Honor, that'd be helpful.

THE COURT: That's fine.

MR. ROSEN: Thank you, Your Honor.

UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

(Recess 12:36 P.M./Reconvene 1:50 P.M.)

THE COURT: All right. Where are we on the agenda?

MR. ROSEN: As I'm stepping up, Your Honor, I think we're up to Number 13 on the agenda, which is JPMorgan's motion to dismiss the debtors' counterclaims in Adversary Proceeding 09-50551.

THE COURT: Okay.

MR. ROSEN: Ms. Friedman is handling that.

MS. FRIEDMAN: Good afternoon, Your Honor. Stacey Friedman for JPMorgan Chase.

The motion to dismiss --

THE COURT: Tell me why this isn't Groundhog's Day.

(Laughter)

MS. FRIEDMAN: Funny. I thought that might be the first question.

I think there's three reasons. And one is just the simple fact, you know, this motion was pending, wasn't completely briefed when the June 24th ruling came down.

When I read the June 24th, and I focus on what Your Honor said about the counterclaims in this proceeding, I'll quote it back to you, but I'm sure you're familiar with it, this is at Page 94 of the transcript, where the debtor is -- "To the extent the debtor is asserting a claim against JPMC to assets that the debtor claims are property of the estate, for various reasons, I think that FIRREA doesn't bar it."

And what we're focusing our argument on here today, and I think that the issue is narrowed down to are two types of counterclaims:

One, assets of the receivership where the debtor admits these are WMB's. For example, the capital of WMB, they're not standing before you and saying, Your Honor, they're ours. They're saying we have a right to claw back through the

receivership to JPMorgan Chase and pull it back in.

And I would submit, Your Honor, that your ruling didn't reach whether the plain language of FIRREA, which jurisdictionally bars claims to determine rights in assets that were the assets the receiver -- of WMB, it didn't reach that point.

And so the first type of counterclaim is the time that's -- the type that's really reaching for these WMB assets.

The second type of counterclaim is the one that truly relates to what the FDIC is doing. The law of the case, Your Honor, the law of the case is not for the debtors to say, it's not for me to say, it's for the Court to say. And the reason why is that FIRREA is an extensive statute. And I think it might be worth passing it up for various reasons when we get into the substance of this argument because this really is about plain language at this point.

The Court is going to have to apply the law of the case how the Court sees fit. And I would submit, Your Honor, to the extent we're arguing about these particular counterclaims, the assets of WMB, the actions of the receiver, that your June 24th ruling doesn't reach these counterclaims.

So, if you'll allow me seven minutes --

THE COURT: Okay.

MS. FRIEDMAN: -- to go through --

THE COURT: You can have a little bit more.

MS. FRIEDMAN: I can have a little bit more. I think the debtors want me to have six and a half. And I am -- I'm going to -- if I may approach the Court and hand up a true and correct copy of 1821, the statute I think we're all familiar with, but it gets a little complex at times.

THE COURT: Okay.

MS. FRIEDMAN: The jurisdictional bar we've all been focused on -- and there's two points to this argument, Your Honor: the jurisdictional bar and the exclusive claims process set out in FIRREA. But the jurisdictional bar appears on Page 1,008, it's over on the left-hand column, we're all familiar with it, I won't read the whole thing, and it appears under Subsection D, it has two romanettes.

In Romanette 1, it bars any claim or action seeking a determination of rights with respect to the assets of any depository institution for which the corporation has been appointed a receiver. So, that's -- that's WMB.

And if you go to the counterclaims, Your Honor, the first and second counterclaim, as I said, is for the capital of WMB. The debtor is not going to stand before you and say that is their asset. They're going to say we have a right to claw that asset back. Reach through the receivership and reach to JPMorgan Chase. And, Your Honor, I would submit that is the determination of a right with respect to an asset of WMB.

THE COURT: But isn't there case law that says once

the assets have been sold by the FDIC, the jurisdictional bar is not applicable?

MS. FRIEDMAN: Two responses. One, not in Third Circuit. There is Sixth Circuit law that goes the other way. But plain language, Your Honor. The debtors are trying to read in this idea that the jurisdictional bar comes to an end when the assets are sold to JPMorgan Chase.

And just stay with me for a second here. Roll up one line to "No attachment or execution in FIRREA." And you'll see when Congress wants to limit a provision of FIRREA, to only assets that are in the possession of the receivership, Congress knows how to write that in. It says in the "No attachment or execution" that that provision only applies to assets in the possession of the receivership.

The debtors want to take those seven words, and they want to put them into the jurisdictional bar. And those seven words don't appear in the jurisdictional bar. And we should turn to the cases, and if you want to skip to that right now because I think the two maiden cases are Hudson and Rosa. Your Honor, they don't stand for the proposition that those seven words are imputed into Romanette 1 or Romanette 2.

THE COURT: Okay.

MS. FRIEDMAN: If you're okay leaving the cases til a little bit further in, I want to stay with the plain language for a little bit, okay? So, it's capital. There's trust

securities. The counterclaims that we're focused on are third, fourth, fifth and sixth. Those are the ones that say even if it went to WMB, we get to claw it back.

There's preferential transfers, same thing.

Asset of WMB. We want to claw it back.

Counterclaim 10.

The entire P&A transaction, the purchase and assumption agreement whereby the FDIC, as receiver, transfer the assets of WMB to JPMorgan Chase. They want to call that an avoidable transaction.

Counterclaim 11, Counterclaim 14, all of these ultimately seek a determination of rights with respect to the assets of the failed bank. And the seven words that the debtors want to read in about until or unless those assets are sold to another institution, Congress put them in some provisions of FIRREA, but they didn't put them in the jurisdictional provision.

It's the same for Romanette 2, Your Honor. Romanette 2, we're all familiar with. This has to do with any claim relating to an act of the receiver. Relating to is broad. And I think it's deliberately broad. And, you know, there's Supreme Court cases, including the Morales case that talks about it as anything in relation to, bearing, concern, pertaining, referring to, anything in association with. How can you have a fraudulent transfer claim where it's the FDIC

doing the transfer, and say that it's not related to an act of the receiver? How can you have a preference claim against a subsequent transferee, and it's the FDIC that made that transfer, and it doesn't relate to that preference claim? How can you have a P&A transaction whereby the assets of a failed bank are sold to a third party, and it can't relate to what the FDIC is doing as receiver.

We looked at the plain language. And, again, I submit the seven words that the debtors want to read in there, they don't exist. But you should also look at the practice because the Hudson case, and I'll turn to that in just a second. The Hudson case on which the debtors rely, it talks about the sale of assets as the standard practice. The Hudson assets stayed in the Hudson receivership for less than a day. They were sold out on the same day.

The Rosa case, which also the debtors rely upon and we'll come to in just a minute, those assets -- there were two receiverships, those assets were either sold on the day of the receivership or the day after.

In the 62 failed banks where there were asset sales since WMB failed, until about mid-July, all 62, the receiver sold off the assets on the same day the receivership put in place. How could the jurisdictional bar be a constraint, an exclusive constraint, a way to tie everything that relates to a determination of assets of the receivership that has to do with

attacks on the acts of the receiver, and yet the moment the FDIC does, again, as they said in Hudson what is standard practice, the whole jurisdictional bar is vitiated.

THE COURT: Well, courts have said that.

MS. FRIEDMAN: Your Honor, with due respect, Hudson -- let's talk about Hudson. Hudson doesn't deal with jurisdiction.

