

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

----- x  
In re : Chapter 11  
: :  
WASHINGTON MUTUAL, INC., *et al.*,<sup>1</sup> : Case No. 08-12229 (MFW)  
: :  
Debtors. : Jointly Administered  
: :  
: **Re: Docket No. 1834**  
----- x

**DEBTORS' OBJECTION TO MOTION OF THE FEDERAL DEPOSIT  
INSURANCE CORPORATION, AS RECEIVER FOR WASHINGTON  
MUTUAL BANK, FOR AN ORDER MODIFYING THE AUTOMATIC STAY**

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), respectfully submit this objection to the *Motion of the Federal Deposit Insurance Corporation* (the "FDIC"), as Receiver for Washington Mutual Bank, for an Order Modifying the Automatic Stay (the "Motion") (Docket No. 1834), dated November 4, 2009.

**PRELIMINARY STATEMENT**<sup>2</sup>

1. A year into the Debtors' chapter 11 bankruptcy cases, five months into turnover litigation, and two weeks after argument on the Debtors' motion for summary judgment with respect to \$4 billion in deposits formerly held at the Debtors' banking subsidiaries (the "Deposits"), the FDIC now seeks to reverse course and invoke Section 9.5 of the P&A Agreement ("Section 9.5"). In doing so, the FDIC attempts to position itself to exercise

---

<sup>1</sup> 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.

<sup>2</sup> Capitalized terms not defined in the preliminary statement shall have the meanings ascribed to them below.



purported setoff rights and further thwart, hinder, and delay the Debtors' efforts to finally recover their liquid assets for the benefit of their chapter 11 estates. By definition, the Motion concedes two points that the FDIC has previously refused to admit: (a) the Deposits are in fact deposits and therefore no material issues of fact exist as to their ownership; and (b) that mutuality of claims, necessary to support a claim of setoff against the Deposits, presently does not exist.

2. The Motion must fail because the FDIC cannot show the requisite justification for stay relief. That is because if the stay were lifted, the FDIC has zero probability of success on the merits, the Debtors' estates would be prejudiced significantly, and the balance of hardships weighs heavily in favor of the Debtors given that the FDIC will not be harmed in any way if the stay remains in effect.

3. With regard to the FDIC's probability of success on the merits, pursuant to section 553 of the Bankruptcy Code, Congress codified century-old case law holding that a depository institution cannot offset a debtor's deposits against its claims against the debtor, if those deposits were procured "with a view to its use for the purpose of set-off, [or] with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy." *N.Y. County Nat'l Bank v. Massey*, 192 U.S. 138, 145 (1904). The FDIC's post-petition attempt to establish mutuality by acquiring a debt with the (repeatedly) expressed intent to setoff against that debt is therefore prohibited. Because it cannot get around this prohibition, the FDIC ignores the current lack of mutuality, stating that it seeks to "preserve the status quo." That is misleading. In reality, assuming *arguendo* the FDIC has allowable claims against the Debtors' estates, the FDIC seeks to manufacture mutuality, pursuant to its agreement with JPMorgan Chase Bank, N.A. ("JPMC"), so that it may be preferred over all of the Debtors' other creditors.

Such a collusive scheme between two non-debtor parties is forbidden in bankruptcy. 11 U.S.C. § 553(a). Moreover, the Motion ignores that 85% of the Debtors' Deposits were never, in any way, touched by the receivership. Those Deposits were at WMB fsb, and were therefore never the subject of the P&A Agreement, and thus Section 9.5 cannot have any application to those Deposits whatsoever.

4. Granting the relief sought by the FDIC will result in significant prejudice to the Debtors' estates. If allowed to setoff, some portion of the Deposits will inure to the benefit of the FDIC (assuming it has any allowable claims) to the detriment of each of the Debtors' legitimate creditors. Setoff aside, the Debtors have sought the return of the Deposits throughout the Debtors' entire stay in chapter 11 – more than a year. Initially, the Debtors engaged in negotiation, and for the past five months, litigation with JPMC. This has come at a great expense to the Debtors' estates. During this time, the FDIC, which has opposed the Debtors' turnover efforts, continuously represented to the Court that it had no intention of “interfer[ing] with the administration of this bankruptcy case.” (See **Exhibit A**, Tr. 6/24/09 at 44.) The FDIC has suddenly changed its course, now asking this Court for permission to effectively moot everything that has occurred over the last year and start anew.

5. By contrast, refusing to modify the stay will not prejudice the FDIC at all. The FDIC concedes repeatedly that setoff is its sole reason for seeking transfer of the Deposits. However, under the circumstances, the FDIC is prohibited by congressional mandate from setting off against the Deposits. Thus, continued application of the automatic stay will not harm the FDIC in any way.

6. Therefore, the balance of hardships weighs heavily in favor of the Debtors given the amount of the Deposits, the cost of further delay and litigation, and the pressing need to craft

a chapter 11 plan. The Third Circuit has stated that the automatic stay exists to “prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor’s assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor.” *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1036 (3d Cir. 1991) (quoting *Ass’n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 672 F.2d 446, 448 (3d Cir. 1982)). If granted, the Motion would result in each and every one of these improper consequences and should, therefore, be swiftly denied with prejudice.

### **RELEVANT FACTUAL BACKGROUND**

7. On September 25, 2008, the Director of the Office of Thrift Supervision placed Washington Mutual Bank (“WMB”) into receivership and appointed the FDIC as receiver. On the same day, the FDIC sold substantially all of WMB’s assets, including the stock of its subsidiary bank, Washington Mutual Bank fsb (“WMB fsb”), to JPMC for \$1.88 billion (the “P&A Transaction”), pursuant to the Purchase and Assumption Agreement, Whole Bank, dated September 25, 2008 (the “P&A Agreement”). Subsequently, JPMC merged WMB fsb into its own banking operations.

8. On September 26, 2008, (the “Petition Date”), the Debtors commenced voluntary cases pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”).

9. On October 14, 2008, the Debtors entered into a stipulation (the “Account Stipulation”) with JPMC pursuant to which JPMC agreed with the Debtors that the Deposits were deposit accounts of the Debtors. Therein, subject to 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.” The parties contemplated that the Deposits – currently the largest of the

Debtors' estates' assets – were to be the cornerstone of a successful chapter 11 plan and would be used to pay administrative expenses and fund distributions to creditors pursuant to a chapter 11 plan. 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.<sup>3</sup>

**A. The D.C. Action**

10. As required by section 11(d) of the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d), the FDIC set December 30, 2008, as the last day to file claims against WMB. The Debtors, in order to preserve their rights, timely filed proofs of claim with the FDIC in connection with WMB's receivership.

11. On January 23, 2009, the FDIC disallowed the Debtors' claims in a one-page Notice of Disallowance, partly on the basis that the Debtors "appear to assert claims against a third party." In order to avoid forfeiting rights with respect to WMB, the Debtors filed a Complaint in the District Court for the District of Columbia on March 20, 2009, challenging the FDIC's disallowance of claims.<sup>4</sup> Included in the Debtors' claims is a protective claim for the Deposits and several causes of action authorized under the Bankruptcy Code's avoidance powers and under state law for monetary relief pursuant to the fraudulent or preferential transfer of more than \$10 billion in the Debtors' assets to WMB prior to the commencement of the Debtors' chapter 11 cases (the "Avoidance Actions"). On June 11, 2009, the FDIC filed an answer and counterclaims asserting claims against the Debtors. Each of the FDIC's claims was already

---

<sup>3</sup> In mid-October 2008, JPMC asserted that it had concerns over the terms of the proposed order and a reservation of rights submitted by the FDIC. The parties continued to try to address JPMC's concerns for several months and ultimately JPMC formally withdraw from the Account Stipulation.

<sup>4</sup> *WMI and WMI Investment v. FDIC*, No. 09-00533 (D.D.C.), (the "DC Action").

asserted against the Debtors via a proof of claim filed in the Bankruptcy Court on March 30, 2009.

**B. JPMC Adversary Proceeding**

12. On March 24, 2009, JPMC filed an action against the Debtors, asserting claims to assorted assets that JPMC allegedly purchased pursuant to the P&A Agreement.<sup>5</sup> On May 29, 2009, the Debtors filed an answer and counterclaims for assets that the Debtors contend are rightfully theirs and therefore were not transferred to JPMC under the P&A Agreement. JPMC filed a motion to dismiss, which was denied by the Bankruptcy Court on August 24, 2009.

**C. The Debtors' Turnover Action**

13. On April 27, 2009, the Debtors filed an action against JPMC seeking to recover their Deposits, expressly assumed by JPMC under the P&A Agreement yet wrongfully withheld.<sup>6</sup> The *Motion of Defendant JPMorgan Chase Bank, National Association to Dismiss Adversary Proceeding* (Adv. No. 09-50934, Docket No. 8) was denied on June 24, 2009. The Bankruptcy Court found that the Debtors' complaint and accompanying exhibits describe a mature debt owed by JPMC to the Debtors, without any indication of a genuine dispute as to "the title to the . . . deposit accounts." (See **Exhibit A**, Tr. 6/24/09 at 117.) On October 22, 2009 (the "SJ Hearing"), the Debtors, the FDIC, JPMC, and a group of bondholders holding WMB debt securities (the "Bank Bondholders") presented argument in connection with the *Motion of Plaintiffs Washington Mutual, Inc. and WMI Investment Corp. for Summary Judgment* (the "SJ

---

<sup>5</sup> *JPMorgan Chase Bank, N.A. v. Washington Mutual, Inc. et al.*, Adv. Proc. No. 09-50551 (MFW) (the "JPMC Adversary Proceeding").

<sup>6</sup> *Washington Mutual, Inc. et al. v. JPMorgan Chase Bank, N.A.*, Adv. Proc. No. 09-50934 (MFW) (the "Turnover Action," and with the JPMC Adversary Proceeding, the "Adversary Proceedings").

Motion") (Adv. No. 09-50934, Docket No. 8). The Bankruptcy Court has taken the matter under advisement.

14. At the SJ Hearing, the FDIC notified the Court that, if the Court "concludes that JPMorgan setoff rights somehow do not preclude turnover here, then the FDIC Receiver is prepared promptly to exercise its Section 9.5 rights and to direct JPMorgan to return the account balances to the FDIC Receiver." (See **Exhibit B**, Tr. 10/22/09 at 62:6.) The FDIC chose not to await the Court's ruling to file this Motion.

### ARGUMENT

15. The automatic stay is "one of the most fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, p. 54 (1978); H.R. Rep. No. 95-595, p. 340 (1977); *accord In re W.R. Grace & Co.*, No. 01-01139 (JFK), 2007 WL 1129170, at \*2 (Bankr. D. Del. Apr. 13, 2007). The filing of a bankruptcy petition operates as a stay "applicable to all entities" of, *inter alia*, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3); *see also In re Cont'l Airlines*, 134 F.3d 536, 539 n.5 (3d Cir. 1998) (The automatic stay is "an injunction that arises by operation of law immediately upon the commencement of the bankruptcy case.") (quotation omitted).

16. As a threshold matter, the automatic stay is indisputably applicable to the FDIC's attempts to exert control over the Debtors' Deposits.<sup>7</sup> *See Gross v. Bell Sav. Bank PA SA*, 974

---

<sup>7</sup> FDIC has acknowledged that any exercise would be an attempt to exercise control over property of the estates and would interfere with this Court's administration of Debtors' estates. *See Exhibit A*, Tr. 6/24/09 at 44 (FDIC Counsel: "We have not asserted that 9.5 right. Because we do not want to interfere with the administration of this bankruptcy case.").

F.2d 403, 407 (3d Cir. 1992) (noting that injunctive relief, such as bankruptcy’s automatic stay, “is appropriate [with respect to the FDIC’s attempt to claw back deposits pursuant to provision in purchase and assumption agreement] where that remedy is imposed by statute, automatically and by operation of law, without any action by a court”); *In re Colonial Realty Co.*, 980 F.2d 125, 137 (2d Cir. 1992) (“We accordingly conclude that the § 1821(j) ban upon ‘*court . . . action . . . to restrain or affect the exercise of powers or functions of the [the FDIC] as a conservator or a receiver’ does not inhibit the operation of [bankruptcy’s] automatic *statutory* stay.”) (emphasis in original); *see also In re Lane*, 136 B.R. 319, 320-21 (D. Mass. 1992) (RTC has no power to foreclose on an asset when a bankruptcy stay is in effect; rejecting the FDIC’s position that it holds “a power that overrides both substantive and procedural law governing bankruptcy proceedings, simply because enforcement of those bodies of law places some constraints on FDIC ‘s power to foreclose” upon assets in which it has interests as successor to a failed bank). In short, the automatic stay exists to shield the Debtors from actions precisely like the ones contemplated by the FDIC which are obviously designed to exert control over the Debtors’ liquid resources and interfere with the orderly administration of the Debtors’ estates.*

17. As the FDIC acknowledges, a three-factor test applies to determine whether “cause” exists to lift the stay: (i) whether any prejudice results to the estate or debtor from lifting the stay; (ii) the probability of a movant’s success on the merits; and (iii) the balance of hardships between the parties. *See, e.g., W.R. Grace*, 2007 WL 1129170, at \*2. For purposes of the third factor, the FDIC must establish that “the balance of hardships from not obtaining relief tips significantly in [its] favor.” *RNI Wind Down Corp.*, 348 B.R. 286, 299 (Bankr. D. Del. 2006) (internal quotations omitted); *see also W.R. Grace*, 2007 WL 1129170, at \*3 (the party seeking relief from automatic stay bears “the heavy and possibly insurmountable burden of



proving that the balance of hardships tips significantly in favor of granting relief”) (quotation omitted). Failure by the FDIC to carry its burden alone “requires a denial of the requested relief.” *Id.*; *see also, e.g., In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1285 (2d Cir. 1990) (“If the movant fails to make an initial showing of cause... the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection.”). As discussed below, the FDIC has failed to meet its burden with respect to any of the pertinent factors, and, as such, the Motion must be denied, leaving the property of the Debtors’ estates intact.

## **II. THE FDIC CANNOT SUCCEED ON THE MERITS**

18. The FDIC’s only stated “cause” for seeking stay modification is to protect purported setoff rights. *See, e.g.,* Motion at 3 (“[The FDIC] therefore brings this motion to protect and preserve its setoff rights in the [Deposits] until the litigation among the parties has concluded and the amount of and extent of [the FDIC’s] claims against WMI and setoff rights have been determined.”); Motion at ¶ 16 (“Once returned, the [Deposits] ... will be held ... at a Federal Home Loan Bank until the pending litigation among the parties has been resolved and the scope of [the FDIC’s] setoff rights has been determined.”); Motion at ¶ 17 (“The relief requested is necessary to preserve [the FDIC’s] setoff rights . . . .”); Motion at ¶ 22 (“Section 9.5 ... provides [the FDIC] the ability to direct the return of assumed deposit balances from the assuming bank under that agreement to protect [setoff] rights.”); Motion at ¶ 25 (“[the FDIC] is entitled to protect these nonbankruptcy setoff rights . . . . Section 9.5 of the P&A Agreement provides [the FDIC] the contractual right to do so . . . .”); Motion at ¶ 27 (“Once the [Deposits] are in [the FDIC’s] possession, the criteria for setoff under section 553 will be satisfied.”); Motion at ¶ 34 (“[the FDIC’s] rights under section 9.5 of the P&A Agreement are clear, and the exercise of those rights with respect to the [Deposits] is necessary to protect its legitimate setoff

rights under nonbankruptcy law.”).<sup>8</sup> However, the FDIC’s scheme to exert control over the Debtors’ property so that the FDIC may protect its purported right to foreclose on such property for its own benefit is specifically prohibited by the Bankruptcy Code section barring such preferential transfers. Moreover, with respect to the lion’s share of the Deposits, the FDIC is independently foreclosed from exercising Section 9.5 because that provision, on its face, is applicable only to Deposits that were held at WMB, passed through receivership, and were assumed by JPMC pursuant to the P&A Agreement. Because 85% of the Deposits were on deposit at WMB fsb, and not WMB – the bank in receivership – Section 9.5, by its terms, is inapplicable to such Deposits.

---

<sup>8</sup> See also **Exhibit B**, Tr. 10/22/09 at 60-61 (“Under 12 U.S.C. Section 1822(d) . . . the FDIC has a statutory right of setoff against the insured deposits of any depositor in a failed bank as made, [‘]as may be required to provide for the payment of any liability,[‘] of that depositor to the failed bank or its Receiver. Section 9.5 of the P&A Agreement . . . is intended to protect the FDIC-Receiver’s rights under Section 1822(d) among other things.”); See **Exhibit B** Tr. 10/22/09 at 61-62 (“we’ll take the accounts back and we’ll litigate about the setoff at that point.”); the *Memorandum of Law of Cross-Claim Defendant Federal Deposit Insurance Corporation, as Receiver, in Opposition to Plaintiffs’ Motion for Summary Judgment* (“FDIC Opposition to SJ Motion”) (Adv. No. 09-50934, Docket No. 97) at 3 (“Whether or not JPMC is permitted to exercise [setoff] rights, the FDIC-Receiver has its own setoff rights, and section 9.5 of the Purchase & Assumption Agreement, Whole Bank, dated as of September 25, 2008 between JPMC and the FDIC-Receiver. provides the FDIC-Receiver the right to direct JPMC to withhold the funds and deliver them to the FDIC-Receiver to prevent this sort of setoff shell game.”); FDIC Opposition to SJ Motion at 14 (“the FDIC-Receiver expressly retained the right in [Section 9.5 of] the P&A Agreement to direct JPMC to withhold all or any portion of any deposit balance and to return all or any portion of such deposit balance to the FDIC-Receiver.”).

**A. The Bankruptcy Code Prohibits The FDIC From Exercising Purported Setoff Rights**

19. Assuming *arguendo* the FDIC has valid setoff rights under applicable nonbankruptcy law,<sup>9</sup> the Bankruptcy Code imposes further requirements and limitations upon such purported rights as set forth in section 553. *In re SemCrude, L.P.*, 399 B.R. 388, 393 (Bankr. D. Del. 2009); *In re Garden Ridge Corp.*, 338 B.R. 627, 632 (Bankr. D. Del. 2006). These statutory restrictions foreclose the setoff the FDIC seeks to accomplish.

20. Claims must be mutual and prepetition in order to setoff against a debtor. *SemCrude*, 399 B.R. at 393; *In re Enron Corp.*, 2003 Bankr. LEXIS 330 (Bankr. S.D.N.Y. Apr. 17, 2003). “[M]utuality is strictly construed against the party seeking setoff.” *In re Bennett Funding Group, Inc.*, 212 B.R. 206, 212 (2d Cir. BAP 1997). The FDIC concedes that mutuality of claims does not exist, stating that, upon invocation of Section 9.5, “[the FDIC’s] claims against the Debtors *could and would* form the basis for setoff under 11 U.S.C. § 553 against [the Deposits] currently being held by JPMC purportedly in the name of WMI” and that “[o]nce the [the Deposits] are in [the FDIC’s] possession, the criteria for setoff under section 553 *will be* satisfied.” (Motion at 2, ¶ 27, emphasis added.) This Court too has recognized this plain fact, acknowledging that JPMC (and not the FDIC) has assumed the Deposits, but has not acquired any claims that could potentially be setoff against the Deposits. (See **Exhibit B**, Tr. 10/22/09 at

---

<sup>9</sup> The Debtors do not concede that the FDIC has setoff rights and reserve their rights in this regard. The FDIC’s statutory basis for setoff is limited to the “insured” portion of the Deposits only, which under current law means up to \$250,000. *See* 12 U.S.C. § 1822(d) (“The Corporation may withhold payment of such portion of the *insured* deposit of any depositor” to cover payment of a liability owed the bank) (emphasis added). FDIC’s citation to 12 C.F.R. 370.4(a) does not change this as that regulation pertains to the FDIC’s Transaction Account Guarantee Program under which WMB was never a participating institution – the relevant regulations were not promulgated until October 29, 2008 (*see* 73 Fed. Reg. 64179) – over a month after WMB was placed into receivership.

69, “THE COURT: The FDIC has the claims, not the party against whom the Turnover Action has been filed. MR. ANKER: But that’s -- THE COURT: There has been no demand to return the deposits.”).

21. This lack of mutuality was designed by the parties to the P&A Agreement which provides that JPMC assumed the Deposits from WMB, but did not take assignment of legacy-WMB claims from the FDIC. See P&A Agreement, § 3.5; see also *In re U.S. Aeroteam, Inc.*, 327 B.R. 852, 865 (Bankr. S.D. Ohio 2005) (“an assignment to a third party in a transaction that had previously involved only two parties may destroy mutuality by transforming a mutual obligation into a triangular one”). Thus, the parties to the P&A Agreement, by their own will, have established a triangular construct of claims.<sup>10</sup>

---

<sup>10</sup> It is hardly remarkable that the P&A Agreement provided for the assumption of the Deposits and the retention of claims against WMI. Courts have routinely interpreted purchase and assumption agreements to provide for such a result. “FIRREA empowers the [FDIC] to organize thrift institutions to ‘take over such assets or such liabilities as [the FDIC] may determine to be appropriate’” and courts interpret purchase and assumption agreements based on their plain language. See *Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236, 247 (D.C. Cir. 1995) (finding plaintiff could not setoff against successor bank because successor bank acquired asset but not liability pursuant to purchase and assumption transaction); see also *Payne v. Sec. Sav. & Loan Assn., F.A.*, 924 F.2d 109, 111-12 (7th Cir. 1991) (interpreting plain language of purchase and assumption agreement governing the transfer of assets to determine which liabilities were expressly assumed); *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990) (same); *Village S. Joint Venture v. FDIC*, 733 F. Supp. 50, 51 n.1 (N.D. Tex. 1990) (statutory predecessor to FDIC, the FSLIC, transferred the assets of failed bank except claims against directors and officers and other specified claims to successor bank in a purchase and assumption transaction). See also 12 U.S.C. § 1821(d)(2)(G)(i) (“The [FDIC] may . . . transfer any asset or liability of the institution in default . . .”). The FDIC should not be heard to complain that it is somehow “inequitable” to apply the clear and controlling legal principles to the P&A Agreement that the FDIC itself crafted. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (“[A] reasonably competent public official should know the law governing his conduct.”); *Adams v. Madison Realty & Dev., Inc.*, 937 F.2d 845, 856 (3d Cir. 1991) (noting how “everyone is presumed to know the law”); *Anderson v. Hershey*, 127 F.2d 884, 887 (6th Cir. 1942) (affirming decision (footnote continued)

22. The result is that the FDIC (or JPMC) may not setoff against the Deposits because courts have routinely held that triangular setoffs are impermissible in bankruptcy. *See, e.g., In re United Sciences of Am., Inc.*, 893 F.2d 720, 723 (5th Cir. 1990) (“The mutuality requirement is designed to protect against ‘triangular’ set-off; for example, where the creditor attempts to set off its debt to the debtor with the latter’s debt to a third party.”); *In re Elcona Homes Corp.*, 863 F.2d 483, 486 (7th Cir. 1988) (holding that the Bankruptcy Code speaks of a “mutual debt” and “therefore precludes ‘triangular’ set offs”) (emphasis in original); *Enron Corp.*, 2003 Bankr. LEXIS 330 (dismissing triangular setoff claim asserted by creditor attempting to assert claims that were the property of the debtor).

23. Now, post-petition, in an undisguised attempt to fabricate mutuality, the FDIC asks this Court for relief in order to invoke Section 9.5 to position itself to setoff its purported claims. (*See* Motion at ¶ 9).<sup>11</sup> However, section 553 of the Bankruptcy Code provides that setoff is precluded where a debt owed the debtor (such as the Deposits) is transferred post-petition “for the purpose of obtaining a right of setoff against the debtor” while the debtor was insolvent. 11 U.S.C. § 553(a)(3). The law is clear that where “deposits are not accepted in the ordinary course of business, *or are procured, accepted, or ‘built up’ for the real purpose of allowing the bank to obtain a setoff*, the deposits will be considered preferential in effect and the right of setoff is

---

holding receiver of failed bank to terms of a federal law because “[t]he defendant receiver is presumed to know the law and to be aware of the federal statute”).

<sup>11</sup> It is simply impossible to reconcile the FDIC’s position that mutuality would be created pursuant to invocation of Section 9.5 with its continued support of JPMC’s putative setoff rights: “Debtors interpretation of Schedule 3.5 is wrong, and the P&A Agreement does not have the effect on JPMC’s setoff rights with respect to the [Deposits].” (Motion at 2-3.) FDIC is arguing that both it and JPMC may setoff against the same Deposits with the same set of claims. The law on setoff and basic common sense preclude such a result. Even more perplexing is FDIC’s continued advocacy for JPMC’s pecuniary interests even where they are clearly adverse to the interests of the Bank Bondholders and other creditors of the WMB receivership.

lost under § 553(a)(3).” *In re Bohlen Enters., Ltd.*, 78 B.R. 556, 560-61 (Bankr. N.D. Iowa 1987) (emphasis added) (examining legislative history of section 553(a)(3) and noting that provision was enacted as a codification of the case law that held that a bank cannot offset the debtor’s deposits against its claim against the debtor, unless the deposits have been accepted in good faith in the ordinary course of business) (citing *N.Y. County Nat’l Bank v. Massey*, 192 U.S. 138 (1904)), *aff’d*, 91 B.R. 486 (N.D. Iowa 1987), *rev’d on other grounds*, 859 F.2d 561 (8th Cir. 1988) (emphasis added); *see also Miller v. Wells Fargo Bank Int’l Corp.*, 540 F.2d 548, 557 (2d Cir. 1976) (“The set-off exception does not apply where a deposit is accepted by a bank with an intent to apply it on a pre-existing claim against the depositor.”). The appropriate inquiry is whether the purpose for accepting the debt in question was to obtain a setoff for the creditor and to improve the creditor’s position among other creditors. *In re S. Indus. Banking Corp.*, 809 F.2d 329, 332 (6th Cir. 1987) (concluding from statements made in court pleadings that bank intended to exercise setoff upon maturity of amounts owed bank investor). There is no dispute that the FDIC seeks to exercise Section 9.5 solely in order to procure the Deposits “for the purpose of obtaining a right of setoff against the Debtor.” 11 U.S.C. § 553(a)(3). Both the Motion and the FDIC’s statements on the record before this Court concede this point repeatedly.