Your Honor, I really do hope -- because I think that we're going to have a disagreement on how it should be read -- that you get an opportunity to sit down and compare what we say about Hudson and Rosa to what they say about Hudson and Rosa to the cases. Hudson is a venue case. And I understand in Hudson, there were two -- there were actually two issues: There was venue and the claims procedure. And when you have a -- and the question was when you have a claim against the receiver, is that under the venue provision sent off? In this case to the District Court of DC. And when you have a claim against the receiver, is that part of the claims procedure. And the Hudson court said, yeah, it is.

The Hudson court did not reach whether a transfer of assets to a third party vitiated the jurisdictional bar. There was a third party purchaser of assets in Hudson, it was JPMorgan Chase.

And when the court decided to transfer the claims against the receiver off to what would be the District Court in

DC here, it sent the claims against Chase, as well. It did so without reaching or deciding, or in analyzing whether Romanette 1 should have those seven words imputed into it, that it gets vitiated when there's a sale of assets without putting those seven words into Romanette 2 that don't exist there. It reached that decision without even considering it.

So, Hudson, Your Honor, does not stand for that proposition.

And Rosa, it seems complex when it gets written about in the papers over and over again. But it's actually -- there's three entities: City One, it has a ERISA plan. The plan participants are bringing the suit. City One fails, it goes into receivership. Some of the assets are sold to City Two. City Two fails. It goes into receivership. Some of the assets are sold to City Three. City Three gets in trouble. It doesn't go into receivership, it goes into conservatorship, and that's where the debtors are focused. This is a conservatorship, it's different, it's more like JPMorgan Chase, Your Honor looked at what happened here.

But, Your Honor, Rosa says the claim of the plan participants are that they should be paid from the ERISA plan and they weren't being paid. Rosa says for one and two, you're seeking payments from assets of the receivership. That is core Romanette 1. That is barred under the jurisdictional provision of FIRREA. It gets to City Three. And guess what? City Three

was formed after the plan had been terminated. There is no dispute about the transfer of assets from the receivership. It wasn't analyzing whether there was an asset of the receivership at issue. It wasn't analyzing whether there was an act of the receiver to which the claim was related. It was just City Three had engaged in wrongful conduct. And, yeah, when you're a purchaser of assets, there's nothing in the FIRREA jurisdictional bar that says you're immunized from all claims for all time. It all related to the receivership.

It says, though, if what you're looking for is a determination of rights to the assets of the receivership, or if your claim is related to the actions of the receiver, it says in those circumstances, you're jurisdictionally barred from proceeding here.

So, Your Honor, I would submit on the jurisdictional bar issue, I don't think that this issue -- it was not fully briefed on June 24th. I think the law of the case, as I read your opinion, leaves open the question, the jurisdictional question as to these counterclaims. As to counterclaims that go to assets of the receiver. As to counterclaims that go to the acts of the receiver. And in any event, even if Your Honor doesn't apply the jurisdictional bar, the exclusive claims procedure is set out in FIRREA. It would now be before this Court, I guess, to apply those.

There is no recovery that's really available to the

debtors beyond what's set out in that exclusive claims procedure. And it's as simple as this: 1821(d)(2)(A), and we can go and we can look at it, if you want -- well, I guess, let's step back. What hat is the debtor wearing when they're bringing these claims? Are they bringing them as the holding company and the sole stockholder of WMB? Or are they bringing them as an ordinary creditor?

Because if they're running the holding as sole shareholder of WMB, 1821(d)(2)(A)(i) says the FDIC got all rights, titles, interest of shareholders. They don't have standing to bring that claim. So, if what they are bringing their claims as is an ordinary creditor of WMB --

THE COURT: What section are you -- at what page is that?

MS. FRIEDMAN: Oh, okay. Sorry. It's -- if you turn to Page 1,003, and you look under -- again, on the left, under D, Powers and Duties of the Corporation as Conservator or Receiver. And then to General Powers, Successor to the Institution, and then Romanette 1.

THE COURT: Okay.

MS. FRIEDMAN: So, if their hat that they're wearing is as shareholder or holding company, it's clear they don't have standing to pursue those claims any longer, those are with the FDIC.

If the hat they're wearing is creditor, then there is

an exclusive process, and that's the phrase that the Shane court used in the Third Circuit. There's an exclusive process in FIRREA for creditors' claims.

And we cited some cases about takings because they just so well articulate, Your Honor. This isn't a widget company, it was a bank. And banks sign up for not only a lot of regulation, but certain constraints that are set out in FIRREA. And in Branch, and, again, this is a takings case, but I think it articulates the point well, the Federal Circuit explained that, "An individual engaged in the banking industry is deemed to understand that if its bank becomes insolvent, the federal government may take possession of its premises and holdings. And no compensation for the government action will be due."

The same thing was applied in California Housing, again, a Federal Circuit takings court -- takings case where it said, "Such an occupation and seizure would not leave the claimant without rights." But those rights were found exclusive in FIRREA.

THE COURT: But aren't they claims against the FDIC?

MS. FRIEDMAN: They're claims, Your Honor, against -- well, let's take it into two points, okay.

THE COURT: Isn't that what the court was talking about, claims against the FDIC?

MS. FRIEDMAN: The claims against the FDIC in the

takings claims, yes, Your Honor. But I think the broad proposition here is as simple as this: That there was a -- there is a regime set down. And so you take that, and then you go on to the Shane case in the Third Circuit, which is talking about a creditors' claims. And it talks about 1821(d) being the exclusive claims process.

THE COURT: Claims against the FDIC.

MS. FRIEDMAN: Claims -- but, Your Honor, claims against the FDIC, it's claims of a creditor. And let me -- let me --

THE COURT: A creditor of the FDIC.

MS. FRIEDMAN: Creditor of the FDIC. Let me put it this way. If, on day one, the receivership happens, and we all agree holding -- bank goes into receivership, holding company has certain rights as creditor of WMB. Under FIRREA, that is exclusive. It can't be supplemented. Case after case says that.

Are we really going to read into this statute that the day the FDIC engages in what Hudson called standard conduct and starts to sell off assets, that new rights arise for creditors to go as an end run around this exclusive process? And I would argue, Your Honor, Hudson doesn't hold that. Rosa doesn't hold that. I don't know what -- if they want to go in -- there were six cases they cited in their brief, I'm happy to discuss any of them. It's not a holding of a court. And the

reason why is it's antithetical to the plain language of FIRREA.

So, Your Honor, both on jurisdictional grounds and because of the limitations the claims process set out in FIRREA, we would submit for the counterclaims that go to the assets of WMB and the conduct of the receiver, that those claims should be dismissed.

THE COURT: All right. Thank you.

MR. CARLINSKY: Good afternoon, Your Honor. Michael Carlinsky from Quinn Emanuel. Mr. Abensohn, my colleague, will address the second part of JPM's argument, which was sort of the federal law preempts. I promise to be extremely brief. And I'm sure people are saying I don't believe it --

(Laughter)

MR. CARLINSKY: -- but, Your Honor, it is Groundhog's Day, or it is déjà vu all over again. I think the Court clearly ruled on the issue of whether the jurisdictional bar applies. Ms. Friedman omitted a fact that at Page 93 of the transcript, Your Honor also made the point of saying Hudson made clear that FIRREA only bars claims against the receiver or an institution in receivership. Hudson said that, I believe, at least three times.

Your Honor also made the observation back to the day we were here with the big boards. In Your Honor's transcript, Your Honor noted that the FDIC in the Heinrich case out of the

Ninth Circuit had argued in its cert petition to the U.S. Supreme Court the very opposite of what we're now hearing, which was the jurisdictional bar only bars a claim against the institution in receivership, or the receiver. And I think really that disposes of the issue.