24. The Debtors are currently insolvent. The Debtors’ financial position subsequent to the loss of their primary operating asset, WMB, is reflected on their schedules filed with this Court which indicate \$4.48 billion in assets and \$7.83 billion in liabilities. This reality is further bolstered by the presumption of insolvency afforded debtors pursuant to section 553 of the Bankruptcy Code for the 90-day period immediately preceding the petition date. *See* 11 U.S.C. § 553(c). It is the setoff applicant’s burden to establish otherwise. *In re Balducci Oil Co.*, 33 B.R. 847, 850 (Bankr. D. Colo. 1983). Although the Debtors have asserted claims to certain assets

such as trust preferred securities and prospective tax refunds, both JPMC and the FDIC have asserted claims against the Debtors for more than the total amount of such assets.<sup>12</sup> Further, more than \$100 billion in claims have been filed against the Debtors' estates in these chapter 11 cases. While a significant portion of these will not likely be allowed, they are further evidence that the Debtors are currently insolvent and would be at the time of any exercise of Section 9.5. Therefore, invocation of Section 9.5 would consist of a postpetition procurement of a debt of the sort that section 553(a)(3) of the Bankruptcy Code prohibits from forming the basis for any setoff.

25. At bottom, section 553(a)(3) is intended to prevent a windfall for the benefit of one or more colluding creditor(s) over the debtor and its other creditors. *See Aeroteam*, 327 B.R. 852 at 867 (“The purpose of [section 553(a)(3)] is to prevent a creditor from undertaking a build-up of its setoff rights in order to obtain a preference.”); *In re Iowa Oil Co.*, No. C04-1002-LRR, 2004 WL 2326377, at \*9 (N.D. Iowa Sept. 30, 2004) (section 553(a)(3) “is intended to eliminate an opportunity for a creditor to engage in some form of manipulation at the expense of other creditors.”) (quotation omitted).<sup>13</sup> These equitable underpinnings could never be more

---

<sup>12</sup> Because the FDIC and JPMC (in multiple forums) have asserted competing claims to both the Trust Preferred Securities and the Debtors' tax refunds, the value of such assets must be discounted for the likelihood that the Debtors will prevail in asserting ownership rights. *See In re Xonics Photochemical, Inc.*, 841 F.2d 198, 199-200 (7th Cir. 1988).

<sup>13</sup> Related section 553(a)(2), concerning the transfer of claims, is grounded in similar equitable principles. Congress sought to “prohibit trafficking in claims against the debtor in order to effect setoff (which would provide a windfall to both parties to the transfer at the expense of the estate).” *In re Denby Stores, Inc.*, 86 B.R. 768, 779 (Bankr. S.D.N.Y. 1988). Although here the FDIC and JPMC contemplate transferring a “debt,” the fact remains that both entities have agreed to terms that threaten to prejudice the Debtors' creditors. Moreover, it bears noting that “Debt” and “Claim” are used interchangeably by Congress. *See Rake v. Wade*, 508 U.S. 464, 474 n.11 (1993) (implying that “debt” and “claim” are synonymous); *In re First Jersey Sec.*, 180 F.3d 504, 510 (3d Cir. 1999) (“As (footnote continued)

applicable than here with respect to the FDIC's desire to transfer the Deposits to attempt to establish mutuality.

26. To the extent the FDIC argues that it has somehow contracted around the mutuality requirement or the applicability of section 553(a)'s restrictions, this argument has already been rejected by the Bankruptcy Court for the District of Delaware. In *SemCrude*, Chevron entered into agreements with various debtor-entities for the purchase and sale of oil, gasoline, and propane. *Id.* at 391. Pursuant to netting provisions in those agreements, the parties agreed that in the event of a payment default they would be allowed to setoff amounts owed between the parties and their affiliates. *Id.* at 391. After the debtors filed for bankruptcy, Chevron sought to effect a setoff so that it would not have to pay in full what it owed the debtors. *Id.* 392. Interpreting the plain language of section 553 of the Bankruptcy Code, the court found that "non-mutual debts cannot be transformed into a 'mutual debt' under section 553 simply because a multi-party agreement allows for setoff of non-mutual debts between the parties to the agreement." *Id.* at 398. Additionally, the court held there exists "no exception to the 'mutual debt' requirement in section 553 [that may] be created by private agreement." *Id.* at 399. Finally, the court noted that its holding was consistent with one of the fundamental principles of bankruptcy – fair treatment for creditors – and that a contrary ruling would allow "one creditor . . . [to] unfairly obtain payment from a debtor at the expense of the debtor's other creditors." *Id.*

27. Even if the FDIC were somehow not prohibited from setting off its purported claims against the Deposits (and clearly it is), consideration of the factual circumstances surrounding the FDIC's intended exercise of Section 9.5, its previous litigation positions

---

debt is defined as a liability on a claim, it is coextensive with the definition of a claim . . . ."); *see also* 11 U.S.C. § 101(12) (defining "debt" to mean "liability on a claim").



concerning JPMC's setoff rights, and the fact that the FDIC itself drafted and negotiated the P&A Agreement (each as discussed below in section I.B.), would all militate significantly against allowing the equitable remedy of setoff. *See In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 896 F.2d 54, 57 (3d Cir. 1990) (equitable right of setoff is permissive, not mandatory and cannot be invoked in a case where the general principles of setoff would not justify it); *In re Penn Cent. Transp. Co.*, 486 F.2d 519, 529 (3d Cir. 1973) ("In the absence of a trust relationship, whether to permit a setoff is in the discretion of the district court."); *In re Ionosphere Clubs, Inc.*, 164 B.R. 839, 841 (Bankr. S.D.N.Y. 1994) (setoff scrutinized in light of goals and objectives in Bankruptcy Code). Thus, given the circumstances, assuming *arguendo* section 553(a) of the Bankruptcy Code did not bar the FDIC's contemplated setoff, the Court should then exercise its discretion to bar this form of preferential treatment of a putative creditor.<sup>14</sup>

**B. Section 9.5 Is Inapplicable To The Lion's Share Of The Deposits**

28. The FDIC contemplates invoking Section 9.5 not just with respect to the Deposits formerly held at WMB, but with respect to the Deposits formerly held at WMB fsb, in an account number ending in 4234 (the "fsb Account"). This is not surprising as per the account statement received from JPMC as of October 14, 2009, the fsb Account contains \$3,674,809,737. This represents approximately 85% of the Deposits. Thus, the FDIC chooses to ignore that such

---

<sup>14</sup> Foreclosed from asserting any purported setoff rights, FDIC may not invoke Section 9.5. In addition to finding that Section 9.5 is enjoined by the automatic stay, the Third Circuit, in a non-bankruptcy context, has recognized that such an exercise is within FDIC's powers only when in furtherance of setoff, unlike the situation here where FDIC would be prohibited from setoff. *See Gross*, 974 F.2d at 408 (3d Cir. 1992) (reversing district court injunction of FDIC based upon finding that FDIC was acting in its powers by withholding deposits from distribution to (non-debtor) depositor "that are necessary to offset depositor liabilities to the bank").

funds were not assumed pursuant to the P&A Agreement and were never touched by WMB's receivership, but were assumed by separate merger with JPMC.

29. However, the plain language of Section 9.5 is clear that it applies only with respect to "any deposit balance assumed by the Assuming Bank pursuant to [the P&A Agreement]." *See* P&A Agreement at § 9.5. Pursuant to Section 2.1 of the P&A Agreement, JPMC agreed to assume "Deposits" "reflected on the Books and Records of the Failed Bank as of Bank Closing." *Id.* at § 2.1. Of course, the "Failed Bank" is defined to mean WMB, and not WMB fsb. Thus, Section 9.5 is simply inapplicable to the fsb Account and the FDIC has no purported Section 9.5 rights with respect to those Deposits.

30. Significantly, the FDIC makes no assertion that the books and records of WMB and/or WMB fsb do not reflect that the fsb Account was established and due and owing as the Debtors have asserted in connection with presentment of their SJ Motion. *See In re Rocor Int'l, Inc.*, 352 B.R. 319, 328 (W.D. Okla. 2006) (Deposits "belong to the entity in whose name an account is established"); *In re Amdura Corp.*, 75 F.3d 1447, 1451 (10th Cir. 1996) ("We presume that deposits in a bank to the credit of a bankruptcy debtor belong to the entity in whose name the account is established."). That is because the FDIC cannot. As the Debtors have already established in connection with the SJ Motion, there is no real factual dispute that the fsb Account was established prior to the receivership. Similarly, there is no real question that a putative exercise of Section 9.5 would have no effect upon the large majority of the Deposits – those held in the fsb Account.

31. Notwithstanding the fact that the plain language of the P&A Agreement does not support the Motion, the FDIC acknowledges this critical point only in a footnote, asserting that the account statements for the fsb Account reflect that the Deposits are held at "Washington

Mutual Bank, FA.” This is truly misleading. As the Debtors have established, the transfer of Deposits to WMB fsb occurred in late September. As of September 30, 2008, the first date that an account statement bearing WMB fsb’s name would have been issued, WMB fsb was already sold as a going concern to JPMC. JPMC has concealed what date it merged WMB fsb into itself and, therefore, it is unclear whether WMB fsb even existed as an independent entity at that time. In any event, the account statements to which the FDIC refers were issued by JPMC – not the Debtors. The account statements issued by JPMC reflect the name of JPMC and the proper and new account number as reflected on WMB fsb’s books and records prior to the merger into JPMC. Assuming WMB fsb even existed as of the issuance of the September 2008 month-end account statements, (and the JPMC label on the account statement implies that it did not), it is not surprising that JPMC did not revise this statement to reflect the name of WMB fsb when JPMC contemplated merging the bank into its own operations shortly.<sup>15</sup>

---

<sup>15</sup> As discussed above, the Debtors have asserted the Avoidance Actions against the FDIC as initial transferees of \$6.5 billion in capital contributions and approximately \$3.4 billion in preferential transfers, which the Debtors are seeking recovery on account of in the DC Action. Thus, assuming *arguendo* that the FDIC is not barred from effectuating any setoff against the Deposits pursuant to section 553(a)(3) of the Bankruptcy Code, as the recipient of avoidable fraudulent and preferential transfers, the FDIC’s claims would be disallowed under section 502(d) of the Bankruptcy Code. 11 U.S.C. § 502(d) (“[T]he court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.”). In turn, section 553(a)(1) provides that setoff is prohibited “to the extent that the claim of such creditor against the debtor is disallowed.” This forms yet another basis why the FDIC would be prohibited from setting off against the Deposits if it were to exercise its purported Section 9.5 rights.

**C. The FDIC Acts and Omissions Preclude Invocation of Section 9.5**

32. These bankruptcy cases have proceeded for more than a year. As far back as October 2008, the FDIC was involved in the JPMC-created dispute surrounding the Debtors' Deposits.<sup>16</sup> In all this time, the FDIC has not sought this Court's approval to invoke Section 9.5. In fact, it has affirmatively stated throughout that it had no intent to "interfere with the administration of these cases."<sup>17</sup>

33. In this time, the FDIC interposed a limited objection to the Account Stipulation and appeared at the related October 20, 2008 hearing without referencing Section 9.5. The FDIC then affirmatively lent its support to JPMC's specious claim to the Deposits at every chance it had. After the Debtors filed their SJ Motion, setting forth significant evidence that the Deposits were in fact the Debtors' assets, JPMC and the FDIC opposed the motion vigorously. In its papers, the FDIC argued that the "Debtors have failed to demonstrate the absence of any dispute as to the ownership of the funds in the six disputed accounts" and that there was a "significant need for discovery concerning [the Deposits] and the circumstances surrounding numerous transactions at involving those accounts." (FDIC Opp. at 1 and Supp. Opp. at 2 [Turnover Action Dkt. Nos. 97, 152].) As recently as two weeks ago, the FDIC argued to the Court that the FDIC hasn't "had an opportunity to conduct discovery. We don't have all of the data." (See **Exhibit B**, Tr. 10/22/09 at 64). *In an incredible about-face, the FDIC now concedes the*

---

<sup>16</sup> See *FDIC's Statement, Response and Limited Objection to Motion of Debtors Pursuant to Sections 105(a), 361, 362 and 542(b) of the Bankruptcy Code Seeking Approval of a Stipulation and Agreement Concerning Deposit Accounts at JPMorgan Chase Bank, National Association* (Docket No. 104).