On law of the case, I would just also note JPM and the FDIC moved with respect to that stay motion on all of the counterclaims. And I make that observation because Ms. Friedman also suggested well, maybe Counterclaim Number 10 should be given some different treatment, or it wasn't encompassed within Your Honor's prior ruling.

Well, for the reasons I stated a moment ago, and the language from Your Honor's decision I quoted, it's clear it would encompass all claims. But also I point that out because all of the counterclaims were subject to the stay motion. And JPM, if Your Honor goes back and looks at the transcript, you will see Counterclaim Number 10 was specifically argued. And when the Court rejected the argument and rejected the stay motion, it addressed all of the counterclaims.

So, with respect to the jurisdictional bar issue, it is law of the case. Your Honor got it right the first time. And the Third Circuit law is binding, notwithstanding what Ms. Friedman suggests may be Sixth Circuit law or dicta in the case. The Third Circuit in Rosa was clear. And if there were any doubt, the Third Circuit in Hudson is referencing

specifically the holding of Rosa.

Thank you, Your Honor.

MR. ABENSOHN: Your Honor, Adam Abensohn for the debtors.

THE COURT: Yes.

MR. ABENSOHN: And I want to address specifically sort of the tail end of the argument as set forth in the briefs by JPMorgan. Once they make their -- or reargue their points as to 1821(d)(13)(D), they move into this takings case law, and they start groping for various other provisions under FIRREA, which, according to them, creates the jurisdictional bar that the Court has already concluded that 1821(d)(13)(D) does not.

And beginning with these takings cases, and counsel acknowledged that these are takings cases, I mean, frankly, they have nothing to do with the present situation. It's almost difficult to distinguish them because they are so fundamentally unrelated to what we're here to address. These are cases against federal agencies seeking damages arising out of the conduct of federal agencies. And the courts preclude takings relief because of takings analysis under the constitution having to do with reasonable investment backed expectations in a highly regulated area.

That has nothing whatsoever to do with the situation here, which is there is a claim asserted under state law, and under federal law under the Bankruptcy Code. There is a claim

of bar under the jurisdictional bars of FIRREA. The Court has already concluded that the bar does not apply. And where we are left is to see if there is any other provision that would permit them the relief they seek.

The answer is that there is not. They conjure up a number of them in their papers. And Ms. Friedman mentioned one in her argument, 1821(d)(2)(A)(i) which is a provision that simply says that the FDIC stands in the shoes of the bank for which it is appointed receiver. That's fine. And that has nothing to do with the position that we're taking here, or with the correct outcome here.

We are not purporting to stand in the shoes of WMB. We are standing in our own shoes, and we are asserting claims that we have, both under the Bankruptcy Code and under state law. That provision that Ms. Friedman cites does not purport to be a jurisdictional bar, it does not -- has not been asserted in the case law as a bar to claims by third parties asserting rights on their own behalf. It simply has nothing to do with the situation in front of us.

There's a number of other provisions that they cite. And I think the most glaring example is this 1828(u)(1) which Ms. Friedman didn't discuss in her argument, I think probably for obvious reasons, but which was raised in their papers. And it's no exaggeration to say that they used an ellipsis to mask that part of the provision that very plainly made it

inapplicable here. And it's all part and parcel of this approach of throwing things against the wall, hoping one will stick, assorted provisions under FIRREA, none of which are actually jurisdictional bars. And sort of hoping that one can get sort of passed the Court. You know, whether by use of ellipses or whether by pretending that it's a jurisdictional bar when, in fact, it simply empowers the FDIC to act in its role as receiver. None of these provisions accomplish what JPMC would need them to accomplish.

The bottom line is FIRREA is a complex regulatory scheme with a great number of provisions. And the case law is clear that when you're addressing such a scheme, the FDIC, and any other party that might be invoking rights under it, can only invoke rights that are explicitly set forth.

To the extent there is a jurisdictional bar under FIRREA, it is clearly defined under 1821(d)(13)(D). The Court has examined it. Ms. Friedman said there hadn't been full briefing on it. I -- having spent way too much time drafting those briefs, Your Honor, it surprised me to hear that. There were hundreds of pages of briefing addressed for that very issue in advance of the June hearing. It was resolved that 1821(d)(13)(D) is not applicable here without a provision that grants them a jurisdictional bar, there was nowhere else to turn in FIRREA. And we are entitled to pursue our claims, Your Honor, under state law, under the Bankruptcy Code, just as we

would be under -- as against any litigant, whether the FDIC had sort of touched this case in one way or another or not.

And if there are no questions, Your Honor, I'll rest with that.

THE COURT: Thank you.

MS. FRIEDMAN: I think just one point, Your Honor. I think I opened with somewhere after we got passed Groundhog's Day that I believe this is really down to when we're talking about assets that were part of WMB, and the acts, the receiver, a plain language analysis, both the jurisdictional bar and the claims process. I would just ask, Your Honor, before you decide, read Hudson, read Rosa, read Village of Oakwood, and asks yourself do those cases read in these seven words that the debtors want to add both to the jurisdictional bar and to the claims process that limit the scope of FIRREA, those particular provisions, only when the assets are in the hands of the receiver. I submit they aren't.

THE COURT: Well, let me say this. I think law of the case does preclude this. I have already decided this issue. I haven't heard anything new with respect to 1821(d)(13)(D) or case law construing it to convince me that my decision was wrong. There are no new facts, no new law. And I think that actions against parties other than the FDIC, and specifically JPMC are not barred by FIRREA, and specifically all of the counterclaims brought by the debtor.

So, I'll deny the motion to dismiss the debtors' counter claims.

MR. CARLINSKY: Thank you, Your Honor. We'll prepare an order.

THE COURT: Okay.

MR. ROSEN: Your Honor, the next items -- and it's, I believe, with respect to both adversary proceedings that are on the agenda, JPM's motion with respect to core or noncore issues.

THE COURT: Okay.

MR. ROSEN: Right? Is that all? Oh, it's being fully briefed -- I apologize, Your Honor. That was done as submitted. I apologize.

And then it's the -- the motions to intervene. Bank bondholders' motions to intervene in both adversary proceedings.

THE COURT: Okay.

MR. SEIDL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SEIDL: For the record, Michael Seidl, Pachulski Stang Ziehl & Jones, on behalf of the bank bondholders.

I rise to introduce our co-counsel from Wilmer Cutler, Philip Anker and Nancy Menzer. Their admissions pro hac have been moved in, granted, and I'd request that they be allowed to appear.

THE COURT: Okay.

MR. SEIDL: Thank you, Your Honor.

MR. ANKER: Good afternoon, Your Honor. Philip Anker.

I realize it's been a long day. I've often said to a judge I'll try to be brief. I will be candid. I rarely am. But I will do my best here.

We filed both an opening memorandum and a reply. I want to try to focus, because I think a lot of what has been said today on other motions is relevant here. First, let me just provide a minute of background on who my clients are. They are just under about $2 billion in bonds, bonds issued by WMB, but bonds as to which they have filed proofs of claim, not only in the receivership, which have been allowed, but against WMI and against WMI Investment on a variety of theories asserting direct liability, piercing the corporate veil, fraud, misrepresentation in the sale, failure to adequately capitalize, and creditor remedies of various kinds, including fraudulent transfer.

Mr. -- let me start with 24(a)(1) because I think it's the easiest. We argued 24(a)(1). We argue in the alternative 24(a)(2). We argue in the alternative permissive intervention under 24(b).

But let me start with a mandatory intervention, and one that is easy, at least in my mind easy.

And I agree with much of what has been said here today, including by Your Honor in response to Mr. Lauria's arguments about Rule 2019, that you start with the plain meaning. And you start with the plain meaning of the words. In this case, it is a statute. And you start with the plain meaning of the words of the Third Circuit.

24(a)(1) provides that where a party has an absolute right to intervene by statute, it must be allowed to intervene. And the Third Circuit in the Marin case, a case that I will acknowledge, Your Honor, has received some criticism in other circuits. It has been rejected in the Fifth Circuit. It has been in dicta questioned in other circuits. It's been expressly endorsed, however, in the Second Circuit.

But to quote counsel here, we are in the Third Circuit and Third Circuit precedent is binding. And that makes Your Honor's job a little bit easier on this issue, and makes me, hopefully, true to my word that I won't go on too long.

Marin dealt with the question does the right in 1109 extend to adversary proceedings. And it held in no uncertain terms an opinion by Judge Adams, once Chief Judge of the Third Circuit, that the answer is yes. In Phar-Mor, the Third Circuit said we meant what we said, the panel said we understand there's arguments to the contrary, but this court meant what it said.

And it seems to me, Your Honor, I shouldn't have to

argue policy, but I'll make one observation. Mr. Rosen, in response to the motion for relief from stay by the plaintiff, said the crux of this case -- I think that was his phrase -- is this adversary or these adversary proceedings. And that statement is one I endorse, and I think is right. And if there were a debate about the wisdom of what the Third Circuit said in Marin, what it repeated in Phar-Mor, this case illustrates that if you limited the right of intervention in 1109 to contested matters in a general bankruptcy, and didn't extend it to adversaries, then you'd have cases like this where the right would be fundamentally meaningless because the action, what really matters is the adversary.

What are the arguments that are made in response on plain meaning. Let me go through them quickly:

One is we're not a creditor. We're a creditor of a creditor. We're just a creditor of WMB.

Indeed, the brief in opposition is filed on that premise. But saying it doesn't make it so. We have outstanding proofs of claim. You heard today that as to many issues, they were adjourned. Those claims are extant.

And, again, let's talk about plain meaning. Are those claims disputed? Well, there's no objection on file, but I will acknowledge, of course, they are going to be disputed by the debtor.

But let's look at the language of 1109. 1109 gives a

creditor, that's the defined term, the use of the term in Section 1109, a right to be heard on any issue in any case. How does the Code define the word "creditor?" A holder of a claim. And how is the word "claim" defined? A right to payment whether allowed or disputed. Plain meaning of the statute.

And let me go to a point Ms. Friedman was making as a rule of statutory construction. And while I'm not going to argue to Your Honor you should revisit your rulings --

(Laughter)

MR. ANKER: -- I think she's right as a matter of statutory construction. The Supreme Court in the BFP in construing the Bankruptcy Code made the point when Congress uses words in one section of a statute, and omits them in another, you have to presume that's intentional, the disparate use and omission is intentional in that regard.

We cited in our papers Section 303 of the Code, involuntaries. In 303, Congress chose, unlike 1109, to provide that an involuntary may only be filed by three or more entities, this is 303(b)(1), each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of bona fide dispute. That language nowhere appears in 1107 (sic).

As I took the train up, it occurred to me I missed an even more obvious one. One that is perhaps more significant

because it's part of Chapter 11 of the Bankruptcy Code. 1126. 1126 says the holder of a claim or interest allowed under Section 502 of this title may accept or reject a plan. Those words "allowed," not subject to bona fide dispute, nowhere appear. And I would say for good reason. The good reason is adversaries matter. And adversaries often involve rights and affect parties whose claims are disputed.

So, we are a creditor of this bankruptcy within the plain meaning of the Code. That, of course, is without prejudice to their rights down the road. And I heard Committee counsel acknowledge all rights to object substantively are preserved.

A separate argument is to say -- and, frankly, this is not made with much -- I don't think -- I don't even know, Your Honor, whether it's really made, but I'll state it. Marin only applies to committees. The problem with that argument, again, is plain meaning. Plain meaning of the statute, plain meaning of the case law. 1109 by its terms says that any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor may raise, and may appear, and be heard on any issue.

And as I was coming on the train this morning from New York, I read Marin again. Marin on five separate occasions talks about the rights of a creditor to intervene. Now, I grant you that case was about a committee, but the case draws

absolutely no distinction.

And I will point, Your Honor, we did not cite this in our papers, but if you look at the Second Circuit's decision endorsing Marin, that's Caldor Corporation, reported at 303 F. 3d 161, that was a case about a creditor. It was about a term loan holder committee, not an official committee, which is described in the opinion as representing the holders of a term loan under a particular credit agreement. So, it was term lenders. And the Second Circuit said the Third Circuit got it right in Marin.

And to go back to something Your Honor said, it said, you know, there could be serious debate whether 1109 as written is wise or unwise, but that's Congress's job. It's not the job of this Court. And this Court's job is to follow the plain wording of the statute, and the Third Circuit got it right.

There is no case that I'm aware of reported that draws the distinction that Marin didn't draw, and that the statute plainly does not draw.

So, Marin applies to creditors, and it applies to creditors whether their claims are disputed or not.

A third argument, Your Honor, is that somehow we're -- we may be creditors, but we're not really seeking to intervene as creditors. There's two answers to that:

One, is 1109 doesn't on its face say -- I know the debtors wish it said this -- you can intervene if, but only if

you want to support the position of the debtors or the position of the official committee. It doesn't say that. But we most assuredly as a factual matter are seeking to intervene to protect our interest as creditors.

Let me give three, and only three examples, and they all stem from a basic principal. The Third Circuit has held -- the District Court in this District has held, and the Third Circuit case principally on this point, Your Honor, is Harris v. Pernsley at 820 F. 2d 592. The District Court decision I would point to, Your Honor, is the Jet Traders case.

But in Harris, the Third Circuit said, and it's later endorsed in Jet Traders, as many other courts have said, that an application has a sufficient interest. Now, we don't need to show we have a sufficient interest for these purposes because that's 24(a)(2) test. But I want to just point here for a moment, "Where a decision will have a significant stare, decisive affect on the applicant's rights, and that that particularly applies, Your Honor, where the same court will have to decide the same or similar issues.

What's our proof of claim about? What's our theory of why an entity that didn't issue the bonds is nevertheless liable?

One is, Your Honor, that it misled the bank bondholders. It said that it would ensure that there was adequate capital. The theory is that it breached those duties.

That is the antithesis of what is much in their claim. You heard, and you just denied, JPMC's motion to dismiss a counterclaim on fraudulent transfer law.

Let me tell you some facts. There allegedly was $9 billion that went downstream from WMI to WMB. What you're not being told is 15 billion went upstream, north of 15 billion, from January 2006, through September, 2008. Every dollar this bank raised was taken by WMI. And that was the -- that was clearly inconsistent with their obligations and their representations.

Part of this is a turnover action, which turns on the question of is this a deposit. Is it a legitimate liability?

Well, part of our contention is it may be viewed as a capital contribution, and properly viewed as capital of the bank.

If it's not viewed as capital, Your Honor, 541(d) says a debtor is entitled to turnover, or a trustee, if, but only if, the alleged liability is not subject to setoff rights, an offset.

So, whether there are offsets and setoffs is going to be decided in here. Those offsets and setoffs are the same legal theories of our claims: Inadequate capitalization, fraudulent transfers that go upstream. And so you have the same legal issues raised here. And, of course, it's raised by the counterclaims that Your Honor just denied a motion to

dismiss.