<sup>17</sup> *Id.* at 2; See **Exhibit A**, Tr. 6/24/09 at 44 (FDIC Counsel: "We have not asserted that 9.5 right. Because we do not want to interfere with the administration of this bankruptcy case."); See **Exhibit C**, Tr. 10/20/08 at 23 (FDIC Counsel: "But Your Honor, we can't, and we don't want to interfere with the administration of this case ....").

*obvious truth that the Deposits are in fact deposits, but seeks to transfer the funds, not to the Debtors, but to the FDIC to attempt further withholding, delay, and setoff.*

34. The FDIC not only questioned ownership of the Deposits, but, on numerous occasions, the FDIC has gone on record in support of JPMC's putative right to setoff against the Deposits. Robert C. Schoppe, the "Receiver in Charge" of WMB's receivership, has asserted that the Debtors' argument that JPMC did not acquire the legacy-WMB claims that JPMC might seek to setoff against the Deposits "is contrary to the FDIC-Receiver's understanding of the provisions of the P&A Agreement that are relied upon by the Debtors." See Exhibit B (the "Schoppe Declaration") to the *Motion for Leave to File Declarations of Daniel P. Cooney and Robert C. Schoppe* (Adv. No. 09-50934, Docket No. 181) at ¶ 2.<sup>18</sup> This position is not only wrong (because JPMC acquired no legacy-WMB claims),<sup>19</sup> but it also runs directly counter to the FDIC's current stance, seeking to transfer the Deposits in a blatant attempt to establish mutuality and effectuate a setoff for FDIC's own benefit. By asserting JPMC's putative right to setoff for more than a year, the FDIC evidenced an intent that it would not seek to invoke Section 9.5 – an intent the FDIC also confirmed explicitly. See Exhibit A, Tr. 6/24/09 at 44

---

<sup>18</sup> See also FDIC Opposition to SJ Motion at 14 ("Even in the unlikely event that the funds in the disputed accounts were somehow not subject to setoff against claims held by JPMC, those funds still would be subject to setoff against claims held by the FDIC-Receiver."); Schoppe Declaration at ¶ 4 ("Contrary to Debtor's argument, Schedule 3.5 does not limit or divest JPMC of any interest, right, action, claim or judgment (including, but not limited to, claims for setoff or recoupment) that it might assert as a result of its acquisition of assets and certain liabilities pursuant to the P&A Agreement against . . . WMI."); Motion at 2-3 ("To be clear, the Debtors' interpretation of Schedule 3.5 is wrong, and the P&A Agreement does not have the effect on JPMC's setoff rights with respect to the Disputed Deposit Balances that the Debtors have advocated."); Motion at ¶ 15 ("The Debtors contend that JPMC does not have setoff rights with respect to the Disputed Deposit Balances for a variety of reasons. The FDIC-Receiver does not agree with the Debtors' assertions....").

<sup>19</sup> See *Debtors' Objection to Motion for Leave to File Declarations of Daniel P. Cooney and Robert C. Schoppe* (Adv. No. 09-50934, Docket No. 186).

(FDIC Counsel: “We have not asserted that 9.5 right. Because we do not want to interfere with the administration of this bankruptcy case.”). Based upon its conduct, the FDIC has waived any right to invoke Section 9.5. *See Cont’l Airlines*, 134 F.3d at 541 (“We recognize that a right of set-off is preserved under § 553 in a bankruptcy proceeding but we believe that the right must be exercised by the creditor in timely fashion and appropriately asserted in accordance with other provisions of the Bankruptcy Code.”); *In re Custom Ctr., Inc.*, 163 B.R. 309, 317 (Bankr. E.D. Tenn. 1994) (“If the creditor does not assert setoff in a timely manner in the bankruptcy case, it may lose the right to setoff under general rules of equity. The court need not identify exactly which rule of equity may bar the setoff. It may be estoppel, laches, waiver, or election.”); *In re Apex Int’l Mgmt. Serv., Inc.*, 155 B.R. 591, 596 (Bankr. M.D. Fla. 1993) (holding that IRS was not entitled to setoff against funds debtor received from Air Force where IRS stated its claim was not subject to setoff and two years later proclaimed to be a secured creditor, noting that “[t]he government should not be treated differently than other creditors”; during that interval debtor spent substantial funds pursuing claims against Air Force in reliance upon IRS’ assertion that it would not setoff.).

35. Moreover, the Debtors have negotiated with JPMC for more than a year and pursued JPMC through litigation for more than five months in reliance upon the FDIC’s actions, all at great expense to the Debtors’ estates. Against this backdrop, the FDIC’s newly-minted threat to reverse course and do what it said it would not do – on the eve of this Court’s impending decision on the SJ Motion concerning the Deposits – is unseemly gamesmanship and the FDIC should be stopped from attempting to moot the events of the past year. *See In re Calore Exp. Co.*, 288 F.3d 22, 39 (1st Cir. 2002) (“When . . . another party to the proceedings has relied on the waiver to its detriment, the court may invoke estoppel and rule that the waiver

has become irrevocable); *In re Metro. Int'l, Inc.*, 616 F.2d 83, 86 (3d Cir. 1980) (holding that creditor had expressly waived its setoff rights based upon statements to receiver and the court and that to the extent “receiver detrimentally rel[ie]d upon the waiver,” rescission would be stopped).

### **III. THE DEBTORS’ ESTATES WILL BE SEVERELY PREJUDICED AND THE BALANCE OF HARDSHIPS TILTS HEAVILY IN FAVOR OF THE DEBTORS**

36. As discussed above, the Deposits have been wrongfully withheld by JPMC for more than a year. After assisting JPMC to this end, and sensing the ultimate turnover of the Deposits to the Debtors, not only does the FDIC seek to further prejudice the Debtors by extending this deprivation through the transfer of the Deposits to the FDIC, but, despite the clear prohibition against such a setoff in section 553 of the Bankruptcy Code, the FDIC contemplates doing so in order to pay itself in full on account of purported claims against the Debtors’ estates. If allowed to do so, the value of the Deposits would not be shared among all of the Debtors’ legitimate creditors. Rather, a portion of the value of the Deposits would be allocated only to the FDIC (assuming it held allowable claims). The prejudice to the Debtors’ estates and their creditors is obvious and the stay should therefore remain in full force and effect.

37. Moreover, if allowed to transfer the Deposits from JPMC to the FDIC, the FDIC will have erased the progress the Debtors have made to date over the course of the Turnover Action. This is an action in which the FDIC has participated meaningfully through submitting numerous briefs, attending the deposition of the Debtors’ key affiant, and presenting oral argument. If allowed to invoke Section 9.5 at this late stage, the estate expenses incurred to date will be put to waste, leaving the Debtors to proceed as appropriate against the FDIC.

38. The further delay imposed on the Debtors threatens to derail the Debtors’ chapter 11 cases. The \$4 billion in Deposits are significant estate assets critical to the Debtors chapter 11

process. The recent amendments to the Bankruptcy Code impose a hard deadline of March 10, 2010 on the Debtors' exclusive period to file a chapter 11 plan. If the Debtors recover the Deposits from JPMC, they will be well-positioned to file a plan in advance of their exclusivity deadline. Without the Deposits, however, the Debtors will not be able to construct a viable plan beneficial to their creditors.

39. On the other hand, if the stay remains extant, the FDIC will not be prejudiced at all. Even if the Deposits were transferred, the FDIC will be prohibited from setting off against the Debtors' Deposits by operation of the Bankruptcy Code. Thus, the FDIC loses nothing if enjoined from invoking Section 9.5 as it has no basis to convert the Debtors' Deposits nor pay itself on account of claims asserted against the Debtors.<sup>20</sup> The FDIC therefore cannot overcome the significant burden of proving that the balance of hardships tips significantly in its favor and the Motion should be denied with prejudice. *W.R. Grace*, 2007 WL 1129170, at \*3.

---

<sup>20</sup> For the very same reason, FDIC's assertion that cause to lift the stay exists because its purported setoff rights require adequate protection is wrong. (Motion at ¶ 19.) In certain instances, courts may treat creditors asserting setoff rights against debtors as secured creditors who may be afforded adequate protection. *See, e.g., Lee v. Schweiker*, 739 F.2d 870, 874 (3d Cir. 1984). However, such a claimant will be considered a secured creditor only to the extent its claim "is subject to setoff under section 553 of [the Bankruptcy Code] or to the extent of the amount subject to setoff. . . ." 11 U.S.C. § 506(a); *see also In re New York City Shoes, Inc.*, 78 B.R. 426, 433 (Bankr. E.D. Pa. 1987) (finding adequate protection not applicable to funds which bank was prohibited from setting off per section 553(a)); *In re Gehrke*, 158 B.R. 465, 469 (Bankr. N.D. Iowa 1993) (holding that only "[o]nce established, the right to setoff is treated as an allowed secured claim under 11 U.S.C. § 506(a)"). Here, section 553 expressly prohibits the FDIC from setting off against the Deposits at all and thus FDIC is not a secured creditor and is not entitled to adequate protection.



**CONCLUSION**

For all of the reasons discussed above, the Court should reject the Motion in its entirety and instruct the FDIC that any actions taken to exert control over the Deposits will be found to be in willful violation of the automatic stay.

Dated: November 11, 2009  
Wilmington, Delaware

**RICHARDS, LAYTON & FINGER, P.A.**

*/s/ Andrew C. Irgens*

---

Mark D. Collins (No. 2981)  
Chun I. Jang (No. 4790)  
Lee E. Kaufman (No. 4877)  
Andrew C. Irgens (No. 5193)  
One Rodney Square  
920 North King Street  
Wilmington, Delaware 19801  
Telephone: (302) 651-7700  
Facsimile: (302) 651-7701

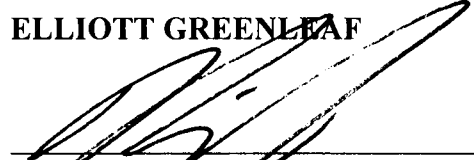
-and-

**WEIL, GOTSHAL & MANGES LLP**

Marcia L. Goldstein, Esq.  
Brian S. Rosen, Esq.  
767 Fifth Avenue  
New York, New York 10153  
Telephone: (212) 310-8000  
Facsimile: (212) 310-8007

*Attorneys to the Debtors  
and Debtors in Possession*

**ELLIOTT GREENLEAF**



---

Rafael X. Zamralde-Aravena (No. 4166)  
Neil R. Lapinski (No. 3645)  
Shelley A. Kinsella (No. 4023)  
1105 North Market Street, Suite 1700  
Wilmington, Delaware 19801  
Telephone: (302) 384-9400  
Facsimile: (302) 384-9399

-and-

**QUINN EMANUEL URQUHART  
OLIVER & HEDGES, LLP**

Peter E. Calamari  
Michael B. Carlinsky  
Susheel Kirpalani  
David Elsberg  
51 Madison Avenue  
New York, New York 10010  
Telephone: (212) 849-7000  
Facsimile: (212) 849-7100

*Special Litigation and Conflicts Co-Counsel  
to the Debtors and Debtors in Possession*

# **Exhibit A**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF DELAWARE

IN RE: )  
)  
)  
WASHINGTON MUTUAL, INC., ) Bankruptcy Action  
et al., ) Case No. 08-12229 (MFW)  
)  
) Chapter 11  
Debtors, )  

---

JPMORGAN CHASE BANK, )  
NATIONAL ASSOCIATION, )  
) Adv. Pro. No. 09-50551 (MFW)  
Plaintiff, )  
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:

For the Debtors:

BRIAN ROSEN, ESQUIRE  
Weil, Gotshal & Manges, LLP  
767 Fifth Avenue  
New York, New York 10153

MIKE CARLINSKY, ESQUIRE  
SUSHEEL KIRPALANI, ESQUIRE  
PETER CALAMARI, ESQUIRE  
Quinn Emanuel Urquhart Oliver &  
Hedges  
51 Madison Avenue, 22nd Floor  
New York, New York

MARK COLLINS, ESQUIRE  
CHUN L. JANG, ESQUIRE  
Richards, Layton & Finger  
One Rodney Square  
920 North King Street  
Wilmington, Delaware 19801

RAFAEL ZAHRALDDIN, ESQUIRE  
Elliott, Greenleaf  
1105 North Market St.  
Wilmington, Delaware 19801

For WMI Bond Holders:

PAUL O'CONNOR, ESQUIRE  
Kasowitz, Benson, Torres & Friedman  
1633 Broadway  
New York, New York 10019

JEFFREY M. SCHLERF, ESQUIRE  
Fox Rothschild LLP  
919 N. Market Street, Suite 1600  
Wilmington, DE 19801

For Official Committee  
of Unsecured Creditors:

DAVID STRATTON, ESQUIRE  
LAURENCE SHICKMAN, ESQUIRE  
Pepper, Hamilton  
Hercules Plaza  
1313 Market Street, Suite 5100  
Wilmington, Delaware

FRED HODARA, ESQUIRE  
ROBERT JOHNSON, ESQUIRE  
Akin Gump Strauss Hauer & Feld LLP  
1 Bryant Park  
New York, New York

(Appearances Continued)

For FDIC:

THOMAS CALIFANO, ESQUIRE  
JOHN CLARKE, ESQUIRE  
DLA Piper, LLP  
1251 Avenue of the Americas  
New York, New York 10020

BLAKE CLEARY, ESQUIRE  
Young, Conaway, Stargatt & Taylor  
The Brandywine Building  
1000 West Street  
17th Floor  
Wilmington, DE 19801

For JPMorgan Chase Bank:

ROBERT SACHS, ESQUIRE  
BRUCE CLARK, ESQUIRE  
HYDEE FELDSTEIN, ESQUIRE  
Sullivan & Cromwell, LLP  
1888 Century Park East  
Los Angeles, California 90067-1725

ADAM LANDIS, ESQUIRE  
Landis, Rath & Cobb  
919 Market Street  
Wilmington, Delaware 19899

Audio Operator:

Brandon McCarthy

Transcribed by:

DIANA DOMAN TRANSCRIBING  
P.O. Box 129  
Gibbsboro, New Jersey 08026-129  
PHONE: (856) 435-7172  
FAX: (856) 435-7124  
Email: [Dianadoman@comcast.net](mailto:Dianadoman@comcast.net)

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1 THE COURT: But is that true under Firrea, or are you  
2 now on the First Filed Rule?