Another argument is that the FDIC and the Creditors' Committee are adequate representatives of our interest.

Well, let me go back to the thing I said a moment ago, but try to underscore it. 24(a)(1), by its terms, says the following: "On timely motion," so, there is a requirement of timeliness, I concede that, and I'm going to come to it, "The court must permit anyone to intervene who: 1, is given an unconditional right to intervene by Federal Statute." The adequate representation is in two, "or claims and interest relating of the transaction that is so situated that disposing of the action may, as a practical matter, impair or impede, unless parties adequately represent that interest."

So, the adequate representation requirement is a requirement only for intervention under (a)(2), not under (a)(1).

In any event, I am not here to argue to Your Honor today, some day we may have disagreements, that the FDIC is not an adequate representative of the interest of WMB receiver, the qua receiver, and qua receivership estate, but they certainly are not an adequate representative of my client's direct claims against WMI. They don't purport to be standing in my shoes as a direct claimant against those entities.

I will also note on the adequacy, and I'll get to this, on (a)(2), the law in this Circuit is absolutely clear

that where you have a governmental body that is acting out of its regulatory purposes, that it is, indeed, not an adequate representative for parties who are acting out of what I will admit, like other creditors in this case, are pecuniary interest.

Two other arguments, and then I'll be done with (a)(1), and I'll move much more quickly. One is what Your Honor called the open the floodgates argument, a parade of horribles argument. Your Honor referred to it on the motion for relief from stay and say that it wasn't an adequate ground to deny. I think Your Honor was right then, I think you'd be right here.

Marin dealt with this issue. The argument was squarely put in front of Marin, and I won't read the whole passage. But Judge Adams said the argument is made to me that I'm going to be opening the floodgates, that every Tom, Dick, and Harry in every adversary is going to come in, but I don't believe that because surely in most cases, 99.9 percent of cases, individual creditors don't have interest that are disparate perhaps from the Creditors' Committee and that are sufficient in order of financial magnitude to warrant intervention. And I think history has proven -- the other thing Judge Adams said was in any event, I can't ignore the language of the statute for policy reasons, that's a judgment for Congress. But the court had it right in Marin.

I will say parenthetically Judge Adams also said, of course, permitting intervention does not mean that the court lacks the power to control its docket. And I concede that point.

If we are permitted to intervene, and a motion comes before you, for example a summary judgment motion, Your Honor may say it's within your discretion, I will hear from one lawyer supporting summary judgment for the debtors, and one lawyer not, and the parties on each side of the V need to get together and figure out how they're going to divide up time. There's no rule that says because there's multiple parties, and parties are going to intervene, that the normal seven-hour rule for depositions gets extended by the number of parties.

I do not dispute that Your Honor has ways to control your own docket. But what Marin says quite clearly is you can't deny intervention altogether.

I will note, by the way, and I want to get to this untimeliness in a moment, I think we try to take that to heart. If Your Honor looks at the piece of paper, and I hope Your Honor doesn't think we're presumptuous, because you hadn't granted our motion to intervene, but we felt that time was moving and so we filed a piece of paper with respect to summary judgment. It's, I think, three pages, it may be two and a half pages. It certainly is not going to -- we tried not to kill trees and repeat arguments that were made quite effectively by

others.

The final argument is that somehow you read 1109 out of the statute, you read Marin out of the statute where there's a countervailing federal interest against intervention. And on that, the only provision that is cited is the one that Ms. Friedman directed you to a moment ago, 1821(d)(2)(A) of the Federal Deposit Insurance Act. And it does say, Your Honor, that the FDIC succeeds to, and is the representative of, the interest of the bank. And it also says, as Ms. Friedman was pointing out, the shareholders of the bank.

What it doesn't say is, and obviously wouldn't say, is that the FDIC succeeds to the rights of creditors of the bank against third parties. These individuals purport to be creditors of the bank, they say they've got claims against the receivership, but they also say they have claims against JPMC, a third party.

And I am confident they do not believe that the FDIC speaks for them, nor does it speak for me or my clients with respect to our claims against third parties.

That leaves one, and only one issue, timeliness. Your Honor, I don't try to kill trees. We moved to intervene early in the DC litigation. We understood and read the papers here filed by the FDIC and JPMC for a stay. We thought to ourselves why file a motion to intervene here if it may all be mooted by the time it's fully briefed because maybe that motion

will be granted.

On June 24th, Your Honor announced in open court, although you didn't enter the order that day, that you would not be granting that motion. We filed our motion three weeks later on July 15th. The cases say you look at timeliness based on prejudice to the parties in the stage of the proceedings.

Your Honor, if what I'm about to say is wrong, I apologize. I haven't been in every hearing in this courtroom. But until today when you denied a 12(b)(6) motion to dismiss, I think it fair to say no substantive ruling had occurred in this case.

What had occurred was a procedural ruling. The litigation will proceed here. There has been no discovery. Indeed, my understanding is the first deposition is scheduled for later this week. Not one deposition.

The litigation is beginning. There will be nothing about our intervention that will delay consideration of summary judgment. We filed our short piece of paper.

And as the debtor acknowledges, we don't purport to expand or add any issues to this litigation. Indeed, when you think about judicial efficiency, which I think ties in with timeliness, it surely is judicially efficient. We heard about how there's all these claims that are going to have to be resolved before there's a distribution, they include my client's claims. Let's get all the issues in one proceeding

teed up now before this Court.

That deals with timeliness. On 24(a)(2), and 24(b), I'm going to be very brief, and this time I'm going to try to be true to my word. You don't need to reach either, if you rule our way, on 24(a)(1). As to 24(a)(2), I think I've dealt with adequacy of representation already. I think I've dealt with timeliness.

That leaves only is there an interest that we have that is legally protected and may, as a practical matter, it be impaired here?

Certainly we have a legal interest in having our claim allowed against these debtors. We're a plaintiff, that's the very interest that is the quintessential interest of a claim in a litigation. And, yes, as a practical matter, it can be impacted. Because if Your Honor, with us being excluded from the courtroom, determines that the people on my right are entirely right, and the people on my left are entirely wrong, I'll go before Your Honor and say, Your Honor, I wasn't in the courtroom when you made all those decisions, hear me out, give me a fair chance.

But my experience is that when judges have heard a dispute, and particularly where the parties on each side are as capable as they are -- represented by lawyers as capable as these lawyers, Your Honor would be rather unique, and I've have to be lot smarter and more persuasive than I am if I could

persuade you to change your mind.

So, having these issues decided without us absolutely affects us as a practical matter, or may affect us, which is the standard.

Under 24(b), it's permissive. The only standards are are the issues in common as I've described. They plainly are in common. Indeed, the debtor doesn't dispute the point.

Is it timely? Will there cause undue delay? No, there won't for the reasons I've articulated.

I do want to just close by saying one thing. I can appreciate, and it goes back to something I said earlier, why a judge would say, you know, this case has a lot of lawyers already, why do I want another in front of me. And I want to underscore in that regard, A, I understand that. And as I point to the proof is in the pudding, we filed a very short piece of paper on summary judgment.

And, two, I do not dispute -- I may come back to Your Honor, and we may have a discussion about how to proper -- you know, what's the best way to manage this litigation. But I do not at all suggest that Marin ties Your Honor's hands as to how you manage a docket.

Unless Your Honor has questions, I'll reserve my remaining remarks.

THE COURT: No. Thank you.