3 MR. CALIFANO: No, it's both, Your Honor.

4 THE COURT: How -- how does Firrea --

5 MR. CALIFANO: I already -- okay, well the connection  
6 with Firrea, as the debtors have recognized, in the allegations  
7 from the complaint that I read to the Court.

8 They recognized the FDIC asserts an interest in those  
9 deposits. The FDIC's interest -- potential interest in those  
10 deposits, which will be an ultimate issue to determined at some  
11 point, relates to its role as receiver.

12 There was a reservation, a carve-out from the  
13 deposits language, of funds owed to a party who has obligations  
14 to the FDIC. That's in the purchase and assumption agreement.

15 We've asserted a proof of claim here. They are  
16 potentially liable to us. Potentially, we have an interest in  
17 those deposits in our role as receiver. Under Section 9.5, we  
18 have the right to direct JPMorgan Chase, and whether the stay  
19 applies or not, we could be in here, Your Honor, fighting the  
20 stay on that. I want the Court to recognize, we have that 9.5  
21 right.

22 We have not asserted that 9.5 right. Because we do  
23 not want to interfere with the administration of this  
24 bankruptcy case. Btu there are claims that are to be  
25 administered in the receivership, and to be administered under

1 Firrea.

2 They made a claim in the receivership to those  
3 deposits. We disallowed it. That's being litigated in the  
4 District Court. The deposits are an asset which the FDIC and  
5 the debtors recognize, there's no issue, they acknowledge we  
6 have asserted an interest in those deposits. That will be -- I  
7 don't want to go into the ultimate issues and the base for  
8 that. Mr. Kirpalani did, I think he was -- I just -- I think  
9 he wasn't on all fours with the facts, we could fight about  
10 that some other time.

11 But the deposits are at issue in our receivership,  
12 Your Honor. They clearly are at issue. Made the proof of  
13 claim, we denied it, they filed the District Court action.

14 THE COURT: But are they at issue only because you  
15 assert setoff rights?

16 MR. CALIFANO: No. They're at issue because they  
17 asserted a right to them and we denied that right. So the --

18 THE COURT: But --

19 MR. CALIFANO: It's not just --

20 THE COURT: Okay. I understand.

21 MR. CALIFANO: You understand what I'm saying? It's  
22 administering a claim. They asserted a right, we disallowed  
23 it, they filed the District Court action. That's the FDIC's  
24 claim process, that's what Firrea provides. And they -- and I  
25 want to make clear, the prejudice to them is minimal, Your

1           And it is not evidence from this -- the complaint and  
2 the attachments that there's any dispute as to the title to the  
3 account -- excuse me, deposit accounts. Obviously, I'm not  
4 deciding a disputed issue, and that may be disputed by the  
5 filing of an answer. I think I can predict that.

6           But this is different from the Lexington Healthcare  
7 case, where the dispute was evident from the debtor's complaint  
8 and attachments. It is not simply enough to say there is a  
9 dispute to preclude a turnover action. Otherwise, there could  
10 never be a turnover action.

11           So I will, as I say, deny the motion to dismiss the  
12 complaint.

13           MR. ROSEN: Your Honor, if I may, can we prepare four  
14 very simple orders based upon the record and send those to  
15 opposing counsel and to the Court?

16           THE COURT: You may.

17           MR. ROSEN: Thank you.

18           THE COURT: I think we're done today.

19           MR. CARLINSKY: The one additional issue, Your Honor,  
20 is in light of the motion to dismiss being denied, do we need a  
21 schedule for the opposition on the summary judgment motion,  
22 which is currently an open motion?

23           THE COURT: Yes.

24           MR. CARLINSKY: We can work that out --

25           THE COURT: Why don't you work that out. I think --



# **Exhibit B**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: :  
: Chapter 11  
WASHINGTON MUTUAL, INC., et : Case No. 08-12229 (MFW)  
al., :  
: (Jointly Administered)  
Debtors. :  
..... :  
IN RE: :  
: Chapter 11  
WASHINGTON MUTUAL, INC., et : Case No. 08-12229 (MFW)  
al., :  
: (Jointly Administered)  
Debtors. :  
..... :  
WASHINGTON MUTUAL, INC. and :  
WMI INVESTMENT CORP., :  
: Adv. Proc. No. 09-50934  
Plaintiffs, :  
v. :  
JPMORGAN CASH BANK, NATIONAL :  
ASSOCIATION, :  
Defendant. :  
.....

Wilmington, Delaware  
October 22, 2009  
9:31 a.m.

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:  
For the Debtors: Brian Rosen, Esquire  
Weil, Gotshal & Manges  
Chun Jang, Esquire  
Richards, Layton & Finger

1 For JPM Chase: Adam Landis, Esquire  
 Landis, Rath & Cobb

2

3 Robert Sacks, Esquire  
 Stacey Friedman, Esquire  
 Sullivan & Cromwell

4

5 For FDIC - Receiver: John Clarke, Esquire  
 Richard Hans, Esquire  
 DLA Piper

6

7 Blake Cleary, Esquire  
 Young, Conaway, Stargatt &  
 Taylor

8

9 For Official Committee  
 of Unsecured Creditors: Laurence Shiekman, Esquire  
 David Stratton, Esquire  
 Pepper Hamilton

10

11 Robert Johnson, Esquire  
 Akin Gump

12

13 For WMI Noteholders: Neil Lapinski, Esquire  
 Elliott Greenleaf

14

15 Thomas Lauria, Esquire  
 White & Case

16

17 Jeffrey Schlerf, Esquire  
 Fox Rothschild

18

19 For DIP: Peter Calamari, Esquire  
 David Elsberg, Esquire  
 Adam Abensohn, Esquire  
 Benjamin Finestone, Esquire  
 Quinn Emanuel

20 **VIA TELEPHONE:**

21

22 For One East Partners: Michael R. Adamski  
 One East Partners

23

24

25

1	For the Official Committee: of Unsecured Creditors	Scott L. Alberino, Esquire Fred S. Hodara, Esquire Davis Simonds, Esquire Peter J. Guefein, Esquire Akin, Gump, Strauss, Hauer & Feld
2		
3		
4	For Davidson Kempner:	Gavaskar Balasingam
5		
6	For The Seaport Group:	George Brickfield The Seaport Group
7		
8	In Propria Persona:	Dan Bullock
9		
10	For Bank of New York/Mellon:	Leo T. Crowley, Esquire Margot P. Erlich, Esquire Pillsbury, Winthrop, Shaw & Pitman, LLP
11		
12	For JPMorgan Chase Bank: Bank, N.A.	Hyde R. Feldstein, Esquire Joshua Frisch, Esquire Adam Hunt, Esquire Justin O'Connell, Esquire Sullivan & Cromwell, LLP
13		
14	For Wells Fargo, N.A.:	Walter H. Curchack, Esquire Vadim Rubenstein, Esquire Lobe & Lobe, LLP
15		
16	For Law Debenture Trust: Company of NY	Brian Guiney, Esquire Patterson, Belknap, Webb & Tyler
17		
18	For Tejas Securities Group:	Rob Halder Tejas Securities Group
19		
20	For Gruss Assett Management:	James Jacobs, Esquire Gruss & Company, LLC
21		
22	For Bank of America: Securities	Alexander Klipper Bank of America Securities
23		
24	For Bond Holders:	Stuart Kovensky Onex Credit Partners
25		
		Nancy Manzer, Esquire Wilmer, Cutler, Pickering, Hale & Dorr

1	For Bond Holders:	Mark Dendinger, Esquire
2		Bracewell & Giuliani -
		Connecticut
3	For Barclays Capital:	James Russo
4	For Angelo Gordon & Co.:	Edward Kressler
		Angelo & Gordon
5	For Mason Capital:	David MacKnight
6		Mason Capital
7	For CRT Capital Group:	Kevin Starke
		CRT Capital Group, LLC
8	For Talamod Asset Management:	Jay Steen
9		Talamod Asset Management, LLC
10	For Washington Mutual, Inc.:	Robert Williams
		Washington Mutual, Inc.
11		Evan Parness, Esquire
12		Erica Taggart, Esquire
		Quinn Emanuel
13		John Maciel, Esquire
14		Alvarez & Marsal
15	For Durham Asset Management:	Jeffrey A. Rosenkranz
		Durham Asset Management
16	For Appaloosa Management:	Jim Bolin
17		Appaloosa Management
18		Carl Stapen
		Fried Frank
19	For Elliott Management:	Whitman L. Holt, Esquire
20		K. John Shaffer, Esquire
		Stuntman, Treister & Glatt
21	For Winston & Strawn:	David Neier, Esquire
22		Winston & Strawn
23	Interested Parties:	Eleanor Chan
		Aurelius Capital
24		Howard Shinker
25		Shinker, Howard - Financial

1 Court Recorder: Brandon McCarthy  
2 Transcription Service: Perfect Pages Transcription, Inc.  
3 18 Tuckerton Road  
4 Shamong, NJ 08088  
5 www.perfecttranscripts.com  
6 (609) 654-8880

7 Proceedings recorded by electronic sound recording;  
8 transcript produced by transcription service.  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 are many, many material issues of fact. I'm not going to be  
2 able to get to the other points that I did want to make, but  
3 there are many issues of fact. There's has been no discovery  
4 in this case. We've had no opportunity to take any discovery  
5 of any decision makers. No executives of Washington Mutual,  
6 Inc., no board members of Washington Mutual, Inc., no  
7 regulators from Washington Mutual, Inc., and we believe that  
8 there should be an opportunity for reasonable discovery and  
9 that this Motion -- this issue ought to be heard on a proper  
10 and full evidentiary record. Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. CLARKE: Good morning, Your Honor. John Clarke  
13 from DLA Piper on behalf of the FDIC Receiver. Mr. Anker is  
14 invited to grab my suit jacket if I go over and take some of  
15 his time. I want to be very quick. I want to be respectful  
16 of Mr. Elsberg's rebuttal time as well.

17 THE COURT: Okay.

18 MR. CLARKE: The Debtors have positioned this Motion  
19 as a dispute between two parties, themselves and JPMorgan, but  
20 this is not accurate, Your Honor. Their Motion papers  
21 virtually ignore the FDIC Receiver's substantial rights in the  
22 disputed account balances, which received no mention in Mr.  
23 Elsberg's opening remarks.

24 Under 12, U.S.C., Section 1822(d), Your Honor, which I'm  
25 happy to hand up to the Court, if you'd like, the FDIC has a

1 statutory right of setoff against the insured deposits of any  
2 depositor in a failed bank as made, quote, as may be required  
3 to provide for the payment of any liability, end quote, of  
4 that depositor to the failed bank or its Receiver. Section  
5 9.5 of the P&A Agreement, which you've heard something about  
6 in the past, is intended to protect the FDIC Receiver's rights  
7 under Section 1822(d) among other things. Under that section  
8 -- by the way, the Third Circuit recognized that in the Gross  
9 versus Bell Savings Bank case that the Debtors cited in their  
10 reply (indiscernible). Under Section 9.5 of the P&A  
11 Agreement, the FDIC Receiver or FDIC corporate if the  
12 receivership is over, may direct JPMorgan to withhold the  
13 deposit balance of any depositor of a failed bank and return  
14 the deposit balance to the FDIC Receiver, at which point  
15 JPMorgan's liability to the depositor will be relieved.  
16 That's what the provision says. The reason that that  
17 provision is in there, I would submit, Your Honor, is to  
18 prevent the type of setoff shell game that the Debtors are  
19 advocating here.

20 The Debtors' arguments on setoff are on -- in the case of  
21 JPMorgan, oh, they don't have a claim. We haven't heard what  
22 their argument is against the FDIC Receiver, but they said in  
23 their receivership Proof of Claim, the FDIC Receiver doesn't  
24 have setoff. Undoubtedly they'll say it's because, oh, they  
25 don't have the accounts. Well, in that case, we'll take the



1 accounts back and we'll litigate about the setoff at that  
2 point. There should not be -- the Debtors are not unique  
3 among depositors, if these are, in fact, depositors in the  
4 United States, in being able to evade setoff rights of their  
5 financial institution.