MR. KIRPALANI: Good afternoon, Your Honor. Susheel

Kirpalani from Quinn Emanuel on behalf of Washington Mutual, Inc.

Your Honor, I will be brief. Everyone says that, but I think you'll find I will be.

I think the issues are fairly straightforward. I've seen these issues in lots of cases, including the Revco (phonetic) Second Circuit case. There really is no question that this is a creditor of a creditor.

However, I do understand the Court may be reluctant to rely on that because they do have a proof of claim on file.

THE COURT: Right.

MR. KIRPALANI: And so for today's purposes, that may, in fact, be technically true.

However, although Mr. Anker talked about a couple of Third Circuit cases, he didn't talk about the third Third Circuit case, which is Amatex, and I think there's a good reason why he didn't. It's because Mr. Anker is actually Peter John Robinson. Peter John Robinson, in the Amatex case, Your Honor, was a futures claimant, a future claimant in asbestos court. And he, too, sought to intervene. And he, too, said he was a party in interest.

I agree with Mr. Anker that a creditors' committee in Marin Motor Oil, a creditors' committee in Phar-Mor doesn't mean that you read the word creditors' committee differently than you'd read the word creditor. Same is true with the word

party in interest.

The Third Circuit Court of Appeals, Your Honor, in the Amatex case clearly held that futures -- future claimants are parties in interest. May not be creditors, they kind of danced around that issue, but they are parties in interest. So, now we're in 1109.

So, what has the Third Circuit said about Section 1109? It's not quite as sweeping as Mr. Anker would like. In fact, if you look, Your Honor, at the Third Circuit's most recent pronouncement on that issue, it stated, quote, "We conclude that future claimants are sufficiently affected by the reorganization proceedings to require some voice in them. Moreover, none of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants. And, therefore, future claimants require their own spokesperson."

What the Third Circuit said, though, is there should be a futures claims representative to serve that function. In other words, there's no rigid application in Rule 24 on how 1109 is implemented and interpreted.

They may be a party in interest. Peter John Robinson was a party in interest, but the Third Circuit Court of Appeals says you're already going to be represented by the futures claims representative that the debtors will find, or the Bankruptcy Court will appoint. That is the FDIC here, Your

Honor. The FDIC is the futures claims representative that should be heard.

And I think, Your Honor, the key here is we really don't know who these bank bondholders are. Your Honor has not ruled on the 2019 issue that relates to the other committee that has appeared here, and the debtors did not take a position on that.

It's pretty clear, Your Honor, under Rule 2019, to the extent Your Honor does rule, that disclosure of the stake and the interest that these creditors do have is relevant or must be complied with.

Rule 2019(b) clearly says that the Court, on its own initiative, may preclude a party from intervening if they do not comply with the rule.

We know, Your Honor, from the 2019 statements that were filed, there are 33 entities purporting to hold $1.6 billion, and they come into Your Honor's courtroom and say the FDIC is not my representative, we've got $1.6 billion of bank bonds and, therefore, we're creditors here in the Chapter 11 case. And the Third Circuit's tying their hands, Your Honor.

Your Honor, this is Peter John Robinson. The FDIC is the adequate representative. And 1109 is not rigid the way that counsel for the bank bondholders, they unabashedly admit, that's their position, that they are bank bondholders, not WMI creditors, would have Your Honor believe.

But to the point of --

THE COURT: What about their point that the FDIC, a federal agency, cannot represent -- be an adequate representative of a party's pecuniary interest?

MR. KIRPALANI: But their pecuniary interest, Your Honor, is entirely derivative of the WMB estate. They have no privity or direct claim --

THE COURT: Well, they --

MR. KIRPALANI: -- against the WMI estate.

THE COURT: That's incorrect. According to their proof of claim, they say they do.

MR. KIRPALANI: Well, Your Honor, if you look at the motion that they filed that we're here arguing --

THE COURT: And they say the same thing. That they have direct claims against the debtors. These are not simply derivative.

MR. KIRPALANI: Well, Your Honor, I'm looking at Page 3 of their motion. What it states is, "Accordingly, the bank bondholders and other holders of senior notes," so they're purporting to act as a representative of a whole bunch of people we don't know, "must look to the WMB receivership estate or third parties, such as the debtors, for payment of their undisputed substantial debt."

And what they say on Page 4 is in their pre-proofs of claim, "The bank bondholders assert, among other claims, a

claim against the debtors relating to funds that the debtors claim to be deposits owed to them asserting, among other things, that the receivership estate and its creditors, including the bank bondholders, have rights of offset against any liability on the putative deposits."

This is a bit of mincing of words, Your Honor. But I think the substance of what they're stating is that they are claiming exactly what the receivership estate is supposed to be getting. And that because the receivership estate did not get sufficient funds, they're looking for more money to be relayed into the receivership estate. That's exactly what they're claiming. That's exactly what they're here trying to do, Your Honor.

On Page 13 of their motion, Your Honor, they stated, "Disposition of the turnover action may impact the bank bondholders' recovery from the WMB receivership estate."

And the next quote, "Any order mandating that JPMC turn over the deposits may eliminate the receivership estate's ability to request their return, thereby reducing the potential assets of the receivership estate, and the recovery of the bondholders' claim in the receivership estate."

They are seeking to intervene, Your Honor, in our turnover action.

So, to the extent they seek to intervene on our turnover action, Your Honor, they absolutely are claiming

through the receivership. They do not agree that our position is it's our money, give us our ATM card, let's withdraw the $4 billion. They don't agree with that.

They're saying, no, it's WMB's estate's monies and, therefore, we can be enriched if you'd just let the WMB estate have it.

And to that extent, Your Honor, they are stuck with the FDIC.

And what I'm trying to tell the Court, Your Honor, is that their broad reading of Marin Motor Oil is not so broad in light of Amatex. That's what I'm trying to communicate, Your Honor.

And Amatex acknowledged there is a party in interest under the Third Circuit's holding that was John Peter Robinson or Peter John Robinson who yet did not have the right to intervene in the Third Circuit's eyes, Your Honor.

THE COURT: Okay.

MR. KIRPALANI: If Your Honor has any other questions, I said I would be brief.

THE COURT: No.

MR. KIRPALANI: Thank you.

THE COURT: Thank you.

MR. CLARKE: Good afternoon, Your Honor. My name is John Clarke on behalf of the FDIC receiver.

I'm sure this may be the only time in these cases

that Mr. Kirpalani and I agree, but --

(Laughter)

MR. CLARKE: -- but we do. And the reason that we put in an objection here is because the bondholders' basis for intervention is entirely derivative of their losses on WMB bonds, which are a claim against the FDIC receivership and their -- that interest is represented here by the FDIC receiver.

THE COURT: Well, the -- it may be -- is the claim, in fact, derivative? Or is just the amount they're seeking a function --

MR. CLARKE: They have a theory that's a direct theory.

THE COURT: Right.

MR. CLARKE: And I'm not disputing that.

THE COURT: Are you representing them in that direct theory?

MR. CLARKE: No, we're not.

THE COURT: Are you representing them in the derivative theory?

MR. CLARKE: Yes. We're representing the receivership, and in that respect, we're representing these creditors of the receivership, as well as the other creditors of the receivership.

THE COURT: Okay.

MR. CLARKE: Your Honor, I wanted to just -- I know you've heard a lot of argument on a lot of different motions today. I wanted to just make a couple of supplemental points, and I promise to, like everybody else, to be brief.

First of all, I agree with Mr. Kirpalani. This motion really needs to be evaluated under Rule 24 (a)(2), not under Rule 24 (a)(1).