6 If, therefore, the Court concludes that JPMorgan setoff  
7 rights somehow do not preclude turnover here, then the FDIC  
8 Receiver is prepared promptly to exercise its Section 9.5  
9 rights and to direct JPMorgan to return the account balances  
10 to the FDIC Receiver. The Debtors assert that a Lift Stay  
11 Motion would be necessary for us to do that. We don't  
12 necessarily agree, but if that's what is required, we're  
13 prepared to bring that Motion on promptly.

14 There's two points that the Debtors raised in their reply  
15 that I'd like to address at this point. First, it is not  
16 true, as the Debtors assert, that the FDIC Receiver's claims  
17 in the DC action against them and in the Proof of Claim here  
18 merely duplicate the JP -- JPMorgan's claims. For example,  
19 the FDIC has a claim for fraudulent conveyance against the  
20 Debtors for the \$922 million that was transmogrified from a  
21 general unsecured -- general ledger entry into purported  
22 deposit balances on the literal eve of the receivership for  
23 Washington Mutual Bank. The Debtors argue in their reply  
24 brief, oh, but your fraudulent conveyance statute says it  
25 doesn't apply to payments on an antecedent debt in good faith.

1 Well, the facts here demonstrate a significant question of  
2 fact as to whether there was good faith for that transfer.  
3 This was the first time in at least five years that a transfer  
4 of these amounts had been made from the bank to the holding  
5 company while this bank was rapidly losing deposits and was in  
6 the midst of discussions with its regulators about its  
7 survival.

8 Another claim that the FDIC Receiver has asserted that  
9 JPMorgan does not have is for recovery of unlawful dividends,  
10 which far exceeds the balances in these accounts. Yet another  
11 would be the Debtors' failure to capitalize their bank or to  
12 accurately account for the bank's loan losses and, therefore,  
13 not portray the bank's financial situation to its regulators  
14 appropriately.

15 Second, the Debtors have suggested that the FDIC  
16 Receiver's rights under Section 9.5 do not extend to balances  
17 held at WMB, FSB. But Your Honor asked why does it matter if  
18 the balances were at FSB or Washington Mutual Bank? Well,  
19 this is one reason why it matters. The Debtors say, well, the  
20 P&A rights under Section 9.5 don't go there. They never  
21 address that in their papers. They never address the fact  
22 that their own Motion for Summary Judgment shows that those  
23 accounts never moved from WMB to WMB, FSB. I'll direct you to  
24 pages A-37 and A-41 of the Debtors' appendix on their Motion  
25 for Summary Judgment. Those are the account statements for

1 the 4234 account, which the Debtors assert is at WMB, FSB.  
2 Those account statements indicate that that account is at WMB,  
3 FA.

4 The Debtors have also argued that discovery isn't  
5 necessary here because JPMorgan has all the data. They have  
6 all the employees. Well, that's not true for the FDIC  
7 Receiver. We haven't had an opportunity to conduct discovery.  
8 We don't have all of the data. We don't have access to the  
9 employees, including people who are employed by the Debtors  
10 here. Mr. Smith in the courtroom, for instance, is a material  
11 witness on these issues. Mr. Williams, employed by the  
12 Debtors is a material witness on this issue. Other witnesses  
13 mentioned by Mr. Elsberg, Mr. Casey, Mr. Rotella, Mr. Brennan,  
14 we haven't had an opportunity to take their depositions.  
15 Yolanda Nobalazada (*ph*) who is the person who implemented the  
16 erroneous transfers. We haven't had a chance to take her  
17 deposition. All of these potential depositions go directly to  
18 the issues on -- in dispute on this Motion.

19 Let me just close by telling you a few areas where I  
20 think discovery is certainly necessary for the FDIC Receiver.  
21 We need inquiry to the facts surrounding this  
22 re-characterization of \$922 million of general unsecured  
23 ledger entries into putative deposits on the eve of the  
24 receivership. Was it even owed? We don't know yet. Ms.  
25 Logan wasn't able to offer anything on that subject. We need

1 inquiry into the facts surrounding this alleged transfer of  
2 the \$3.67 billion to FSB, and whether that, in fact, happened.  
3 Mr. Sacks put up a board that listed about 17 to 18 or 20  
4 reasons why that transaction was inherently suspicious.  
5 Again, under Section 1821(d)(17), even -- strike that. Sorry,  
6 Your Honor. We need discovery into why the account statements  
7 for the 4234 account continue to reflect that those balances  
8 are being held at Washington Mutual Bank, FA and not  
9 Washington Mutual Bank, FSB. And as I mentioned, the  
10 witnesses, at a minimum, whose depositions we need to take  
11 include Robert Williams, employed by the Debtors, Chad Smith,  
12 employed by the Debtors, Tom Casey, Steve Rotella, Carey  
13 Brennan and Yolanda Nobalazada.

14 Your Honor, there's been no discovery whatever in this  
15 case or any of the related litigation. Summary judgment  
16 should be denied here. This deposit issue should be sorted  
17 out with all of the other issues that are at stake between  
18 these parties on an expedited schedule, which we've  
19 demonstrated our willingness to follow. Thank you very much.

20 THE COURT: Thank you.

21 MR. ANKER: I'll try to be very brief, Your Honor,  
22 and not push you or anyone's patience. Philip Anker, Wilmer,  
23 Cutler, Pickering, Hale & Dorr for the bank Bondholders who  
24 Your Honor allowed to intervene. I want to try and follow up  
25 a little bit and -- Mr. Clarke and I tried to coordinate last

1 night. He's taken some of my thunder, but that will make it  
2 more rapid for me.

3 This is not a two-party dispute. There is a separate  
4 estate here and an estate that has far more Creditors. Let me  
5 give Your Honor some sense of the numbers here. The WMI  
6 estate has 3 tranches of bond debt. It adds up to about 6  
7 plus billion in debt. At the bank Bondholder level, there's  
8 over \$13.7 billion of bank Bondholders who thought they were  
9 structurally senior. They alone got an operating company at  
10 lower interest rates expecting that they would get paid. And  
11 their rights matter here and that's why we're an intervenor  
12 and why the FDIC is an intervenor. How does that matter as a  
13 legal matter? It matters on both prongs. And I agree with  
14 counsel, there are two things they have to satisfy to get  
15 summary judgment.

16 First, this is an undisputed debt owed to them. You  
17 heard counsel say, what could be unjust about paying this  
18 money over to WMI? What's unjust about it is it's the bank's  
19 money. Take the tax refunds, and I don't concede this is a  
20 \$243 million issue. We haven't had discovery, but there are  
21 records and they are in the record here. The FDIC cites them  
22 that 3.1 billion, with a B, of net tax payments all deriving  
23 at the bank, were in the WMI accounts. Let me read to you  
24 just one second what the law is in this area and this comes  
25 out of the interagency --

1 THE COURT: Where do you -- where is there evidence  
2 of the 3.1 billion of tax refunds being in these accounts?

3 MR. ANKER: Your Honor, it's in -- the FDIC's brief  
4 cites to it. It is in one of the underlying documents --

5 MR. CLARKE: Exhibit L to the Logan Affidavit, Your  
6 Honor.

7 MR. ANKER: Thank you, Mr. Clarke. Now, we've had  
8 no discovery on that and I'm not going to represent to you  
9 that's the right number, but I do know there's evidence of it.  
10 In the interagency statement, and I will read this to you.  
11 It's just two sentences, Your Honor. Regardless of the  
12 treatment of an institutions tax loss for regulatory reporting  
13 and supervisory purposes, a parent company, that's WMI, that  
14 receives a tax refund from a taxing authority obtains those  
15 funds as agent, agent, for the consolidated group on behalf of  
16 the group members. Accordingly, an organization's Tax  
17 Allocation Agreement or other corporate policies should not  
18 purport to characterize refunds attributable to a  
19 subsidiary's, the subsidiary here is the bank, a subsidiary  
20 depository institution that the parent receives from the  
21 taxing authority as the property of the parent. It's the  
22 bank's money. It was the bank's money and it either is today  
23 the bank's money or it is JPM's money if it has been sold, but  
24 it is most assuredly not WMI's money. That's one element.  
25 And I'm going to -- Mr. Sacks pointed out to a lot of other

1 issues on ownership, I've got limited time. I only want to  
2 focus on that one because it matters because it's our money.

3 The other is setoff. Your Honor asked the right  
4 question. What difference does it make? Let's assume the WMB  
5 transfer to WM, FSB of this liability three days before the  
6 bankruptcy all designed, obviously, to defeat setoff rights.  
7 That's got to be what was going on here. Let's assume you're  
8 right and we undo it all. What is the consequence of undoing  
9 it all if that ends up being where Your Honor comes out? It's  
10 demonstrably important because it creates mutuality for  
11 setoff. You then have the deposit liability, if it's a real  
12 liability, if 3.7 billion is owed, entirely owed by Washington  
13 Mutual Bank, Washington Mutual Bank. And as Mr. Clarke  
14 pointed out in Section 9.5 is in the record and it is  
15 unequivocal the bank can require back the deposit. I'll read  
16 you the critical sentence. At the direction of the Receiver,  
17 that's the FDIC or the corporation, that's FDIC Corporate, the  
18 assuming bank, the assuming bank here is JPM, shall return all  
19 or any portion of such deposit balance to the Receiver or the  
20 corporation as appropriate and there upon the assuming bank  
21 shall be discharged, that's JPM, from any further liability to  
22 such depositor with respect to such return deposit balance.  
23 So the 3.7 goes back to WMB. Why does that matter? Your  
24 Honor, this is why this Motion -- you don't have to decide  
25 anything else, this requires denial of this Motion. The

1 Receiver has claims here in the record, pre-petition Proof of  
2 Claim and Counterclaims for upwards of \$15 billion. There has  
3 been no objection to those claims, no disallowance to those  
4 claims, no anything with respect to those claims. You can't  
5 adjudicate a Turnover Motion with a party who is alleged to  
6 have -- to be obligated to turnover has countervailing claims  
7 and those claims haven't been adjudicated.

8 THE COURT: The FDIC has the claims, not the party  
9 against whom the Turnover Action has been filed.

10 MR. ANKER: But that's --

11 THE COURT: There has been no demand to return the  
12 deposits.

13 MR. ANKER: And what -- that's right, Your Honor.  
14 And what you've heard Mr. Clarke say is that the FDIC is  
15 prepared to make that demand if that is necessary. And the  
16 reason, Your Honor, is that the FDIC has not believed is  
17 necessary because the remaining language says, and I'll read  
18 it to you, Your Honor. That the FDIC can simply direct JPM to  
19 withhold payment without demanding it back. But, Your Honor,  
20 if there is any dispute, you allowed my clients to intervene.  
21 If there is any dispute here, we on behalf of the bank  
22 Bondholders and the FDIC assert we are Creditors of this  
23 estate, Secured Creditors secured by interest in these  
24 deposits. We can demand back the money and the FDIC has said  
25 it will demand back the money.



# **Exhibit C**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Chapter 11  
WASHINGTON MUTUAL, INC., .  
*et al.*, . Case No. 08-12229 (MFW)  
. (Jointly Administered)  
. .  
. October 20, 2008  
. 2:00 p.m.  
Debtors. . (Wilmington)  
. .

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1 with the FDIC's ability to do its job and all its rights and  
2 powers. Both as receiver and regulator. But Your Honor, we  
3 can't, and we don't want to interfere with the administration  
4 of this case, but I think there's a concern when the WMB  
5 bondholders are in here trying to insert themselves in the  
6 process when their rights are derivative of ours. Now we  
7 recognize, the FDIC recognizes that those bondholders we have  
8 to answer to on some levels. And those bondholders'  
9 interests, at certain levels, need to be brought into  
10 account. But my client, having read the objection they filed  
11 today, wants us to make it very clear that we believe any  
12 rights that they have in this proceeding are derivative of  
13 rights of the FDIC. And the FDIC is here to assert the  
14 rights of the receiver to the extent any exist. And to, then  
15 the rights and claims that may derive from WMB. We have a  
16 very important job to do, Your Honor. We don't want to  
17 interfere with this case. But we can't have proceedings in  
18 this case interfere with our job. So they wanted to make it  
19 very clear that we believe that their claim, that their  
20 rights are derivative of ours. And also Mr. Hodara said  
21 something that I think might have given the Court the wrong  
22 impression. We did get changes to the order that made the  
23 FDIC more comfortable, but I don't think that put us at odds  
24 with JP Morgan Chase. I think that there are some  
25 considerations that flow from our preservation of all our

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

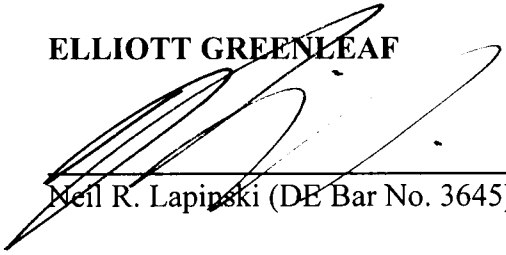
-----	x	
In re	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC., <i>et al.</i> , <sup>1</sup>	:	Case No. 08-12229 (MFW)
	:	
Debtors.	:	Jointly Administered
-----	x	

**CERTIFICATE OF SERVICE REGARDING  
DEBTORS' OBJECTION TO MOTION OF THE FEDERAL DEPOSIT  
INSURANCE CORPORATION, AS RECEIVER FOR WASHINGTON  
MUTUAL BANK, FOR AN ORDER MODIFYING THE AUTOMATIC STAY**

I, Neil R. Lapinski, Delaware counsel to Washington Mutual, Inc. and WMI Investment Corp., hereby certify that I caused copies of the *Debtors' Objection to Motion of the Federal Deposit Insurance Corporation, as Receiver for Washington Mutual Bank, for an Order Modifying the Automatic Stay* to be served on November 11, 2009 to all Notice Parties via hand delivery on all local parties; and via U.S. First Class Mail and Foreign First Class Mail upon the remaining parties listed on the attached service list.

Dated: November 11, 2009  
Wilmington, Delaware

**ELLIOTT GREENLEAF**

  
\_\_\_\_\_  
Neil R. Lapinski (DE Bar No. 3645)

*Special Litigation and Conflicts  
Counsel to Washington Mutual, Inc.  
and WMI Investment Corp.*

<sup>1</sup> 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.

***Hand Delivery***

Archer & Greiner PC  
Charles J Brown III  
300 Delaware Avenue, Suite 1370  
Wilmington, DE 19801

***Hand Delivery***

Ashby & Geddes PA  
Don A Beskrone  
Amanda M Winfree  
William P Bowden  
500 Delaware Avenue, 8<sup>th</sup> Floor  
P.O. Box 1150  
Wilmington, DE 19899

***Hand Delivery***

Attorney Generals Office  
Joseph R Biden III  
Carvel State Office Building  
820 N. French Street, 8<sup>th</sup> Floor  
Wilmington, DE 19801

***Hand Delivery***

Bayard PA  
Jeffrey M Schlerf  
P.O. Box 25130  
Wilmington, DE 19899

***Hand Delivery***

Connolly Bove Lodge & Hutz LLP  
Marc J Phillips  
Jeffrey C Wisler  
1007 N. Orange Street  
P.O. Box 2207  
Wilmington, DE 19899

***Hand Delivery***

Blank Rome LLP  
Michael DeBaecke  
1201 Market Street, Suite 800  
Wilmington, DE 19801

***Hand Delivery***

Cross & Simon LLC  
Christopher P Simon  
913 N. Market Street, 11<sup>th</sup> Floor  
Wilmington, DE 19801

***Hand Delivery***

Delaware Dept of Justice  
Attn: Bankruptcy Department  
Division of Securities  
820 N. French Street, 5<sup>th</sup> Floor  
Wilmington, DE 19801

***Hand Delivery***

Department of Labor  
Division of Unemployment Insurance  
4425 N. Market Street  
Wilmington, DE 19802

***Hand Delivery***

Eckert Seamans Cherin & Mellot LLC  
Ronald S Gellert  
Tara L Lattomus  
300 Delaware Avenue, Suite 1210  
Wilmington, DE 19801

***Hand Delivery***

Edwards Angell Palmer & Dodge LLP  
Craig R Martin  
Stuart M Brown  
919 N. Market Street, 15<sup>th</sup> Floor  
Wilmington, DE 19801

***Hand Delivery***

Fox Rothschild LLP  
Jeffrey M Schlerf  
919 N. Market Street  
Citizens Bank Center, Suite 1600  
Wilmington, DE 19801

***Hand Delivery***

Landis Rath & Cobb LLP  
Adam G Landis  
Matthew B McGuire  
919 Market Street, Suite 600  
Wilmington, DE 19801

***Hand Delivery***

Morris James LLP  
Brett D Fallon  
500 Delaware Avenue, Suite 1500  
P.O. Box 2306  
Wilmington, DE 19899-2306

***Hand Delivery***

**Office of the United States Trustee Delaware**  
**Joseph McMahan**  
**844 King Street, Suite 2207**  
**Lockbox 35**  
**Wilmington, DE 19899-0035**

***Hand Delivery***

**Pepper Hamilton LLP**  
**David B Stratton**  
**David M Fournier**  
**Evelyn J Meltzer**  
**Hercules Plaza, Suite 5100**  
**1313 N. Market Street**  
**Wilmington, DE 19801**

***Hand Delivery***

Young Conaway Stargatt & Taylor LLP  
M Blake Cleary  
Robert S Brady  
1000 West Street, 17<sup>th</sup> Floor  
Wilmington, DE 19801

***Hand Delivery***

Reed Smith LLP  
J Cory Falgowski  
Kurt F Gwynne  
1201 Market Street, Suite 1500  
Wilmington, DE 19801

***Hand Delivery***

**Richards Layton & Finger PA**  
**Chun I Jang**  
**Mark D Collins**  
**One Rodney Square**  
**920 N. King Street**  
**Wilmington, DE 19899**

***Hand Delivery***

Saul Ewing LLP  
Mark Minuti  
222 Delaware Avenue, Suite 1200  
P.O. Box 1266  
Wilmington, DE 19899

***Hand Delivery***

State of Delaware Division of Revenue  
Randy R Weller MS No 25  
820 N. French Street, 8<sup>th</sup> Floor  
Wilmington, DE 19801-0820

***Hand Delivery***

US Attorneys Office  
Ellen W Slight  
1007 N. Orange Street, Suite 700  
P.O. Box 2046  
Wilmington, DE 19899-2046

***Hand Delivery***

Werb & Sullivan  
Duane D Werb  
Matthew P Austria  
300 Delaware Avenue, Suite 1300  
P.O. Box 25046  
Wilmington, DE 19899

***First Class Mail***

Akin Gump Strauss Hauer & Feld LLP  
David P Simonds  
Peter J Gurfein  
2029 Century Park E, Suite 2400  
Los Angeles, CA 90067-3012

***First Class Mail***

Acxiom Corporation  
CB Blackard III  
301 E Dave Ward Drive  
PO Box 2000  
Conway, AR 72033-2000

***First Class Mail***

Akin Gump Strauss Hauer & Feld LLP  
Scott L Alberino  
1333 New Hampshire Avenue, NW  
Washington, DC 20036

***First Class Mail***

Arent Fox LLP  
Andrew Silfen  
1675 Broadway  
New York, NY 10019

***First Class Mail***

Arapahoe County Attorneys Office  
George Rosenberg  
5334 S Prince Street  
Littleton, CO 80166

***First Class Mail***

Angelo Gordon & Co  
Edward W Kressler  
245 Park Avenue, 26th Floor  
New York, NY 10167

***First Class Mail***

Arent Fox LLP  
Jeffrey N Rothleder  
1050 Connecticut Ave NW  
Washington, DC 20036

***First Class Mail***

Akin Gump Strauss Hauer & Feld LLP  
Fred S Hodara  
One Bryant Park  
New York, NY 10036

***First Class Mail***

Alston & Brid LLP  
J William Boone  
1201 W Peachtree St  
Atlanta, GA 30309-3424

***First Class Mail***

Arnall Golden Gregory LLP  
Darryl S Laddin  
Michael F Holbein  
171 17th St NW Ste 2100  
Atlanta, GA 30363-1031

***First Class Mail***

Bank of New York Mellon  
Attn Gary S Bush  
Global Corporate Trust  
101 Barclay St  
New York, NY 10286

***First Class Mail***

Bartlett Hackett Feinberg PC  
Frank F McGinn  
155 Federal St 9th Fl  
Boston, MA 02110

***First Class Mail***

Bernstein Litowitz Berger & Grossmann LLP  
Chad Johnson  
Hannah Ross  
Jerald Bien Willner  
1285 Avenue of the Americas 38th Fl  
New York, NY 10019

***First Class Mail***

Breslow & Walker LLP  
Roy H Carlin  
767 Third Ave  
New York, NY 10017

***First Class Mail***

Bronwen Price  
Gail B Price  
2600 Mission St Ste 206  
San Marion, CA 91108

***First Class Mail***

Brown & Connery LLP  
Donald K Ludman  
6 N Broad St Ste 100  
Woodbury, NJ 08096

***First Class Mail***

Buchalter Nemer PC  
Shawn M Christianson  
333 Market St 25th Fl  
San Francisco, CA 94105-2126



***First Class Mail***

Cairncross & Hempelmann PS  
John R Knapp Jr  
542 2nd Ave Ste 500  
Seattle, WA 98104-2323

***First Class Mail***

Capehart & Scatchard PA  
William G Wright  
8000 Midlantic Dr Ste 300S  
Mt Laurel, NJ 08054

***First Class Mail***

Centerbridge Capital Partners LP  
Vivek Melwani  
375 Park Ave 12th Fl  
New York, NY 10152-0002

***First Class Mail***

City and County of Denver  
Eugene J Kottenstette  
Municipal Operations  
201 W Colfax Ave Dept 1207  
Denver, CO 80202-5332

***First Class Mail***

City of Fort Worth  
Christopher B Mosley  
1000 Throckmorton St  
Fort Worth, TX 76102

***First Class Mail***

Cox Smith Matthew Inc  
Patrick L Huffstickler  
112 E Pecan Ste 1800  
San Antonio, TX 78205

***First Class Mail***

County Attorneys Office  
Erica S Zaron Asst County Attorney  
2810 Stephen P Clark Center  
111 NW First St  
Miami, FL 33128-1993

***First Class Mail***

David D Lennon  
Asst Attorney General  
Revenue Section  
PO Box 629  
Raleigh, NC 27602-0629

***First Class Mail***

Curtis Mallet Prevost Colt & Mosle LLP  
Steven J Reisman  
101 Park Ave  
New York, NY 10178-0061

***First Class Mail***

Delaware Secretary of the Treasury  
PO Box 7040  
Dover, DE 19903

***First Class Mail***

Delaware Secretary of the State  
Division of Corporations  
PO Box 898  
Franchise Tax Division  
Dover, DE 19903

***First Class Mail***

Dewey & LeBoeuf LLP  
Andrew Z Lebwohl  
Peter A Ivanick  
1301 Avenue of the Americas  
New York, NY 10019

***First Class Mail***

Tannenbaum Helporn Syracuse & Hirschtritt LLP  
900 Third Avenue, 13<sup>th</sup> Floor  
New York, NY 10022

***First Class Mail***

DLA Piper LLP  
Jeremy R Johnson  
Thomas R Califano  
1251 Avenue of the Americas  
New York, NY 10020-1104

***First Class Mail***

E Gaston Riou  
110 SW Robin Rd  
Lees Summit, MO 64063

***First Class Mail***

Friedlander Misler  
Robert E Greenberg  
1101 17th St NW Ste 700  
Washington, DC 20036-4704

***First Class Mail***

Electronic Data Systems LLC  
Ayala A Hassell  
5400 Legacy Dr  
MS H3 3A 05  
Plano, TX 75024

***First Class Mail***

Entwistle & Cappucci LLP  
Andrew J Entwistle  
Johnston de F Whitman Jr  
Joshua K Porter  
280 Park Ave 26th Fl  
New York, NY 10017

***First Class Mail***

Federal Deposit Insurance Corp  
Donald McKinley  
Stephen J Pruss  
1601 Bryan St  
PAC 04024  
Dallas, TX 75201

***First Class Mail***

First Pacific Bank of California  
Jame Burgess  
9333 Genesee Ave Ste 300  
San Diego, CA 92121

***First Class Mail***

Fox Hefter Swibel Levin & Carroll LLP  
Margaret Peg M Anderson  
200 W Madison St Ste 3000  
Chicago, IL 60606

***Foreign First Class Mail***

Freshfields Bruckhaus Deringer LLP  
Will Higgs  
65 Fleet St  
London, EC4Y 1HS UK

***First Class Mail***

Freshfields Bruckhaus Deringer US LLP  
Harvey Dychiao  
520 Madison Ave  
New York, NY 10022

***First Class Mail***

Fried Frank Harris Shriver & Jacobson LLP  
Brian D Pfeiffer  
Matthew M Roose  
One New York Plaza  
New York, NY 10004-1980

***First Class Mail***

Gay McCall Isaacks Gordon & Roberts  
David McCall  
777 E 15th St  
Plano, TX 75074

***First Class Mail***

Goulston & Storrs PC  
Christine D Lynch  
400 Atlantic Ave  
Boston, MA 02110-333

***First Class Mail***

Greer Herz & Adams LLP  
Tara B Annweiler  
Frederick Black  
One Moody Plz 18th Fl  
Galveston, TX 77550

***First Class Mail***

Gulf Group Holdings Acquisitions & Applications  
Beatriz Agramonte  
18305 Biscayne Blvd Ste 400  
Aventura, FL 33160