I invite the Court to look at Judge Becker's opinion in Phar-Mor which the bank bondholders rely on in support of their argument that they're entitled as of right to intervene in an adversary proceeding. That case was about a creditors' committee, just like Marin was about a creditors' committee.

Judge Becker came as close as an appellate judge can come to saying my Circuit got it wrong in a prior decision, but I'm bound by it.

THE COURT: But, yes, they --

MR. CLARKE: -- so I have to follow it for a creditors' committee.

Your Honor, I urge you to look at those cases. I believe that those cases should be limited to their facts, which involve a creditors' committee, and that this intervention motion needs to be evaluated under 24 (a)(2).

I also don't think that the bondholders' view of 1109, whether it's supported by Marin and Phar-Mor or not, can explain why the judicial conference included Bankruptcy Rule

7024 in the bankruptcy rules.

Section 1109 says that any -- bear with me for one second. Any debtor, any trustee, any creditors' committee, any equity security holders' committee, a creditor, an equity security holder, or any indenture trustee may be heard on any issue in the case.

THE COURT: But there are clearly parties who may seek to intervene under Rule 24 that are not in that category.

MR. CLARKE: It -- it seems to cover almost everybody to me, Your Honor. It covers creditors, equity security holders, indenture trustees, committees, debtors, trustees, who is left?

If everybody has a right to intervene as of right by virtue of --

THE COURT: That's not everybody --

MR. CLARKE: -- Section 1109 in an adversary proceeding, why have Rule 7024?

THE COURT: How about directors and officers who may --

MR. CLARKE: They may be creditors. They're a party in interest.

THE COURT: They may not. They may not. I can conceive of many third parties who don't fit into that category who may have a right to intervene, or may seek to intervene, at least under 24 (a)(2).

MR. CLARKE: Okay. It would -- just seemed like an anomaly from Marin to me, Your Honor. I think Judge Becker, in the Third Circuit, described the problems with Marin as well as anybody can. It's right in the decision.

Mr. Anker now agrees that we're an adequate representative, at least for the moment. He reserves the right to change his mind later, and I don't -- you know, that's fine, he can.

THE COURT: I don't think he did admit you were an adequate representative.

MR. CLARKE: He was willing to agree today that we are an adequate representative but he was saying --

THE COURT: He says --

MR. CLARKE: -- it doesn't matter because it's only relevant if (a)(2) applies.

THE COURT: Well, he said assuming that you were.

MR. CLARKE: Okay. That's fine. I didn't mean to misstate his position.

Then let me address the two bases that he has -- the bondholders have raised in their papers for opposing the FDIC receiver as allegedly inadequate representative of them:

One is that the FDIC receiver doesn't have a pecuniary interest in this case. Well, the FDIC receiver does have a pecuniary interest in this case because it's charged by statute in Section 1821(d)(13)(E) to maximize the recovery for

creditors of the receivership basically. I don't think it's necessary to work through the specific language of that section.

So, that is the -- that's the function of the -- one of the functions of the FDIC receiver.

And Mr. Anker's analogy of the FDIC to cases that involve police power functions like might be exercised by the SEC or the Department of Justice or Environmental Protection Agency misses the distinction between the FDIC receiver in its capacity as receiver, and the FDIC in its other capacities as regulator or in its corporate capacity.

The FDIC receiver is charged with taking over the estate of a failed bank and operating it for the benefit of the creditors of the failed bank, trying to seek recovery, selling assets, doing all the things that are set forth in the statute in 1821(d). And one of those things, we're named as a party here. Mr. Anker's clients are creditors of that receivership. We believe we're adequate representatives. And just as a practical matter, I would note that one of the reasons that we oppose the intervention here is illustrated by one of the examples that Mr. Anker gave in support of his argument. He said, well, one of the things Your Honor could do if there are too many parties is limit the parties. Say one side puts in their opposition to summary judgment, the other side has one brief in support of summary judgment. Well, maybe the FDIC

receiver wants the ability as a party in this case to file its own brief.

But by virtue of having the receivership creditors participating individually, it's going to create a situation where the Court has to issue those kinds of limiting orders. So, the FDIC receiver objects to the bondholders' motion to intervene, Your Honor.

Thank you.

THE COURT: Thank you.

MR. LAURIA: Your Honor, if I may be heard?

THE COURT: Yes.

MR. LAURIA: Tom Lauria for the WMI bondholders.

Your Honor, we support denial of the motion to intervene. And we have been content not to seek to participate directly in the adversaries.

However, I don't know that that will continue to be the case if the Court disagrees and grants the bank bondholder intervention. It may be that WMI noteholders will also feel the need then to become direct participants in these adversary proceedings. And if based on the broad interpretation of 1109 as urged by counsel for the bank bondholders, presumably that would permit that participation.

This is not a result that we endorse or support, but I just wanted the Court to be aware that, you know, dynamics inevitably will change and be affected.

THE COURT: Understood.

MR. LAURIA: Thank you.

MR. ANKER: I will really try to be brief. Let me start, because it's then easy with the point Mr. Clarke made, which is really an argument against Marin. That you can't read 1109(b) to give an unconditional right to intervene under 24(a)(1) because that would render the rules a nullity.

The Second Circuit in the Caldor case was faced with that exact argument. And at Pages 171 to 172, it said the following. I think Your Honor -- I don't know if Your Honor had read it, but it certainly parrots Your Honor's words. Quote, "The joint liquidators," they are defendants, "assert that a broad interpretation of Section 1109(b) would render Federal Rule of Bankruptcy Procedure 7024 a nullity. They suggest that reading 1109(b) to confer an unconditional right to intervene within the meaning of FRCP 24(a)(1) would make FRCP 24(a)(2) and (b)(1) and (b)(2) superfluous in adversary proceedings.

"This argument is flawed for the simple reason that Section 1109(b), by its expressed terms, pertains only to parties in interest. Other entities seeking intervention in an adversary proceeding may well find it necessary to enter those proceedings by way of FRCP 24(a)(2), (b)(1) or (b)(2)."

As for Amatex, Your Honor, actually there's a more simple reason why I didn't address it in my remarks. It was

never cited by the debtor in their papers. And, therefore, I didn't -- if you -- I just looked again at the table of contents, it's never cited. If it were such a seminal and critical case for this issue, I would have thought it would have.

As I recall Amatex and, Your Honor, I am handicap because it was not cited in the papers:

First, it dealt with a future claims representative who, by definition, represents holders of demands, not claims. And, therefore, is not a creditor.

Second, it was not a 24(a)(1) intervention case.

And, third, and I guess this brings me to a point that matters, on both Mr. Clarke's and Mr. Kirpalani's argument, the FCA -- future claims representative most assuredly is a fiduciary for future demand holders who only have claims that will rise in the future. Here you have an FDIC where I think Mr. Clarke was very candid, and I appreciate his candor, said I do not represent the bank bondholders with respect to their direct claims. And so that there is no confusion, we most assuredly assert direct claims.

If you look at our proof of claim, and you look at the very beginning of the proof of claim, we say in Paragraph 2, "Because the bank bondholders have suffered direct injury, the bank bondholders have standing to bring the bank bondholder claims."

Mr. Kirpalani says, but they're not really seeking to try to intervene on their direct claims. We most assuredly are. The point is our direct claims start from theories. Theories of why there should be direct liability that go to the utter mismanagement and breach of duties owed that are fundamentally also at issue in this adversary proceeding. And so you have exactly the circumstance that the Third Circuit and the District Court here have said give rise to an interest that matters, even if you analyze the issue under 24 (a)(2).