***First Class Mail***

Hagens Berman Sobol Shapiro LLP  
Andrew M Volk  
1301 Fifth Ave Ste 2900  
Seattle, WA 98101

***First Class Mail***

Hangley Aronchick Segal & Pudlin  
Ashley M Chan  
One Logan Square 27th Fl  
Philadelphia, PA 19103

***First Class Mail***

Hennigan Bennet Dorman LLP  
Bennett J Murphy  
Michael C Schneiderei  
865 S Figueroa St Ste 2900  
Los Angeles, CA 90017

***First Class Mail***

IBM Corporation  
Vicky Namken  
13800 Diplomat Dr  
Dallas, TX 75234

***First Class Mail***

Hewlett Packard Company  
Ken Higman  
2125 E Katella Ave Ste 400  
Anaheim, CA 92806

***First Class Mail***

Hodges and Associates  
A Clifton Hodges  
4 E Holly St Ste 202  
Pasadena, CA 91103-3900

***First Class Mail***

IBM Credit LLC  
Bill Dimos  
North Castle Dr  
MD 320  
Armonk, NY 10504

***First Class Mail***

Internal Revenue Service  
Insolvency Section  
31 Hopkins Plz Rm 1150  
Baltimore, MD 21201

***First Class Mail***

Johnson Pope Bokor Ruppel & Burns LLP  
Angelina E Lim  
PO Box 1368  
Clearwater, FL 33757

***First Class Mail***

Kasowitz Benson Torres & Friedman  
Daniel A Fliman  
David S Rosner  
Paul M Oconnor III  
Trevor J Welch  
1633 Broadway  
New York, NY 10019

***First Class Mail***

Keller Rohrback LLP  
Derek W Loeser  
Lynn L. Sarko  
Karin B. Swope  
1201 Third Ave Ste 3200  
Seattle, WA 98101

***First Class Mail***

Kelley Drye & Warren LLP  
Eric R Wilson  
Howard S Steel  
101 Park Ave  
New York, NY 10178

***First Class Mail***

Law Debenture Trust Company of New York  
Jame Heaney  
400 Madison Ave 4th Fl  
New York, NY 10017

***First Class Mail***

Law Offices of Lippe & Associates  
Emil Lippe Jr  
600 N Pearl St Ste S2460  
Plaza of the Americas South Tower  
Dallas, TX 75201

***First Class Mail***

Law Offices of Robert E Luna PC  
Andrea Sheehan  
4411 N Central Expressway  
Dallas, TX 75205

***First Class Mail***

Leslie Stephen Wolfe  
711 Van Nuys St  
San Diego, CA 92109

***First Class Mail***

Linebarger Goggan Blair & Sampson LLP  
Elizabeth Weller  
2323 Bryan St Ste 1600  
Dallas, TX 75201

***First Class Mail***

Loeb & Loeb LLP  
Daniel B Besikof  
Vadim J Rubinstein  
Walter H Curchack  
345 Park Ave  
New York, NY 10154

***First Class Mail***

Lowenstein Sandler PC  
Eric H Horn  
Ira M Levee  
Joseph M Yar  
Michael S Etkin  
Vincent A Dagostino  
65 Livingston Ave  
Roseland, NJ 07068

***First Class Mail***

Manatee County Tax Collector  
Ken Burton  
Michelle Leeson  
PO Box 25300  
Bradenton, FL 34206-5300

***First Class Mail***

Manatee County Tax Collector  
Ken Burton  
Michelle Leeson  
819 US 301 Blvd W  
Bradenton, FL 34205

***First Class Mail***

McCreary Veselka Bragg & Allen  
Michael Reed  
PO Box 1269  
Round Rock, TX 78680

***First Class Mail***

McDermott Will & Emery LLP  
Gary O Ravert  
Nava Hazan  
340 Madison Ave  
New York, NY 10173-1922

***First Class Mail***

Miami Dade Bankruptcy Unit  
Alberto Burnstein  
140 W Flagler St Ste 1403  
Miami, FL 33130-1575

***First Class Mail***

McGuire Woods LLP  
Sally E Edison  
Nicholas E Meriwether  
625 Liberty Ave 23rd Fl  
Pittsburgh, PA 15222

***First Class Mail***

Newstart Factors Inc  
Gregory Vadasdi  
2 Stamford Plaza Ste 1501  
281 Tresser Blvd  
Stamford, CT 06901

***First Class Mail***

Morrison & Foerster LLP  
Brett H Miller  
1290 Avenue of the Americas  
New York, NY 10104

***First Class Mail***

O Melveny & Myers LLP  
Michael J Sage  
Jason Alderson  
Time Square Tower  
7 Times Square  
New York, NY 10036

***First Class Mail***

Office of Thrift Supervision  
Christopher A Sterbenz  
Trial Counsel Litigation Div  
1700 G St NW  
Washington, DC 20552

***First Class Mail***

Office of Thrift Supervision  
Darrell W Dochow  
Pacific Plaza  
2001 Junipero Serra Blvd Ste 650  
Daly City, CA 94014-1976

***First Class Mail***

Oregon Dept of Justice  
Carolyn G Wade  
Senior Asst Attorney General  
1162 Court St NE  
Salem, OR 97301-4096

***First Class Mail***

Patterson Belknap Webb & Tyler  
Brian P Guiney  
Daniel A Lowenthal  
1133 Avenue of the Americas  
New York, NY 10036-6710

***First Class Mail***

Pension Benefit Guaranty Corp  
Joel W Ruderman  
Office of the Chief Counsel  
1200 K St NW  
Washington, DC 20005-4026

***First Class Mail***

Perdue Brandon Fielder Collins & Mott LLP  
Elizabeth Banda  
PO Box 13430  
Arlington, TX 76094-0430

***First Class Mail***

Perkins Coie LLP  
Alan D Smith  
Brian A Jennings  
Ronald L Berenstain  
1201 Third Ave 48th Fl  
Seattle, WA 98101

***First Class Mail***

San Diego Treasurer Tax Collector of California  
Bankruptcy Desk  
Dan McAllister  
1600 Pacific Hwy Rm 162  
San Diego, CA 92101

***First Class Mail***

Phillips Goldman & Spence PA  
Stephen W Spence  
1200 N Broom St  
Wilmington, DE 19806

***First Class Mail***

San Joaquin County Treasurer & Tax Collector  
Christine M Babb  
500 E Mail St 1st Fl  
PO Box 2169  
Stockton, CA 95201

***First Class Mail***

Pillsbury Winthrop Shaw Pittman LLP  
Rick B Antonoff  
Erica Carrig  
1540 Broadway  
New York, NY 10036-4039

***First Class Mail***

Plains Capital Bank Building  
Michael S Mitchell  
18111 N Preston Rd Ste 810  
Dallas, TX 75252

***First Class Mail***

Platzer Sergold Karlin Levine Goldberg Jaslow LLP  
Sydney G Platzer  
1065 Avenue of the Americas 18th Fl  
New York, NY 10018

***First Class Mail***

Reed Smith LLP  
J Andrew Rahl  
James C McCarroll  
599 Lexington Ave, 30<sup>th</sup> Floor  
New York, NY 10022

***First Class Mail***  
Riddell Williams PS  
Joseph E Shickich Jr  
1001 4th Ave Ste 4500  
Seattle, WA 98154-1192

***First Class Mail***  
Robert M Menar  
700 S Lake Ave Ste 325  
Pasadena, CA 91106

***First Class Mail***  
Satterlee Stephens Burke & Burke LLP  
Pamela A Bosswick  
Christopher R Belmonte  
230 Park Ave  
New York, NY 10169

***First Class Mail***  
Securities & Exchange Commission  
Allen Maiza  
Northeast Regional Office  
3 World Financial Center Rm 4300  
New York, NY 10281

***First Class Mail***  
Securities & Exchange Commission  
Daniel M Hawke  
The Mellon Independence Ctr  
701 Market St  
Philadelphia, PA 19106-1532

***First Class Mail***  
Securities & Exchange Commission  
100 F Street NE  
Washington, DC 20549

***First Class Mail***  
Securities & Exchange Commission  
15th & Pennsylvania Ave NW  
Washington, DC 20020

***First Class Mail***  
State of Washington Dept of Revenue  
Zachary Mosner Asst Attorney General  
800 Fifth Ave Ste 2000  
Seattle, WA 98104-3188

***First Class Mail***  
Romero Law Firm  
Martha E. Romero  
BMR Professional Building  
6516 Bright Avenue  
Whittier, CA 90601

***First Class Mail***  
Shipman & Goodwin LLP  
Julie A Manning  
One Constitution Plaza  
Hartford, CT 06103-1919



***First Class Mail***  
Singer & Levick PC  
Michelle E Shriro  
16200 Addison Rd Ste 140  
Addison, TX 75001

***First Class Mail***  
Sullivan & Cromwell LLP  
Hydee R Feldstein  
Robert R Urband  
1888 Century Park E  
Los Angeles, CA 90067-1725

***First Class Mail***  
Steckbauer Weinhart Jaffe LLP  
Barry S Glaser  
333 S Hope St Ste 3600  
Los Angeles, CA 90071

***First Class Mail***  
Tennessee Dept of Revenue  
TN Attorney Generals Office Bankruptcy Div  
PO Box 20207  
Nashville, TN 37202-0207

***First Class Mail***  
Sullivan & Cromwell LLP  
Robinson B Lacy  
125 Broad St  
New York, NY 10004-2498

***First Class Mail***  
Tax Collector for Polk County  
Office of Joe G Tedder  
Bonnie Holly Delinquency & Enforcement  
PO Box 2016  
Bartow, FL 33831-2016

***First Class Mail***  
Treasurer Tax Collector  
Dan McAllister Bankruptcy Desk  
1600 Pacific Hwy Room 162  
San Diego, CA 92101

***Hand Delivery***  
Carmella P. Keener  
Rosenthal, Monhait & Goddess, P.A.  
919 N. Market Street, Suite 1401  
P.O. Box 1070  
Wilmington, DE 19899

***First Class Mail***  
Unisys Corporation  
Janet Fitzpatrick Legal Asst  
Unisys Way  
PO Box 500 MS E8 108  
Blue Bell, PA 19424

***First Class Mail***  
US Attorney General US Department of Justice  
Michael Mukasey  
950 Pennsylvania Ave NW  
Washington, DC 20530-0001

***First Class Mail***

US Department of Justice  
Jan M Geht Trial Attorney Tax Division  
PO Box 227  
Washington, DC 20044

***First Class Mail***

Vedder Price PC  
Douglas J Lipke  
222 N LaSalle St Ste 2600  
Chicago, IL 60601

***First Class Mail***

Verizon Services Corp  
William M Vermette  
22001 Loudon County Parkway  
Room E1 3 113  
Ashburn, VA 20147

***First Class Mail***

Walter R Holly Jr  
10853 Garland Ave  
Culver City, CA 90232

***First Class Mail***

Washington Mutual Claims Processing  
c/o Kurtzman Carson Consultants  
2335 Alaska Ave  
El Segundo, CA 90245

***First Class Mail***

**Weil Gotshal & Manges LLP**  
**Brian S Rosen**  
**Marcia L Goldstein**  
**Michael F Walsh**  
**767 Fifth Ave**  
**New York, NY 10153**

***First Class Mail***

Weiss Serota Helfman  
Douglas R Gonzales  
200 E Broward Blvd Ste 1900  
Fort Lauderdale, FL 33301

***First Class Mail***

Wells Fargo Bank NA  
Thomas M Korsman  
625 Marquette Ave  
Minneapolis, MN 55479

***First Class Mail***

White & Case LLP  
Thomas E Lauria  
Wachovia Financial Center  
200 S Biscayne Blvd Ste 4900  
Miami, FL 33131

***First Class Mail***

Willkie Farr & Gallagher LLP  
Shaunna D Jones  
Shelley Chapman  
Thomas H Golden  
787 Seventh Ave  
New York, NY 10019-6099

***First Class Mail***  
Wilmington Trust Company  
Jame McGinley  
520 Madison Ave 33rd Fl  
New York, NY 10022

***First Class Mail***  
Michael J. Bennett  
Kathleen R. Dahlgren  
Lichtsinn & Haensel, s.c.  
111 East Wisconsin Avenue, Suite 1800  
Milwaukee, WI 53202

***Hand Delivery***  
Ian Connor Bifferato  
Kevin G. Collins  
Bifferato LLC  
800 N. King Street, Plaza Level  
Wilmington, DE 19801

***First Class Mail***  
Jeffrey Isaacs  
Procopio, Cory, Hargreaves & Savitch LLP  
530 B Street, Suite 2100  
San Diego, CA 92101

***First Class Mail***  
**Washington Mutual, Inc.**  
1301 Second Avenue  
Seattle, WA 98101

***First Class Mail***  
Deputy Attorney General  
Office of the Attorney General  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013

***First Class Mail***  
Gary A. Gotto  
Keller Rohrback PLC  
3101 North Central Avenue, Suite 1400  
Phoenix, AZ 85012