Finally, Your Honor, on the adequacy of representation. And I don't want to spend much time on this because I think as to the direct claims, it could not be more clear. I think Mr. Clarke was telling. The Third Circuit in the Kleissler, K-L-E-I-S-S-L-E-R v. United States Forest Service case said, and I quote, "When an agency's views are necessarily colored by its views of the public welfare, rather than more parochial views of a proposed intervener whose interest is personal to it, the burden is comparatively light."

One last point, Your Honor, on the 2019, I appreciate that Your Honor's going to issue -- we have filed 2019 statements. They do not provide the date of acquisition of bonds and the dollar amount paid. I appreciate Your Honor is going to issue a decision. And if that decision issues affects us, we will comply with the order or, as Mr. Kirpalani said, there may be consequences, including, at that point, revisiting

intervention.

But I understand Your Honor's going to reach a decision. But it's not here yet, and it's not a reason at this point to fail to apply what I think is the quite clear law of this Circuit.

For all those reasons, Your Honor, I would urge the Court to grant the motion.

I also will say it is, at the end of the day, the only fair thing. Your Honor -- given Your Honor's views on the fundamental question here of the jurisdictional bar, the -- you don't hear Mr. Kirpalani disputing this. The theories that underlie my client's proofs of claim are going to be litigated in this adversary. And to have that litigation proceed in front of the very same judge who ultimately is going to decide the validity of those claims. Nearly two billion in claims without having us in the courtroom is fundamentally unfair.

Finally just one last point, and this is why I think case management issues should be taken up at the appropriate time. I was not suggesting that Mr. Clarke and I have to file a joint brief.

I was simply suggesting that when it comes to argument, if Your Honor doesn't in a future argument on summary judgment to be still on the bench, and we appreciate all the time and care you've paid -- spent today. Three and a half hours after a hearing, you can say you need to divide up

argument. And, frankly, Your Honor, you can also say if the parties don't reach agreement, I want to hear from the following parties because they are, in my view, the central figures on this dispute.

THE COURT: Okay.

MR. ANKER: Thank you, Your Honor.

THE COURT: Thank you.

MR. KIRPALANI: Your Honor?

THE COURT: Yes?

MR. KIRPALANI: Can I just clarify the record, please?

THE COURT: Yes.

MR. KIRPALANI: Okay. On Page Romanette 2 of the table of authorities on the debtors' opposition clearly listed In Re: Amatex, 755 F. 2d 1034, it's cited to on three pages in our brief, Pages 5, 8, and 12.

Thank you, Your Honor.

MR. ANKER: If I misrepresented, Your Honor, I apologize. I must say, I did look, and I didn't see it.

MR. KIRPALANI: It's the third page, Phil.

MR. ANKER: My apologies, Your Honor.

THE COURT: All right. All right. Well, let me issue my ruling.

I think that I will grant the motion. I think there is an absolute right to intervene. I think that the fact that

the bondholders have filed a proof of claim asserting direct action claims against the debtors means they're a creditor. The claim may be disputed, but it is a claim nonetheless. 1109 gives them the right to appear and be heard on any matter in the case.

The Third Circuit has held that that includes adversaries.

I think the Amatex -- excuse me. I think the Marin and the Phar-Mor cases, although Phar-Mor criticized Marin, it did not reverse that holding. I think they both stand for the proposition that there is an absolute right to intervene. I don't think either limited it specifically to creditors' committee, and I don't know how they could given the plain language of the statute, which says creditors' committee and creditor have rights to intervene.

As I understand the Amatex holding, it was a reversal of a decision -- a reversal on remand to the Bankruptcy Court directing the Bankruptcy Court to appoint a legal representative for future claimants and to reconsider the motion to intervene to see if continued intervention was a matter of right.

I think that future claimants are in a different position from creditors because by their very nature, they do not currently hold a claim against the estate. And so that may be a reason that the Third Circuit was not prepared to direct

or conclude that Robinson had an absolute right to intervene. It might have been viewing it under 24(a)(2) rather than (a)(1).

But I think (a)(1) is clear, as is 1109. And I think that I'll grant the motion.

MR. ANKER: Your Honor, we attached a very plain vanilla order of the motion. We can resubmit it. It just said the motion is granted.

THE COURT: All right. Why don't you resubmit it under certification of counsel?

MR. ANKER: I will, Your Honor. Thank you.

MR. ROSEN: Your Honor, I think the only item remaining then on the agenda are interim fee applications from various parties.

THE COURT: All right. Let's go ahead then.

MR. ROSEN: Your Honor, I believe there are a total of 16 applicants who may have filed, if I got that right. Yes, 16 different professional groups that filed applications.

To my understanding, there are certificates of no objection with respect to the monthlies that have been filed. And so, therefore, Your Honor, and I don't know of any objections that were interposed to the actual notices for the interim fee applications. So, it would leave it then to the Court if the Court has any questions with respect to the respective --

THE COURT: Well, let's take five minutes so I can find my notes.

MR. ROSEN: Okay.

THE COURT: All right?

(Recess 3:10 P.M./Reconvene 3:30 P.M.)

THE COURT: All right. I'm going to do this on your fees, I'm going to let you guys all go. But one of them -- was it Akin Gump who had redacted --

MR. ROSEN: I'm sorry, which one, Your Honor?

THE COURT: Akin Gump, is it, that has redacted their fees?

MR. GURFEIN: I'm not aware of what you're referring to, Your Honor. Peter Gurfein for the Committee.

THE COURT: I pulled my notes and left them back there. Whichever law firm redacted their fee applications, I need the full fee application. This is the second time, I think.

MR. GURFEIN: We've redacted legal issues. Is that what you're referring to, Your Honor?

THE COURT: Yes.

MR. GURFEIN: I understand.

THE COURT: Yes.

MR. GURFEIN: We'll provide that promptly.

THE COURT: Submit your fee application again exactly as an entire fee application so I can read it in context.

MR. GURFEIN: Strictly for the Court's eyes.

THE COURT: Strictly for the Court.

MR. GURFEIN: Yes, Your Honor.

THE COURT: Yes. But otherwise, I'm going to allow the fees on an interim basis. But deal with any issues at the final hearing. How's that?

MR. ROSEN: Thank you, Your Honor.

THE COURT: If the intent was to wear me out, it worked.

(Laughter)

MR. ROSEN: I didn't even have one on today, Your Honor. So, I wish I had taken advantage of that.

THE COURT: Okay.

MR. STRATTON: Now we know how to deal with fees in this court.

(Laughter)

THE COURT: Exactly.

MR. STRATTON: Your Honor, I think I understand that what you want is the Akin Gump fee, unredacted fee applications, the monthlies delivered to chambers.

THE COURT: Well, the whole quarterly.

MR. STRATTON: Well, the quarterly is just a summary of the monthly.

THE COURT: Well, I want the summary, too --

MR. STRATTON: Okay.

THE COURT: -- is what I'm saying.

MR. STRATTON: We'll get you the whole package, but without the redaction.

THE COURT: Redaction, exactly. And deliver it directly to chambers. It will be returned to counsel.

MR. STRATTON: Thank you, Your Honor.

MR. GURFEIN: Thank you.

MR. CARLINSKY: May I present a form of order, Your Honor?

THE COURT: You may. Thank you. All right. And I think we're finally adjourned.

(Whereupon, at 3:32 P.M., the hearing was adjourned.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Karen Hartmann* AAERT CET**D0475 Date: August 26, 2009

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